SUPREME COURT OF QUEENSLAND

CITATION:	*Ostwald Accommodation Pty Ltd v Western Downs Regional Council* [2015] QSC 210
PARTIES:	**OSTWALD ACCOMMODATION PTY LTD** ACN 153 832 181 (applicant) v **WESTERN DOWNS REGIONAL COUNCIL** (respondent)
FILE NO:	BS10446/14
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	19 August 2015
DELIVERED AT:	Brisbane
HEARING DATE:	13-14 April 2015
JUDGE:	Jackson J
ORDERS:	**The order of the court is that:** **1. The application is dismissed.** **2. The applicant pay the respondent's costs of the application.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – ERROR OF LAW – where the respondent local government levied differential general rates for land in the local government area where the rating categories included a rating category for land used for intensive accommodation based on use for accommodation to service industry as a workers camp or quarters – whether there was an error of law in making the decision ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – IRRELEVANT AND RELEVANT CONSIDERATIONS – where the respondent local government levied differential general rates for land in the local government area – where the rating categories included a rating category for land used for intensive accommodation based on use for accommodation to service industry as a workers camp or quarters – whether the local government took an irrelevant consideration into account or failed to take a relevant consideration into account

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – UNCERTAIN EXERCISE OF POWER –where the respondent local government levied differential general rates for land in the local government area – where the rating categories included a rating category for land used for intensive accommodation based on use for accommodation to service industry as a workers camp or quarters – whether the exercise of power was invalid for uncertainty

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – UNREASONABLENESS where the respondent local government levied differential general rates for land in the local government area – where the rating categories included a rating category for land used for intensive accommodation based on use for accommodation to service industry as a workers camp or quarters – whether the decision was unreasonable

Judicial Review Act 1991 (Qld), ss 12, 13, 20, 23
Local Authorities Act 1902 (Qld), s 209-212
Local Government Act 1993 (Qld), ss 559-565, 572-575
Local Government Act 1936 (Qld), s 21
Local Government Act 2009 (Qld), ss 9, 11, 28-29A, 34-38AA, 38B, 93, 94, 96
Racing Act 2002 (Qld), s 322(1)

Explosives Regulation 2003 (Qld), r 88
Local Government Regulation 2012 (Qld), ch 4, rr 72-74, 88, 90, 92-93

Arana Hills Property Pty Ltd v Townsville City Council (unreported, Supreme Court of Queensland, Moynihan J, 24 February 1995, no 881 of 1994), cited
Associated Provincial Pictures House Ltd v Wednesbury Corporation [1948] 1 KB 223, cited
Brunswick Corporation v Stewart (1941) 65 CLR 88; [1941] HCA 7, cited
Cassels & Anor v Brisbane City Council [2009] QSC 124, referred to
Collector of Customs v AGFA-Gevaert Ltd (1996) 186 CLR 389; [1996] HCA 36, followed
Delta Properties Pty Ltd v Brisbane City Council (1955) 95 CLR 1; [1955] HCA 51, followed
Hope v Bathurst City Council (1986) 7 NSWLR 669; (1986) 61 LGRA 392, cited
King Gee Clothing Pty Ltd v The Commonwealth (1945) 71 CLR 184; [1945] HCA 23, followed
Lynch v Brisbane City Council (1961) 104 CLR 353; [1961] HCA 19, cited
MacCormick v Federal Commissioner of Taxation (1984)

158 CLR 622; [1984] HCA 20, followed
Marrickville Metro Shopping Centre Pty Ltd v Marrickville Council (2010) 174 LGERA 67; [2010] NSWCA 145, referred to
Minister for Immigration & Citizenship v Li & Anor (2013) 249 CLR 332; [2013] HCA 18, followed
Minister of Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24; [1986] HCA 40, followed
Paton & Ors v Mackay Regional Council [2014] QSC 75, distinguished
Sunwater v Burdekin Shire Council (2002) 125 LGERA 263; [2002] QSC 433, considered
Tarong Energy Corporation Ltd v South Burnett Regional Council [2012] 1 Qd R 171; [2011] QSC 74, considered
Television Corporation Ltd v The Commonwealth (1963) 109 CLR 59; [1963] HCA 30, cited
Woolway v Mazars [2015] UKSC 53, referred to
Xstrata Coal Queensland Pty Ltd & Ors v Council of the Shire of Bowen [2010] QCA 170, distinguished

COUNSEL: D Gore QC with P Bickford for the applicant
M Hinson QC with S Fynes-Clinton for the respondent

SOLICITORS: HWL Ebsworth for the applicant
King & Company for the respondent

[1] **JACKSON J**: By this application for a statutory order of review and other relief the applicant challenges the validity of three decisions made by the respondent. Each of the decisions relates to the levying of a differential general rate that would apply to the applicant's land at Miles on the Darling Downs. If any of the decisions is invalid, the applicant is not liable to pay the relevant rate.

The challenged rating category and levying of differential general rates

[2] On 19 May 2014, the respondent resolved to adopt a revenue statement for 2014/2015 in accordance with s 104 of the *Local Government Act* 2009 (Qld) ("LGA").

[3] The revenue statement provides that the respondent has determined that there are a number of categories of urban/rural residential areas namely regional centre, major town, towns and villages in its area. The rating categories are divided into a series of numbered codes. Rate code 4 headed "Other Intensive Business and Industries" includes a sub-code numbered 84 for "Intensive Accommodation 101-200 Persons". The description of the rating category 4/84 for 2014/2015 ("the challenged rating category") is as follows:

> "Land used or intended to be used, in whole or in part, for providing intensive accommodation for more than 100 persons but less than or equal to 200 persons (other than the ordinary travelling public) in rooms, suites, dongas, or caravan sites specifically build or provided for this purpose. Land within this category is commonly known as'Worker's Accommodation', 'Single Person's Quarters', 'Work

> Camps', 'Accommodation Village', 'Barracks', or 'Other Multi Accommodation Units'."

[4] The meaning of the description of the challenged rating category is further informed by the definition of "intensive accommodation" that is also contained in the revenue statement as adopted, as follows:

> "intensive accommodation is inclusive of those premises advertised as being for workers' accommodation, used or intended to be used for workers' accommodation to service industry located away from the property containing such accommodation and which exhibits one or more of the following features – ie five (5) or more ensuited bedrooms or five (5) or more bedrooms and five (5) or more bathrooms or five (5) or more toilets, individually numbered bedrooms, keyed access to bedrooms, catered meals, serviced rooms (laundry and/or bed linen), signs advising the rules of behaviour and/or conduct of the premises, common kitchen, common area, toilet."

[5] On 13 June 2014, the respondent resolved to adopt, inter alia, the challenged rating category among the rating categories adopted for 2014/2015. In these reasons, I will describe that as the "first decision".

[6] Also on 13 June 2014, and upon adopting the rating categories for 2014/2015, the respondent decided to levy a differential general rate of 2.982 cents in the dollars of the rateable value of the land, with a minimum rate of $115,425, for the challenged rating category, as part of levying the differential general rates for 2014/2015.

[7] That decision will be called "the second decision" in these reasons.

[8] On 21 February 2015, the respondent decided to apply the challenged rating category to the applicant's land.[1] This decision will be called "the third decision" in these reasons.

The Eastwood

[9] The applicant is co-owner of land within the town of Miles in the local government area of the respondent. The land has been developed under a joint venture arrangement. The name of the development is The Eastwood-Miles ("The Eastwood"). The development approval for The Eastwood authorised an accommodation building with 201 accommodation rooms.

[10] The Eastwood supplies commercial accommodation described as motel facilities, including a pool, recreation room, buffet restaurant and function rooms that cater for conferences, training sessions and networking functions.

[11] Accommodation is available to members of the public. Bookings may be made by a website or telephone. The facility is advertised by the website. The advertising statements include that The Eastwood is comfortable and affordable and provides quality accommodation for industry and the general public at its location.

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1 There is an earlier similar decision not specifically the subject of the amended application for judicial review.

Grounds of the application

[12] The application for a statutory order of review was made in compliance with the provisions of the *Judicial Review Act* 1991 (Qld) ("JR Act"). It is not in dispute that each of the decisions was a decision made under an enactment or that the applicant is an aggrieved person in relation to it.[2] Accordingly, the application was properly made under s 20 of the JRA on the grounds provided for under s 20(2)(e), (f) and (h), and s 23(b) and (g).

[13] As to the first decision, the grounds of the application are that:

(a) the respondent exercised the power to levy differential general rates in a way that was so unreasonable that no reasonable person would have exercised the power;
(b) the decision involved errors of law;
(c) the purported exercise of the power was done in such a way that the result is uncertain.

[14] As to the second and third decisions, the grounds of the application are that:

(a) the respondent failed to take into account relevant considerations;
(b) the respondent exercised the power in a way that was so unreasonable that no reasonable person could have so exercised the power;
(c) the decisions involved errors of law;
(d) there was no evidence or other material to justify the making of the decisions;
(e) the purported exercise of the power to make the decision was done in such a way that the result is uncertain.

Differential general rates – the statute

[15] Local authority rates may be traced back to early modern history in England. Recently, Lord Sumption said of that history:

> "Local authority rates are the oldest tax in continuous existence in England, having originally been introduced in the reign of Queen Elizabeth I by the Poor Relief Act 1601 (43 Eliz 1, c 2). Historically, they were payable in respect of the rateable occupation of hereditaments, and that continues to shape the law in this area even though non-domestic rates are today imposed on unoccupied hereditaments also. The core concepts underlying the assessment of rates are that they are a tax on property and not on persons or businesses, and that the 'hereditament' is the unit of assessment. Each hereditament is separately identified in the rating list and separately assessed, notwithstanding that the same occupier may have more than one."[3]

[16] The history of rates in Queensland is also statutory, but it has proceeded without reliance on the concept of an hereditament. Instead, the engaging unit of assessment is "rateable land". The powers to levy a general rate or differential general rates are

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2 See *Arana Hills Property Pty Ltd v Townsville City Council* (unreported, Supreme Court of Queensland, Moynihan J, 24 February 1995, no 881 of 1994).

3 *Woolway v Mazars* [2015] UKSC 53, [1].

now contained in the *Local Government Act* 2009 (Qld). Historically, those powers can be traced back through the prior iterations of the *Local Government Act*.[4]

[17] Neither the *Local Authorities Act* 1902 (Qld), nor the *Local Government Act* 1936 (Qld), as originally enacted, contained a power to levy differential general rates of the kind in question in this case, although they did contain general rating powers. The first comparable differential general rating power appears to have been introduced by the *Local Government Act Amendment Act* 1985 (Qld), s 6. That section conferred the power to categorise land in a local authority's area or within each division, if the area was divided into divisions, for the purpose of imposing differential general rates in the categories so created.

[18] Section 65 of the *Constitution of Queensland* 2001 provides that a requirement to pay a rate must be authorised under an Act.

[19] Sections 92 to 94 of the LGA, in part, are as follows:

> **"92 Types of rates and charges**
>
> (1) There are 4 types of rates and charges—
> (a) general rates (including differential rates); and
> (b) special rates and charges; and
> (c) utility charges; and
> (d) separate rates and charges.
>
> (2) ***General rates*** are for services, facilities and activities that are supplied or undertaken for the benefit of the community in general (rather than a particular person).
> *Example—*
> *General rates contribute to the cost of roads and library services that benefit the community in general.*
>
> (3) ***Special rates and charges*** are for services, facilities and activities that have a special association with particular land because—
> (a) the land or its occupier—
> (i) specially benefits from the service, facility or activity; or
> (ii) has or will have special access to the service, facility or activity; or
> (b) the land is or will be used in a way that specially contributes to the need for the service, facility or activity; or
> (c) the occupier of the land specially contributes to the need for the service, facility or activity.
> *Examples—*
> *Special rates and charges could be levied—*
> - *for the cost of maintaining a road in an industrial area that is regularly used by heavy vehicles*

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[4] *Local Government Act* 1993 (Qld), ss 559-565, 572-575; *Local Government Act* 1936 (Qld), s 21; *Local Authorities Act* 1902 (Qld), s 209-212.

- *for the cost of replacing the drainage system in only part of the local government area*
- *on land that is used only by businesses that would benefit from the promotion of tourism in the local government area.*

(4) ***Utility charges*** are for a service, facility or activity for any of the following utilities—

(a) waste management;
(b) gas;
(c) sewerage;
(d) water.

(5) ***Separate rates and charges*** are for any other service, facility or activity.

93 Land on which rates are levied

(1) Rates may be levied on rateable land.

(2) ***Rateable land*** is any land or building unit, in the local government area, that is not exempted from rates.

…

94 Power to levy rates and charges

(1) Each local government—

(a) must levy general rates on all rateable land within the local government area; and
(b) may levy—
(i) special rates and charges; and
(ii) utility charges; and
(iii) separate rates and charges.

(1A) Without limiting subsection (1), a local government may categorise rateable land, and decide differential rates for rateable land, according to whether or not the land is the principal place of residence of the owner.

(2) A local government must decide, by resolution at the local government's budget meeting for a financial year, what rates and charges are to be levied for that financial year."

[20] The LGA also provided for the making of a regulation. In particular, r 81 of the *Local Government Regulation* 2012 (Qld) ("LGR"), provides:

"**81 Categorisation of land for differential general rates**

(1) Before a local government levies differential general rates, it must decide the different categories (each a ***rating category***) of rateable land in the local government area.
(2) The local government must, by resolution, make the decision at the local government's budget meeting.

(3) The resolution must state—

(a) the rating categories of rateable land in the local government area; and

(b) a description of each of the rating categories.

Example—

A resolution may state that the rating categories, and a description of each of the rating categories, are as follows—

(a) residential land—land that is used for residential purposes in particular urban centres, rural localities, park residential estates and coastal villages;

(b) commercial and industrial land—land that is used solely for commerce or industry in particular urban centres and rural localities, other than land used for manufacturing sugar or another rural production industry;

(c) grazing and livestock land—land that is used, for commercial purposes, for grazing and livestock;

(d) sugar cane land—land that is used for producing sugar cane;

(e) sugar milling land—land that is used for manufacturing sugar;

(f) rural land—

(i) that is not in an urban centre or locality; or

(ii) that is not used for grazing and livestock; or

(iii) that is not sugar cane land or sugar milling land;

(g) other land—any other type of land.

(4) After the rating categories and descriptions have been decided, the local government must identify the rating category to which each parcel of rateable land in the local government area belongs.

(5) The local government may do so in any way it considers appropriate.

(6) The fact that some parcels of rateable land are inadvertently not categorised does not stop differential general rates being levied on rateable land that has been categorised."

[21] There are machinery provisions in the LGR for identifying the rating category that applies to a particular parcel of land, notifying the land owner, objection by the land owner on the ground that the land should belong to a different rating category, decision of the local government on the objection and appeal from the decision of the local government to the Land Court.

[22] There are other extensive provisions in the LGR dealing with rates and charges.[5] They deal with the value of land,[6] some further exemptions from rateable land,[7] require rates to be calculated by using the rateable value of land,[8] regulate the fixing of a minimum amount for a general rate,[9] and regulate the levy of general rates that differ for different categories of rateable land, each called a "rating category".[10]

[23] Before leaving the statutory provisions, it may be as well to further identify the place of these sections in their constitutional context. The power of the State of

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5 *Local Government Regulation* 2012 (Qld), ch 4.

6 *Local Government Regulation* 2012 (Qld), r 72.

7 *Local Government Regulation* 2012 (Qld), r 73.

8 *Local Government Regulation* 2012 (Qld), r 74(1).

9 *Local Government Regulation* 2012 (Qld), ch 4, pt 4.

10 *Local Government Regulation* 2012 (Qld), ch 4, pt 5.

Queensland to impose taxation, subject to the operation of the Commonwealth Constitution, is regulated by the constitutional precept that taxation must be imposed under the authority of legislation.

[24] Each local government is a statutorily constituted body corporate,[11] with the power to do anything that is necessary or convenient for the good rule and local government of its local government area,[12] although expressly limited by the extent of the State's constitutional power.[13] The local government's express powers include the legislative power to make and the executive power to enforce any local law that is necessary or convenient for the good rule and local government of its local government area,[14] within specified limits[15] and subject to procedural requirements.[16]

[25] The taxing power of a local government is conferred by the power to levy rates and charges. At the risk of some repetition, rates may be levied on rateable land.[17] Each local government must levy a general rate[18] and may levy special rates and charges, utility charges and separate rates and charges.[19] Rateable land is any land or building unit in the local government area that is not exempt from rates.[20] A regulation may provide for any matter connected with rates and charges including the categorisation of land for rates and charges.[21]

[26] The constitutional power of a local government is thus conferred in the language of plenary power in s 9 of the LGA,[22] namely that a local government has the power to do anything that is necessary or convenient for the good rule and local government of its local government area. However, there are many limits, starting with the express provision that a local government can only do something that the State can validly do. Unlike the State, which is a body politic, a local government is a body corporate. Councillors are responsible for its activities.

[27] The legislative function of a local government is conferred by the power to make any local law that is necessary or convenient for the good rule and government of its local government area. A local law is made by passing a resolution to make it at a meeting of councillors. There are limits upon that power and upon the inconsistent operation of a local law and a law of the State, but they are not presently relevant.

[28] The specific subject matters of rates and charges are expressly dealt with in the LGA. That is, the power of a local government to levy a rate, including differential general rate, is conferred and limited by Chapter 4 of the LGA, quite separately from the power to make a local law. A general rate is levied by passing a resolution at a meeting of councillors.

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11 *Local Government Act* 2009 (Qld), s 11.
12 *Local Government Act* 2009 (Qld), s 9(1).
13 *Local Government Act* 2009 (Qld), s 9(2).
14 *Local Government Act* 2009 (Qld), s 28(1).
15 *Local Government Act* 2009 (Qld), ss 28(2), 34-38AA and 38B.
16 *Local Government Act* 2009 (Qld), s 28(3), 29 and 29A.
17 *Local Government Act* 2009 (Qld), s 93(1).
18 *Local Government Act* 2009 (Qld), s 94(1)(a).
19 *Local Government Act* 2009 (Qld), s 94(1)(b)(i)-(iii).
20 *Local Government Act* 2009 (Qld), s 93(2).
21 *Local Government Act* 2009 (Qld), s 96(b).
22 Compare *Lynch v Brisbane City Council* (1961) 104 CLR 353, 362.

[29] Against that background, and in particular the recognition that the power to levy a general rate is a power to impose taxation of a particular species in accordance with the provisions previously set out or summarised, another cognate field of discourse has considered the nature of a law with respect to taxation in the context of s 51(ii) of the *Constitution*. In *MacCormick v Federal Commissioner of Taxation*,[23] Gibbs CJ, Wilson, Deane and Dawson JJ said:

> "The exactions in question answer the usual description of a tax. They are compulsory. They are to raise money for governmental purposes. They do not constitute payment for services rendered: see *Matthews v Chicory Marketing Board (Vict)*, per Latham CJ; *Leake v Commissioner of State Taxation*, per Dwyer J. They are not penalties since the liability to pay the exactions does not arise from any failure to discharge antecedent obligations on the part of the persons upon whom the exactions fall: see *R v Barger*, per Isaacs J. They are not arbitrary. Liability is imposed by reference to criteria which are sufficiently general in their application and which mark out the objects and subject-matter of the tax: see *Federal Commissioner of Taxation v Hipsleys Ltd*."[24]

First decision - unreasonableness

[30] First, the applicant submits that the exercise of the power to determine the challenged rating category was unreasonable because the description includes land used or intended to be used "in part" for intensive accommodation. It submits that it is an absurd result that the general rate payable is the same whether land is wholly used for intensive accommodation or is used only in part for intensive accommodation. It submits that the approach adopted self-evidently leads to an unfair, inequitable and absurd result.

[31] This ground of unreasonableness was argued by reference to s 23(g) of the JRA and some of the case law that applies to a decision that no reasonable person could have made, without identifying a particular error, such as improper purpose in the sense of taking an irrelevant consideration into account or failing to take into account a relevant consideration or that there is no evidence.

[32] The present ground of unreasonableness is sometimes associated with the concept of "Wednesbury unreasonableness", a short-hand expression that refers to *Associated Provincial Pictures House Ltd v Wednesbury Corporation*.[25]

[33] There have been many judicial and non-judicial attempts to give greater or clearer content to the principles which affect this ground of judicial review. A recent and authoritative statement of principle by the High Court of Australia is contained in *Minister for Immigration and Citizenship v Li & Anor*.[26]

[34] A detailed explanation of the case law, either before or after *Li,* will not assist analysis of the present case. However, some uncontentious propositions may be stated. The power to levy a differential general rate is a "discretionary" power to

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23 (1984) 158 CLR 622.
24 *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622, 639.
25 [1948] 1 KB 223.
26 (2013) 249 CLR 332.

impose a tax. Accordingly, the discretion is constrained by law.[27] Second, the scope of the discretion is confined by the subject matter, scope and purposes of legislation under which it is conferred.[28] Third, beyond unreasonableness attributable to a particular error, a decision maker may come to a conclusion "so unreasonable that no authority could ever have come to it".[29] In this formulation, there is no practical distinction between unreasonableness at common law and s 23(g) of the JRA for the purposes of this case. Fourth, "the requirement of reasonableness is not a vehicle for challenging a decision on the basis that the decision maker has given insufficient or excessive consideration to some matters or has made an evaluative judgment with which the court disagrees even though that judgment is rationally open to the decision maker."[30] Fifth, the concept of unreasonableness may be expressed by reference to what "is to be done according to rules of reason of justice" which is what is meant by "according to law" and is to be contrasted with what is "arbitrary, vague and fanciful".[31] When it comes to the merits of a decision "[t]he courts are conscious of not exceeding their supervisory role by undertaking a review of the merits of an exercise of discretionary power. Properly applied, a standard of legal reasonableness involves substituting a court's view as to how a discretion should be exercised of that of a decision maker."[32]

[35] The factual context in *Li* provides no assistance in this case. However, there are, comparators about unreasonableness in the exercise of a statutory power to make by-laws and in particular a power to levy a differential general rate by a local government.

[36] Dealing generally with the power to make subordinated or delegated legislation, in *King Gee Clothing Pty Ltd v The Commonwealth*,[33] Dixon J said:

> "I should have thought that, in this matter, they stood on the same ground as an Act of Parliament, and were governed by the same rules of construction. I am unaware of any principle of law or of interpretation which places upon a power of subordinate legislation conferred upon the Governor-General by the Parliament a limitation or condition making either reasonableness or certainty indispensable to its valid exercise. Our Constitution contains no due process clause, and we cannot follow the jurisprudence of the United States by saying that uncertainty violates a constitutional safeguard."[34]

[37] A number of cases deal with a power to levy rates and unreasonableness. In *Marrickville Metro Shopping Centre Pty Ltd v Marrickville Council*,[35] a rate payer challenged the validity of the determination of a differential ad valorem rate in respect of a shopping centre. The statutory context was that of the New South Wales legislation providing for the levy of a differential rate by a local authority. The case was also decided before *Li*. Nevertheless, the discussions by Tobias JA

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27 *Minister for Immigration and Citizenship v Li & Anor* (2013) 249 CLR 332, 348 [23]-[24].
28 *Minister for Immigration & Citizenship v Li & Anor* (2013) 249 CLR 332, 348 and 349 [23]-[24].
29 *Minister for Immigration & Citizenship v Li & Anor* (2013) 249 CLR 332, 350 [28].
30 *Minister for Immigration & Citizenship v Li & Anor* (2013) 249 CLR 332, 351 [30].
31 *Minister for Immigration & Citizenship v Li & Anor* (2013) 249 CLR 332, 363 [65].
32 *Minister for Immigration & Citizenship v Li & Anor* (2013) 249 CLR 332, 363 [66].
33 (1945) 71 CLR 184.
34 (1945) 71 CLR 184, 195.
35 (2010) 174 LGERA 67.

and Basten JA of the law as to manifest unreasonableness in the context of levying a differential rate are instructive.[36] Among the relevant passages, Tobias JA said:

> "The Council was a collegiate body made up of community representatives who were relevantly performing in the present instance a quasi-legislative function. It was setting a tax, but one in which the empowering statute permitted differentiation and/or discrimination. It was not acting as a decision-maker determining some form of dispute between parties. There were no relevant statutory criteria that were required to be satisfied before it exercised the power."[37]

[38] *Marrickville* has been considered in relation to the exercise of rating powers similar to the current *Local Government Act* 2009 (Qld). In *Tarong Energy Corporation Ltd v South Burnett Regional Council*,[38] Mullins J considered whether the imposition of a differential general rate for a rating category of land primarily used or intended for use for the purpose of electricity generation was manifestly unreasonable.

[39] Her Honour rejected the contention that the applicant's land had to bear too much of the general revenue for the relevant year because of a lack of evidence for any of the relevant years of any disproportionate contribution from the general rates levied against the applicant's land in comparison to the general rates borne by other categories of land. The substantial increase of general rates was held not to determine the issue of whether there was manifest unreasonableness in the decision making for the relevant year.[39]

[40] Her Honour also referred to an earlier case, *Sunwater v Burdekin Shire Council*,[40] where Cullinane J held that a minimum differential general rate that exceeded the value of the land concerned "in virtually all cases" and "rising to a high of 700 percent of that value in one case… produce[d] results so anomalous that they can be regarded as unreasonable in the relevant sense".[41]

[41] In reaching that conclusion, Cullinane J applied unreasonableness "in the Wednesbury sense".[42] His Honour also said:

> "No doubt there are cases in which the effect of the adopting a particular differential rating system is to throw an excessively high proportion of the overall rates upon a particular rate payer or group of rate payers or cases in which a rate per dollar is itself so high that it can be regarded as capricious and outside the boundaries of a reasonable exercise of a local authorities powers to make and levy rates. Although the general rate is certainly a high one I am not persuaded that it can be regarded as so lacking in any rational justification as to invalidate it."[43]

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36 (2010) 174 LGERA 67, 90-94. [85]-[110], 111 [207]-[208] and 115 [232].
37 (2010) 174 LGERA 67, 92 [99].
38 [2012] 1 Qd R 171.
39 [2012] 1 Qd R 171, 191, [83].
40 (2002) 125 LGERA 263.
41 (2002) 125 LGERA 263, 172, [49].
42 (2002) 125 LGERA 263, 170, [40].
43 (2002) 125 LGERA 263, 273, [48].

[42] The applicant entered one caveat about the principles expressed in the cases decided before *Li*, including *Marrickville.* The point made is that the plurality in *Li* determined that the legal standard of unreasonableness at common law "should not be considered as limited to what is in effect an irrational, if not bizarre, decision - which is to say one that is so unreasonable that no reasonable person could have arrived at it – nor should Lord Greene in be taken to have limited unreasonableness in this way in his judgment in *Wednesbury*."[44]

[43] However, the extensive discussion in *Li* of the relationship of unreasonableness in a broader sense to other grounds of judicial review is not particularly directed towards the unreasonableness question raised by the ground of the application for a statutory or other order of review in the present case. The ground of unreasonableness in the present case does not fall within the class of cases where the "inference of unreasonableness" is alleged "where a particular error in reasoning cannot be identified",[45] by analogy with the inferences that an appellate court draws on an appeal from the exercise of a judicial discretion "if upon the facts [the result] is unreasonable or plainly unjust."[46]

[44] The critical plank of the applicant's unreasonableness argument in the present case is that it is unfair and unreasonable to levy differential general rates on land based on no more than a partial land use. The applicant submits that is so where the predominant use of the land clearly falls within a different and "lower" land use. In my view, at this level of abstraction any distinction between partial and predominant land uses is difficult to analyse.

[45] For example, is the distinction to be assessed having regard to the area of the land that is being used partially or predominantly for the particular use in comparison to the use or uses of the balance of the area of the land? Or is the assessment to have regard to the economic value of the partial or predominant use in comparison to the use or uses of the balance area? Or is the assessment to have regard to the impact of the intensity of the predominant or partial use on the services to be provided by the local government in comparison to the impact on those services of the use of the balance area? These questions are not novel. They are raised, for example, when a rate is fixed to engage upon land used "wholly or mainly" for a specified purpose.[47] However, the parties did not address them in submissions.

[46] The applicant drew attention to the circumstance that in prior decisions or determinations of the respondent of the rating categories to levy differential general rates for intensive accommodation the respondent has engaged on land used "predominately" rather than land used "in whole or in part" for the stipulated purpose.

[47] Additionally, the applicant relies on a comparison between the use of land constituted by The Eastwood and other motels and caravan parks in the area. As a matter of fact, the applicant submits that the differences are that The Eastwood has

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44 *Minister for Immigration & Citizenship v Li & Anor* (2013) 249 CLR 332, 364 [68]. For a recent discussion of the state of Australian authority see W Gummow, "Rationality and reasonableness as grounds of review" (2015) 40 Aust Bar Rev 1.

45 *Minister for Immigration & Citizenship v Li & Anor* (2013) 249 CLR 332, 364 [68].

46 *Minister for Immigration & Citizenship v Li & Anor* (2013) 249 CLR 332, 367 [76].

47 *Hope v Bathurst City Council* (1986) 7 NSWLR 669, 672-674 and 676-677.

substantially more rooms made up by the construction of interconnected demountable dongas rather than more permanent structures.

[48] The differential general rate for the challenged rating category is substantially higher than the rate that apply to land used for accommodation in Miles comprising motels, caravan parks and private accommodation, where those uses fall within other rating categories not within the "intensive accommodation" rating categories.

[49] The applicant's contention does not turn on any difficulty associated with the meaning of the phrase "wholly or in part". Statutes can and do engage upon land or a building being wholly or partly used for some purpose.[48] The point of the applicant's argument lies in the comparison between the operation of a rating category restricted to a "predominant" use as opposed to a rating category extended to a use "in part", leading to the conclusion that it is inherently unreasonable to adopt use "in part" as the criterion, in the sense that no reasonable decision maker could so categorise land for rating purposes.

[50] However, in my view, in putting the argument that way the applicant leaves aside a vital element of the challenged rating category as it was in fact made. The category engages upon use for "intensive accommodation for more than 100 persons but less than or equal to 200 persons (other than the ordinary travelling public)" that also satisfies other requirements. Although that may only be use "in part" of the relevant land, the use must be of that kind and intensity to fall within the challenged rating category.

[51] Accordingly, in my view, it does not follow that by adopting a rating category for land that is engaged by use of the land in part as opposed to use that is predominant the respondent must have acted unreasonably in the required sense. Nor is the applicant's comparison with other rating categories which apply to other existing uses necessarily a like with like comparison.

[52] For example, the applicant compared the challenged rating category use with rating category 1/72, because that category applies to land within the Town locality of Miles that is used for intensive residential purposes such as flats, guest houses and building units. But residential use and accommodation use are a basis of distinction in the rating categories adopted. Also, rating category 1/72 is not restricted to residences for more than 100 persons.

[53] Another (closer) example chosen by the applicant for comparison was rating category 2/67, because that category applies to land in the locality of Miles used for retail or commercial business purposes. Those uses include a motel and a caravan park.[49] They are similar to but distinguishable from workers' accommodation used to service industry located away from the property containing such accommodation for more than 100 persons but less than or equal to 200 persons (other than the ordinary travelling public) in rooms, suites, dongas, or caravan sites specifically built or provided for this purpose. Rating category 2/67 is not restricted to use for more than 100 persons. Nor is it concerned with the purpose for which the motel or caravan park was built.

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48 For examples, see *Racing Act* 2002 (Qld), s 322(1); *Explosives Regulation* 2003 (Qld), r 88; and *Delta Properties Pty Ltd v Brisbane City Council* (1955) 95 CLR 1, 13.

49 The land use codes specified set out in the rating statement in the rating category identification include codes 43 (motel) and 49A (caravan park).

[54] In my view, the comparison made by the applicant with rating category 2/67 does not add to the argument that the challenged rating category was adopted unreasonably because, as it is put in the applicant's particulars of the ground, "no reasonable person in the position of the respondent could conclude that land could be lawfully rated on the basis of a partial, rather than a predominant use."

[55] The use targeted by the challenged rating category is specifically linked to servicing industry located away from the property used for intensive accommodation, where the accommodation is for more than 100 persons. The challenged rating category appears in the section of the rating statement grouped under "Rate Code 4" as "Other Intensive Business and Industries". The rating categories in that section include land used for petroleum leases, gas or oil extraction or processing, electricity generation or transmission or substations, coal mining and mining operations other than for coal.

[56] The applicant submits that a use within the challenged rating category is impermanent and owes nothing to any characteristic of the land as such. It did not submit that land use, per se, was an impermissible criterion upon which to create a differential general rating category. It could not have done so having regard to the examples of use given under r 81 of the LGR. Most of the examples of differential rating categories in that regulation are expressly defined by the text "land that is used for…".

[57] Once it is accepted that the use of land is a valid criterion to establish a rating category, the distinctions sought to be drawn by the applicant in this submission become elusive. Although it is submitted that demountable buildings such as those comprising The Eastwood could be removed and re-erected on other land, it is difficult to see where the submission goes. If The Eastwood were dismantled, the challenged rating category would no longer apply to the land on which it is erected. The submission that the defined use for the challenged rating category is not an inherent quality of the land elides the physical characteristics of land and the uses to which it may be put. Many uses of land depend on improvements made from its natural state. That is no less true of a fixed but demountable workers' camp than it is true of a more permanent building for workers' quarters or a motel that is not removable except by demolition.

[58] The LGA requires a local government to levy general rates on all rateable land in the local government area and defines general rates to include differential general rates. The LGR empowers a local government to "decide the different categories (each a rating category) of rateable land." It requires that the decision must be made by resolution at the local government's budget meeting. It is thus a decision of the political organ of the local government. The resolution must state a description of each of the categories. Again, the description must be decided by the political organ of the local government.

[59] There is no other relevant express statutory constraint on the exercise of the power to decide the rating categories.

[60] In the end, stripped bare of factors considered so far, the applicant's challenge falls back upon a comparison of the extent of the disparity between the amount of the rate levied for the challenged rating category and the amounts of the rates levied for

other rating categories of suggested comparable uses. But that is a challenge to the second decision, not the first decision to make the challenged rating category.

[61] Once the local government has decided the rating categories, under the LGR it may levy general rates that differ for different categories of rateable land. There is no relevant express statutory constraint upon the power to levy the differential general rates. It would have been possible for the LGA or LGR to provide that no differential general rate should exceed any other differential general rate by more than a stated amount, or proportion or multiple. But it does not do so.

[62] In some cases, statutory provisions for a local government to impose or levy differential general rates like those in question in this case have been described as "quasi-legislative".[50] The imposition of a tax by an elected body politic passing a law to do so is recognised as legislative. The imposition or levy of a general rate by a body corporate local government acting through the organ of its elected representative councillors making a resolution at a meeting is a closely analogous process.

[63] In *Sunwater*,[51] decided under the progenitors to the present sections, Cullinane J said that substantial latitude must be allowed in a local authority in choosing the criteria for determining the relevant categories of land, meaning rating categories.[52]

[64] Another helpful statement is that made by Douglas J in *Cassels & Anor v Brisbane City Council*,[53] as to "the unconfined factors that may be taken into account of setting the rate", referring also to the "width of the language used" in provisions in the *City of Brisbane Act* 1924 (Qld), that are not readily distinguished from the relevant provisions in the present case.

[65] For the reasons set out above, I do not find a justification in the present case for the conclusion that the first decision to make the challenged rating category was unreasonable, in the required sense, because it includes land used "in part" for intensive accommodation.

[66] Second, the applicant submits that the exercise of power to make the challenged rating category was so unreasonable that no reasonable person could so exercise the power because the characteristics of the occupants, meaning workers or single persons as opposed to the ordinary travelling public is the basis of the rating category and that is not a characteristic of the land.

[67] In my view, this ground of challenge is not a matter of unreasonableness in the sense employed in s 23(g) of the JRA or in *Li*, as such, but is a challenge to the scope of the power to levy differential rates under the LGA and LGR, in the sense described by Dixon J in *Avon Downs Pty Ltd v Federal Commissioner of Taxation*.[54] I will deal with it under the ground of irrelevant considerations, an alternative ground relied upon by the applicant for this point in relation to the second and third decisions, below. In truth, the point relates to the first decision, as

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50 *Marrickville Metro Shopping Centre Pty Ltd v Marrickville Council* (2010) 174 LGERA 67, 92 [99]; *Tarong Energy Corporation Ltd v South Burnett Regional Council* [2012] 1 Qd R 171, 190 [78].

51 (2002) 125 LGERA 263.

52 (2002) 125 LGERA 263, 270 [35].

53 [2009] QSC 124, [30].

54 (1949) 78 CLR 353, 360.

much or more than it does to the second or third decisions, because it turns on the requirements of the rating category, rather than the amount of the rate.

[68] In my view the challenge to the first decision on the ground of unreasonableness must be rejected.

Second and third decisions - unreasonableness

[69] The applicant submits that the respondent levied differential general rates for the 2014/2015 year by the second decision because intensive accommodation uses place a much higher demand on existing facilities and create a demand for new and improved services by nature of the increased number of persons permanently or temporarily resident.

[70] The applicant submits that exercise of power was so unreasonable that no reasonable person could have done so because intensive accommodation does not place the much higher demand that the respondent found to exist.

[71] So stated, the applicant's challenge on this ground turns on a challenge to an alleged factual finding that the applicant submits was a cause of the respondent's decision to levy the differential general rate for 2014/2015.

[72] There is no evidence as to the actual reasoning of the respondent on this point in making the second decision.

[73] There is no statement of reasons for the respondent's first or second decisions, from which the answer to that factual question can be resolved. The JR Act provides, in effect, that the first and second decisions are decisions for which the respondent does not have to give reasons.

[74] Section 31(b) excludes from the decisions to which Part 4 of the JR Act applies a decision included in the class of decision set out in Schedule 2 of the JR Act. Schedule 2 item 15 provides:

> "Decisions making, or forming part of the process of making, or leading up to the making of, assessments, reassessments, calculations or determinations of tax, duty or other impost, other than a decision on an objection made and determined under an enactment."

[75] It is understandable that a decision of a local government to levy differential general rates is so treated. The decision is made by the councillors acting as the council. The reasons for such a decision would in fact be the collective reasons of those individuals. That is not readily susceptible of a singular analysis, unless the councillors, or at least a majority who voted in favour of the budget including the rating categories and differential general rates, all acted for the same reason in casting their votes or agreed on a statement of reasons. The difficulty is compounded when the decision is not constrained by identifiable relevant factors which must be taken into account in making the decision.

[76] Faced with this difficulty, the applicant sets up statements made in the respondent's revenue statements as to the explanations for the differential general rates.

Effectively, the applicant treated the revenue statement as though it was a statement of reasons for the first and second decisions, in particular.

[77] The requirement for a revenue statement is found in the LGR. By r 107A(1) of the LGR a local government must consider the budget and adopt it with or without changes. By r 169(2)(b) of the LGR a local government's budget for a financial year must include a revenue statement. By r 172(1) the revenue statement must state the rating categories and a description of each rating category, if the local government levies differential general rates. As well, by r 172(2) it must include an outline and explanation of the rates and charges to be levied in the financial year. Except for the requirement for an explanation of the rates, there is no requirement to give reasons for the decision to levy differential rates, as such.

[78] The applicant submits that the respondent failed to comply with r 172(2)(a) because there was not an adequate explanation of the differential general rates. In my view, the requirement for an explanation is not a requirement for a statement of reasons, as that expression is now understood in the administrative law context, in accordance with s 27B of the *Acts Interpretation Act* 1954 (Qld):

> "If an Act requires a tribunal, authority, body or person making a decision to give written reasons for the decision (whether the expression 'reasons', 'grounds' or another expression is used), the instrument giving the reasons must also—
> (a) set out the findings on material questions of fact; and
> (b) refer to the evidence or other material on which those findings were based."

[79] The 2014/2015 revenue statement contained no particular explanation for the differences between the challenged revenue category and the requirements of that category in prior years. It said that the rationale for the differing categories is to recognise the different levels of facilities and services provided to the differing classes of land and to the occupiers of these classes of land and that in determining its differential rating system, the council's objective is to ensure the fair and consistent application of lawful rating and charging principles, without bias, taking account of all relevant considerations and disregarding irrelevancies such as the perceived wealth of individual ratepayers or ratepayer classes.

[80] As a matter of fact, the applicant sought to challenge that the challenged rating category required a different level of facilities or services from a motel or other accommodation, except in relation to its comparative size to existing facilities of that kind. However, first, the respondent made no express finding of fact to that effect. Second, since the consideration of the levels of facilities and services was treated as relevant in the 2014/2015 revenue statement, if a finding of fact had been made by respondent in adopting the challenged rating category, it could be no more than a wrong finding of fact. The respondent's findings of fact are not subject to judicial review, as such, under the guise of a challenge based on unreasonableness of the decision to adopt the rating categories for 2014/2105 including the challenged rating category.

[81] The applicant also sought to challenge the factual conclusion that intensive accommodation uses place a much higher demand on existing facilities and create a demand for new and improved services by nature of the increased number of

persons permanently or temporarily resident. But that factual statement does not appear in the 2014/2015 revenue statement. It appeared in the prior year's revenue statement. There is not a sufficient factual basis, in my view, for finding that it was taken into account as a factual finding made by the respondent for levying the 2014/2015 differential general rates.

[82] Second, the applicant submits that the respondent failed to take into account that The Eastwood is advertised as accommodation for the ordinary travelling public as a ground of unreasonableness. This ground of review can only apply to the third decision.

[83] As previously set out "intensive accommodation" as defined provides that the use of intensive accommodation includes premises advertised as being for workers' accommodation.

[84] There is no evidence as to what was before the respondent in making the third decision as to any advertising for the applicant's land.

[85] Chapter 4 Part 5 of the LGR contains extensive provisions about the process by which a local government must identify the rating category to which each parcel of rateable land in the local government area belongs. This is not a decision required to be made by the local government at a meeting of councillors. Notice must be given to the owner of the rating categories and the rating category for the owner's land.[55] Chapter 4 Part 5 Division 4 of the LGR provides for a process of objection to the rating category applied to the land[56] and for appeal by the owner from the local government's decision on the objection to the Land Court.[57]

[86] In my view, it would be inappropriate to decide the application for a statutory order of review of the third decision on the ground that the decision was unreasonable because the applicant's land was advertised as being available to the public. There are two reasons. First, it is possible that The Eastwood could have been advertised as being for workers' accommodation and as accommodation for the ordinary travelling public. The one does not necessarily exclude the possibility of the other. Yet the evidence on this point was not clear. Second, ch 4 pt 5 of the LGR makes provision under which the applicant is entitled to seek a review of the matter on this point.[58]

[87] Third, the applicant submits that the respondent failed to consider the effective rate per person per bed-night of the differential general rates levied under the challenged rating category by the second decision, namely $1.58, compared with the lower rates levied for the use of a motel, namely $0.67, or a caravan park, namely $0.38, or private accommodation, namely $0.66.

[88] The applicant submits that no reasonable person could exercise the power to levy differential general rates so that a rate under the challenged rating category on a per

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55 *Local Government Regulation* 2012 (Qld), r 88.
56 *Local Government Regulation* 2012 (Qld), r 90.
57 *Local Government Regulation* 2012 (Qld), rr 92, 93.
58 *Judicial Review Act* 1991 (Qld), ss 12 and 13.

bed per night basis is 136[59] per cent higher than that applied on average to "equivalent" accommodation such as motels, caravan parks and private accommodation.

[89] In my view, the respondent was not required to make and take into account a comparison of the effective rate per person per bed nights of the differential general rates levied for those respective uses. Even if that were incorrect, in my view the comparison does not prove unreasonableness, per se.

[90] Fourth, the applicant did not press another ground of the amended application that no reasonable person could conclude that the expectations of permanent or temporary resident included that facilities and services were available at a high standard at all times.

First decision – error of law

[91] In support of the ground of review of the first decision for error of law, the applicant relies on the particulars of the alleged irrelevant considerations taken into account for and the unreasonableness of the second and third decisions. I will not repeat my analyses of those contentions under this ground of review, because no separate discussion is called for on those particular points.

[92] The applicant also alleges under this ground[60] that there was no evidence that the use of land for intensive accommodation facilities placed a much higher demand on existing facilities and created a demand for new and improved services.[61] I have previously dealt with the applicant'sl allegation that the respondent made a finding that there were such demands under the unreasonableness ground.

[93] In my view, in any event, the power to adopt a rating category is not conditioned on there being any such demand or evidence of it. There is no such condition expressed in the text of either the LGA or the LGR and there is no reason, in my view, why those requirements should be implied.

[94] In my view, the challenge to the first decision based on error of law must also be dismissed.

First, second and third decisions - uncertainty

[95] The applicant submits that the challenged rating category is also uncertain and invalid because it engages upon land that is used or is intended to be used "in part" for the particular identified uses. The essence of the contention is that there are no criteria to determine what constitutes use or intention to use in part.

[96] There is no separate challenge to the second decision or third decision on this ground. The contention is that if the first decision is invalid on this ground the second and third decisions are also invalidated as they depend upon its validity. So isolated, the challenge is to the validity of the exercise of the power of a local

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59 The basis of the calculation of 136 per cent is not clear. The number was stated in par 26 of the report of Synergies Economic Consulting dated 18 March 2015, but the basis of the calculation was not stated there either.

60 *Judicial Review Act* 1991 (Qld), s 20(2)(f).

61 No specific reliance was placed on s 20(2)(h) of the *Judicial Review Act* 1991 (Qld).

government to impose a rate engaged by a rating category based on the use of land "in part".

[97] I have previously set out the statutory provisions against which the applicant's contention of invalidity because of uncertainty must be assessed.

[98] I have also previously set out a passage by Dixon J from *King Gee* that was partly concerned with uncertainty in relation to delegated legislation comprising a by-law. In a later case, the High Court repeated part of Dixon J's statement in *King Gee* as follows:

> "The general principles relating to the interpretation of Acts of Parliament are equally applicable to the interpretation of delegated legislation. To use the words of Dixon J, 'subordinate or delegated legislation … [stands] on the same ground as an Act of Parliament and [is] governed by the same rules of construction'."[62]

[99] I have also previously mentioned that there are questions that may be raised as to the proper construction of such a provision as to the basis of the assessment or measure of what is use "in part".

[100] Some cases and commentators stand for the proposition that uncertainty may be a ground of invalidity of some forms of delegated legislation.[63] The applicant relied on some cases dealing with the limits of delegated legislative power[64] and others dealing with administrative power.[65] But it is unnecessary to enter upon that field of discourse in this case.

[101] That is because whatever the proper basis on which to assess what is use "in part" might be, it is a problem of ascertaining the meaning of that requirement in the context in which it appears. There is no uncertainty involved in carrying out a constructional task of that kind. This is not an instance where the statute requires a clear or fixed outcome, for example the fixing of a price, but the delegated legislative provision is incapable of producing the required outcome.

[102] Second, the applicant submits that the phrase "other than the ordinary travelling public" is uncertain. The applicant did not develop this submission in detail. It is appropriate to deal with it briefly.

[103] Whatever the precise limits of the meaning of "the ordinary travelling public", in the context of the definition of "intensive accommodation", it is clearly enough a category intended to exclude those persons from the calculation of more than 100 persons but fewer than 200 persons which is an element of the challenged rating category.

[104] In my view, the expression "ordinary travelling public" is quite possibly used, in context, to distinguish others who may stay in short term accommodation facilities that fall within the definition of intensive accommodation from workers or single

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62 *Collector of Customs v AGFA-Gevaert Ltd* (1996) 186 CLR 389, 398.

63 See, for example, D. Pearce and S. Argument, *Delegated Legislation in Australia*, 3 ed, LexisNexis, Sydney, ch 22.

64 For example, *Brunswick Corporation v Stewart* (1941) 65 CLR 88, 99.

65 For example, *Television Corporation Ltd v The Commonwealth* (1963) 109 CLR 59, 71.

persons staying in the designated rooms etc in facilities commonly known as workers accommodation etc. However, it is not necessary to decide that question. It is enough that it is possible to discern a meaning. That conclusion is inconsistent with a finding that the expression is uncertain.

[105] Accordingly, in my view, the uncertainty ground of challenge to the first, second and third decisions must be dismissed.

First, second and third decisions – irrelevant and relevant considerations

[106] The applicant relied on a number of relevant considerations it submits that the respondent failed to take into account, for the purposes of ss 20(2)(e) and 23(b) of the JR Act. One of the points raised was really a consideration that the applicant submits was an irrelevant consideration that the applicant took into account. That would engage s 23(a) rather than s 23(b).

[107] The applicant submits that the irrelevant consideration is the distinction made in the challenged rating category between workers and persons who are the ordinary travelling public. It submits that a characteristic of the persons who temporarily occupy the land or the type of people who stay in the premises is an irrelevant consideration in making a decision as to a rating category for the purpose of levying differential general rates.

[108] The challenged rating category does not engage upon a category of persons as such. It engages upon land use for a category of accommodation. I accept that the persons for whom the accommodation is provided, namely workers (or single persons as well), comprise an element of the category. I accept also that land used for accommodation for those persons is distinguished from land used for the accommodation of the ordinary travelling public. But that is not the only element of the challenged rating category. A second element engages upon the number of rooms and types of rooms and services provided to the accommodated persons. A third element is the number of persons who are not members of the ordinary travelling public for whom accommodation is provided. A fourth element is that the accommodation provided constitutes workers accommodation, single person's quarters, workers' camps, accommodation villages, barracks or other multi-accommodation units.

[109] These elements engage upon the nature of the improvements on the land and the use of those improvements. They are not characteristics that are "owner dependent".[66] They are mostly characteristics that fall within the meaning of the expression an "attribute of the land" including improvements.[67]

[110] Once that point is reached, in my view, the applicant's argument on this point must resolve into a contention that in the exercise of the power to levy differential general rates it is not permissible to take into account any distinction between a use for quarters etc for a group of workers or single persons and a use for other persons. The challenged rating category engages upon, inter alia, single person's or workers' multi-accommodation units, as opposed to other multi-accommodation units as a category of land use.

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66 *Paton & Ors v Mackay Regional Council* [2014] QSC 75, [32].

67 *Xstrata Coal Queensland Pty Ltd & Ors v Council of the Shire of Bowen* [2010] QCA 170, [22]-[23].

[111] The applicant relied heavily upon the decision of the Court of Appeal in *Xstrata Coal Queensland Pty Ltd & Ors v Council of the Shire of Bowen*[68] and also relied on *Paton v Mackay Regional Council*,[69] a decision that followed a similar process of reasoning. *Xstrata* is relied on for the proposition that the capacity of the owner of land to pay a rate, independent of any quality of the subject land, is an irrelevant consideration in the decision to set rates.

[112] However, an important part of that proposition is the qualification that the relevant capacity is independent of any quality of the subject land. The use of land is a relevant consideration in making a decision as to differential rating categories. It cannot be disputed that it is. Where the difference is not in the use but in the personal characteristics of the owner, the limit of the power to create a different category may be exceeded. Thus, in *Paton*, it was not permissible to create separate rating categories for residential land used for rental and residential land used for non-rental purposes in the levying of a differential general rate. This amounts to saying that for the purpose of ss 92(1)(a) and 94(1)(a) of the LGA and the relevant provisions of the LGR, the use of residential land by an owner or their permitted occupant is the same as the use of that land by a rent paying tenant so far as the power to levy a general rate is concerned and that to distinguish the rental use in making separate rating categories is to take an irrelevant consideration into account in levying differential general rates.

[113] *Xstrata* is more complex, however. The differential general rates in that case were levied for separate rating categories for land used for the purposes of and incidental to the extraction of coal. The challenge was not made to the rating category as such. It was held as a matter of fact that the amount of the differential general rate was levied having regard to the "capacity to pay" of the owner of the coal mines.

[114] The successful appellant in that case argued, in effect, that the relevant considerations that may be taken into account in exercising the power to set a rating category include some attribute or characteristic of the land which is to be categorised and differentially rated. Those relevant considerations include the use to which the land might be put, including its highest and best use, the burden that the land or its use may have upon the Council's budget and the value of the land including its potential to earn income for the land owner. Chesterman JA accepted that submission.[70]

[115] The unsuccessful respondent in *Xstrata* submitted that the financial capacity to pay that could be taken into account (as a relevant consideration) was that derived from the potential of the lands in question to generate income and wealth. It appears that Chesterman JA also accepted the respondent's submission because he accepted that the point in contention resolved into whether the differential general rate was set by reference to the appellant's personal capacity to pay rates as opposed to the capacity of the land in the separate categories to produce the capacity to pay.[71]

[116] The conclusion reached by Chesterman JA was that the respondent had taken the appellant's personal capacity to pay into account in levying or fixing the rate.

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68 [2010] QCA 170.
69 [2014] QSC 75.
70 [2010] QCA 170, [21]-[22].
71 [2014] QCA 170, [26]-[27].

[117] So analysed, *Xstrata* is not authority for the proposition that the capacity of an owner of land to pay a differential rate is an irrelevant consideration, except in the sense that it is the personal capacity of the owner, independent of any quality of the land.

[118] There are some passages of Chesterman JA's reasons which might be thought to range more widely than the propositions stated above, as follows:

> "There are good reasons why the Act would not contemplate that wealth, or capacity to pay rates, should be a factor relevant to the rates fixed by a local government in its budget. One is the limited ability of any local authority to make an accurate assessment of that capacity of its ratepayers. Many of the ratepayers who own property within a local authority area may not be residents. To make an assessment of wealth, or capacity to pay, one needs more than an indication of the ownership of valuable land, or an apparently profitable enterprise conducted on land, or the income of the ratepayer. Before an assessment could be made one must know also the level of debt obligation and the cost of operations. I doubt that any local authority would have access to such information concerning its ratepayers.
>
> A second reason is that the fixing of rates by reference to a ratepayer's wealth is a shifting and impermanent base. In times of volatile financial and commodities markets the capacity of a ratepayer to pay rates may fluctuate markedly in the short term. Constant adjustments to the rate would be necessary. The ability of a local authority to set a budget for income and expenditure over an extended period would be compromised.
>
> Thirdly setting rates by reference to capacity to pay is inconsistent with the system of annual valuations of property required by the *Valuation Act* and made the basis of a local government rating policy. The Act, and the *Valuation Act*, both contemplate regular valuations of land to form a stable basis for setting local authority budgets."[72]

[119] These passages might be thought to suggest that in the decisions to make a rating category and to levy differential general rates, a local government may not take into account the economic value of the use or uses to which improved land in the local government area is or may be put as a relevant consideration. I do not share that view of the scope of the powers to levy differential general rates under ss 92(1)(a) and 94(1)(a) of the LGA and the relevant provisions of the LGR.

[120] A differential general rate will impose a higher or lower burden or incidence of taxation on the owners of some land as opposed to the owners of other land of the same unimproved value. The individual burden of a ratepayer is a function of both the unimproved value and the differential general rate that applies to the land. The statutory provisions do not require that the differential general rates must be levied only by reference to the costs or expenses which the local government will incur in

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72 *Xstrata Coal Queensland Pty Ltd & Ors v Council of the Shire of Bowen* [2014] QCA 170, [40]-[42].

relation to land in the rating category chosen. It would be erroneous to construe the statutory provisions as being subject to that limitation. Once it is accepted that the use of land in its improved state can be a relevant factor in setting rating categories, and in levying differential general rates, in my view, it follows that the economic use and value of that land use may be taken into account as a relevant factor, unless there is some express or implied limit on the scope of the power to levy differential general rates.

[121] Returning to the applicant's particular challenge to the second and third decisions on the ground that an irrelevant consideration was taken into account, the applicant submits that the reasons in *Xstrata* and *Paton* support the conclusion that the respondent took an irrelevant consideration into account in making the challenged rating category because it distinguished between use for workers and single person's accommodation on the on the hand and use for the ordinary travelling public on the other.

[122] As analysed above, in my view, *Xstrata* does not carry the applicant's argument so far. The basis of the distinction drawn by the challenged rating category does not depend on the personal capacity to pay of the owner, independent of any quality of the land.

[123] In my view, the applicant's challenge is more closely analogous to *Paton*. I put to one side the intensity of the stipulated use for the challenged rating category, because of the minimum number of 100 persons. The substance of the distinctions otherwise drawn between the challenged rating category and the rating category that applies to a motel lies in the difference between a workers or single person's off-site accommodation facility provided as a service to industry on the one hand and a motel facility for the ordinary travelling public on the other. These are at least arguably different business models based on the different groups of target clientele.

[124] If the difference between land used for residential purposes by an owner or their permitted occupant and land used for residential purposes by a rent paying tenant of the owner is insufficient to constitute a valid basis for a separate rating category, in my view, it may follow that the difference between land used for the purpose of supplying of accommodation services to a particular group of patrons, the ordinary travelling public and land used for the purpose of supplying those services to another group of patrons, namely workers or single persons engaged in industry located away from the accommodation property is similarly insufficient.

[125] However, in my view, this analogous reasoning goes too far. In my view, the use of land for a major income earning activity is a relevant consideration to take into account in making a decision to establish a rating category and the related decision to levy differential general rates. The similarities between uses of a similar kind in the context of different industry sectors may give pause for thought, but the economic realities are that some industries and activities for which land is used are capable of generating much greater income than others.

[126] In my view, it assists analysis to consider two of the distinctions between the challenged rating category and other relevant rating categories. One is that a workers' camp or similar facility that comes within the challenged rating category is off-site. This has the effect of excluding, for example, shearers' quarters on a pastoral property. Putting modern conveniences to one side, the functional

distinctions between a set of shearers' quarters and a modern mining or gas field workers' accommodation camp may be few, but they notoriously operate in industries experiencing vastly different economic conditions.

[127] The other distinction is between the accommodation offered by the workers' camp or similar facility within the challenged rating category and that offered to the ordinary travelling public. The latter might be accommodated at short term apartments, hotels, motels or caravan parks in the respondent's local government area. It is also notorious that the respondent's local government area includes relatively recent developments in the mining, gas and electricity generation industries. The thrust of the challenged rating category appears to be directed to the workers' and single person's accommodation facilities that may be built to service those industries.

[128] In my view, the respondent's power to levy differential general rates for land used for the challenged rating category is not limited by the fact that the facilities to be used for the stated purposes are or could be adapted to service the ordinary travelling public, or that there is no functional distinction to be made between a workers' camp that is off site and one that is on site for the industry it serves.

[129] The similarity of the accommodation uses that fall within the challenged rating category to the uses of land in other rating categories does not mean that these uses cannot be distinguished for the purposes of a separate rating category. In my view, the proper construction of the sections of the LGA and regulations under the LGR under which the challenged rating category was set does not require that the court read further limits into the scope of the broadly expressed taxing powers involved, because of the court's notions of equity or fairness as to the distinctions drawn between the challenged rating category and other similar uses of land that fall within other rating categories. That is the province of the local government in making the decisions to levy differential general rates.

[130] The applicant relies on a number of other particular considerations that it submits the respondent was required to take into account as a relevant consideration under s 20(2)(e) and s 23(b) of the JR Act but did not take into account.

[131] First, the applicant submits that the respondent was required to take into account that the form of accommodation in the challenged rating category does not place a higher demand on existing facilities or create a demand for new and improved services compared to other commercial, short term forms of accommodation.

[132] There are two steps in this contention. The initial step is whether the respondent was required to take the relative levels of those demands into account as a relevant consideration. A failure to take a relevant consideration into account constitutes a ground of judicial review only where the repository of the power in question is bound to take the consideration into account.[73] The second step is whether the respondent failed to take into account that the demands of the challenged rating category are not higher than other categories.

[133] I will proceed on the footing that the relevant considerations that a repository of power is required to consider may depend on the matters raised during the

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73 *Minister of Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 39 [20].

consideration of the exercise of the power. Thus, since the revenue statement referred to the different levels of facilities and services provided to the differing classes of land and to the occupiers of these classes of land, that may have been a matter that the respondent was bound to consider.

[134] However, assuming that the first step were a matter that the respondent was required to consider, in my view, the applicant has failed to prove as a matter of fact that the respondent did not take that consideration into account in making the second decision.

[135] As previously stated, the 2014/2015 Revenue Statement contained no particular explanation for the differences between the challenged revenue category and the requirements of that category in prior years. It said that the rationale for the differing categories is to recognise the different levels of facilities and services provided to the differing classes of land and to the occupiers of these classes of land and that in determining its differential rating system council's objective is to ensure the fair and consistent application of lawful rating and charging principles, without bias, taking account of all relevant considerations and disregarding irrelevancies such as the perceived wealth of individual ratepayers or ratepayer classes.

[136] As a matter of fact, the applicant sought to challenge that the challenged rating category required a different level of facilities or services from a motel, caravan park or other private accommodation, except in relation to its comparative size to existing facilities of those kind.

[137] However, in my view, that challenge is not to the point. If the respondent wrongly formed a factual view as to the comparative levels of facilities and services required, that was not a failure to take into account a consideration that the respondent was required to take into account. The consideration was relevant. If the consideration was taken into account, the challenge would establish no more than a wrong finding of fact by the respondent. But the respondent's findings of fact are not subject to judicial review as such, on this ground of judicial review.

[138] The relevant factual inquiry on this ground of judicial review is that the respondent did not take the question of the relative levels into account when it was required to take that consideration into account. That fact is one the applicant has failed to prove.

[139] Second, the applicant submits that the respondent failed to take into account the consideration that intensive accommodation facilities in the challenged rating category are required as a condition of development approval from the respondent (under the *Sustainable Planning Act* 2009 (Qld)) to provide and make contributions to the provision of local government infrastructure and services.

[140] In my view, the respondent was not required to take that matter into account as a relevant consideration in the making of the second decision or the third decision.

No evidence

[141] The applicant challenges the second and third decisions on the ground that there was no evidence or other material to satisfy the respondent that intensive accommodation uses place a much higher demand on existing facilities and create a

demand for new and improved services by the nature of the increased numbers of persons resident whether permanently or temporarily compared to other commercial short term forms of accommodation for the second and third decisions.

[142] The ground depends on the proposition that the respondent made a finding of fact or acted on that view of those demands in making the second or third decisions.

[143] The applicant submits that the court can infer that the respondent made that finding of fact or acted on that view because of a statement to that effect which appears as part of a wider series of statements in the 2013/2014 revenue statement. As previously stated, the 2014/2015 revenue statement did not contain any similar statement.

[144] As previously stated in relation to the relevant considerations ground, in my view, the applicant has not shown that the respondent made a finding to that effect or acted on that view. Accordingly, it is unnecessary to consider whether there was any evidence to support such a finding or view.