Yeperenye Pty Ltd & Anor v Alice Springs Town Council [2011] NTSC 06

PARTIES:	Yeperenye Pty Ltd and Loechel Management Pty Ltd v Alice Springs Town Council
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	13 of 2009 (20934588)
DELIVERED:	14 January 2011
HEARING DATES:	16 December 2010
JUDGMENT OF:	KELLY J

CATCHWORDS:

LOCAL GOVERNMENT ACT, S 157 - DECLARATION OF CHARGE

Whether valid - whether services performed for the benefit of land in relation to which the charge was declared - whether services performed for the benefit of occupiers of land in relation to which the charge was declared - identification of benefit -irrelevant considerations - charge imposed on land said to give rise to the need for the service.

Local Government Act, s 157

Waste Management and Pollution Control Act

*Associated Provincial Picture Houses Ltd v Wednesbury Corporatio*n [1948] 1 KB 223; *Australand Land and Housing No 5 (Hope Island) Pty Ltd v Gold Coast City Council* [2006] QSC 332; *Parramatta City Council v Pestell* (1972) 128 CLR 305; *Shanvale Pty Ltd v Council of the Shire of Livingstone* (1999) 105 LGERA 380; [1999] QCA 483, referred to

REPRESENTATION:

Counsel:	
Plaintiff:	R Webb QC
Defendant:	A Wyvill SC
Solicitors:	
Plaintiff:	Povey Stirk
Defendant:	Chris Turner
Judgment category classification:	B
Judgment ID Number:	KEL11002
Number of pages:	22

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Yeperenye Pty Ltd & Anor v Alice Springs Town Council [2011] NTSC 06
No. 13 of 2009 (20934588)

BETWEEN:

YEPERENYE PTY LTD
First Plaintiff

AND:

LOECHEL MANAGEMENT PTY LTD
Second Plaintiff

AND:

ALICE SPRINGS TOWN COUNCIL
Defendant

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 14 January 2011)

[1] Alice Springs has a significant litter problem. Collection of litter in Alice Springs costs the Alice Springs Town Council ("ASTC") around $630,000 per year. Approximately 50 per cent to 60 per cent of that litter consists of alcohol related litter including empty cans, bottles and cardboard and plastic packaging.

[2] In 2009, the Council decided to impose a charge on land in the municipality occupied by 12 take away liquor outlets pursuant to s 157 of the *Local*

Government Act ("the Act") to help defray the cost of collecting litter in the town.

[3] Section 157 provides (so far as is relevant):

> "**157. Imposition of charges**
>
> (1) If a council carries out work, or provides services, for the benefit of land, or the occupiers of land, within its area, the council may declare a charge on the land.
>
> (2) A declaration of a charge must:
>
> (a) state the amount or basis of the charge; and
>
> (b) identify the land to which the charge will apply.
>
> (3) The amount of a charge need not be limited to the cost of providing the service."

[4] The plaintiffs are the owners of land subject to the charge. They lease the land in question to the occupiers who conduct the liquor retail businesses on the land. With one minor exception, the plaintiffs have no interest in the liquor outlets conducted on the land. The plaintiffs have brought this proceeding seeking a declaration that the charge is invalid on the grounds set out below.

Process leading to imposition of the charge

[5] At a Council meeting on 23 February 2009, the Council unanimously passed the following resolutions:

> "A. That Council declare a liquor litter charge for the 2009/10 at the time of the declaration of the 2009/10 rates and charges.
>
> B. That Council through the Mayor and Chief Executive Officer liaise with liquor take-away outlets in regard to this decision."

[6] The minutes of the Council meeting at which this resolution was passed contain the following report of the discussion leading to the resolution:

> "Further to discussions held at the January Council meeting. This report explores the legalities and options for raising a charge on take-away liquor outlets to help cover the cost of clean up of the litter generated from liquor sales in town.
>
> Section 157 of the *Local Government Act 2008* states that the Council may declare a charge on land if it carries out work, or provides services, for the benefit of the land, or the occupiers of the land.
>
> Under the *Local Government Act* 2008, a charge may have a reasonable basis that differs from rates, though it should be noted from the above that there needs to be some connection between the charge and the services provided for the benefit of the land or the occupiers of the land.
>
> The tactics used to help clean up the liquor litter around town is a separate matter for Council to decide and there is no requirement for a connection to be established between the cost of such services and the charges levied."

[7] It appears from this that the purpose of the proposed rate was to help cover the cost of clean up of the litter generated from liquor sales in town.

[8] During 2009 the Council prepared, discussed and adopted a "Draft Municipal Plan" and invited submissions on the draft from the general public.

[9] That Draft Municipal Plan contained the following provision in relation to the proposed liquor litter charge.

> "Charges are a method Council can use to ensure a user pays approach, so that those who are benefiting from specific services provided by Council are charged for that benefit.
>
> Pursuant to section 157 of the Local Government Act Council will declare a Liquor Litter Charge from the 2009/10 financial year. The basis for the charge will be:
>
> - A charge of $60,000 for liquor takeaway outlets located within the CBD.
> - A charge of $60,000 for liquor takeaway outlets with a drive-through facility.
> - A charge of $7,500 for liquor takeaway outlets not located within the CBD.
>
> As per Council Decision # 14969
>
> This Liquor Litter Charge is aimed at recovering the costs for cleanup of the liquor related litter from the source of that litter."

[10] This provision in the draft plan correctly sets out the effect of s 157 of the *Local Government Act*, namely that Council is empowered to levy charges so that those who are benefiting from specific services provided by Council are charged for that benefit.

[11] It then sets out the proposed rates but does not specify the benefit (or purported benefit) said to flow to either the land or the occupiers of the land upon which the charge is to be levied.

[12] On 30 April 2009 the Council put out a media release headed "Council: Getting Tough on the Tough Issues". That media release was in the following terms:

> "Council is taking a bold and positive step towards combating liquor litter in Alice Springs by declaring a Liquor Litter Charge.
>
> Pursuant to section 157 of the Local Government Act Council proposes to declare a Liquor Litter Charge from the 2009/10 financial year, **aimed at recovering a portion of the costs for the cleanup of liquor related litter from the source of that litter.**
>
> The scale for the charge will be:
>
> $60K for liquor takeaway outlets located within the CBD
>
> $60K for liquor takeaway outlets with a drive-through facility
>
> $7.5K for liquor takeaway outlets not located within the CBD
>
> The residents of Alice Springs have expressed concern over the town's untidiness to Council for many years. A July 2004 community survey indicated the top 6 out of 7 concerns in Alice Springs were all related to litter and cleanliness.
>
> Alice Springs is a unique town with its own distinctive problems, and **the Alice Springs Town Council is adopting a unique approach to combating the highest-rating concerns for its ratepayers – litter, cleanliness, and a tidy town for all to enjoy.**
>
> Compared with most local government authorities in Australia, Council spends a disproportionately high percentage of its ratepayer's money on litter abatement each year.
>
> The introduction of the Litter Liquor Charge aims to adopt a user pays approach to acknowledge the fact that properties with liquor takeaway outlets create a substantial part of the liquor litter

> challenge facing our town – and asks those property owners to take some financial responsibility.
>
> The Liquor Litter Charge will not cover the total cost to Council each year of cleaning up liquor litter across Alice Springs, but proposes to share the cost of litter collection with the property owners with liquor takeaway outlets." [emphasis added]

[13] On publication of the Draft Municipal Plan Council received submissions from a number of bodies including the present plaintiffs. The submission from Jill and Alan Braithwaite pointed out that s 157 of the *Local Government Act* allows the Council to declare a charge on land when it has carried out work or provided services that are for the benefit of the land and stated in no uncertain terms (and in capital letters) that the proposed services in this case provide "NO BENEFIT" to the land which will carry the burden of the charge.

[14] By letter dated 18 May 2009 the Council replied to the Braithwaites' submissions providing information about the budget for litter control in the municipality, complaints received by the Council concerning litter in public places, and the method of calculation of the proportion of rubbish said to be liquor related. The letter contained the following explanation for targeting the land containing takeaway liquor outlets by the imposition of the charge.

> "The total amount of $300k to be raised from the liquor litter charge is related to the costs Council faces in collection of liquor related litter only, this litter representing approximately 50% - 60% of the litter collected in the Municipality Collection of all litter within the Municipality costs Council $630k per year.

> The introduction of the Liquor Litter Charge aims to adopt a user pays approach to acknowledge the fact that properties with liquor takeaway outlets create a substantial part of the liquor litter challenge facing our town – and asks those property owners to take some financial responsibility."

[15] The letter did not specify what benefit, if any, would accrue to the land (or the occupiers of the land) on which the charge was to be levied. Rather it spoke in terms of asking property owners to take financial responsibility for what was said to be a problem of their creation.

[16] In a report to Council dated 25 May 2009 the Council's director finance made a number of comments on the proposed liquor litter charge and submissions which had been received in relation to that charge.

[17] That section of the report begins:

> **"1) Who is subject to the Liquor Litter Charge**
>
> The introduction of the Liquor Litter Charge aims to adopt a user pays approach to acknowledge the fact that properties with liquor takeaway outlets create a substantial part of the liquor litter challenge facing our town - and asks those property owners to take some financial responsibility."

[18] On the question raised in the submission by the Braithwaites that s 157 only allows a charge to be levied where Council carries out work or provides service for the benefit of land (or occupiers of land), the report states:

> "Section 157 of the *Local Government Act (LGA)* enables a council to declare a charge on land where it carries out work or provides services for the benefit of land owners or occupiers within its area.

On the question as to whether s*ection 157* of the *LGA* can be relied on in order to raise this charge, Council's Solicitor remains of the opinion that there is an arguable case in this regards, as discussed previously.

The fact that Council currently carries out the work involved in collection of the liquor related litter in the Municipality does not negate the fact that there is a cost to provide such service, there is no requirement, under the *LGA*, that Council propose "extra" or 'specific' services to undertake this work in order for it to raise a charge for the service provided. Furthermore, under *section 157(3)* 'the amount of a charge need not be limited to the cost of providing the service'."

[19] The report does not state that the proposed charge will in fact benefit either the land or the occupiers or allude to any potential benefit to the land or the occupiers.

[20] On 25 May 2009 Council declared its rates and charges for the 2009/2010 which included the following liquor litter charge:

"5. <u>LIQUOR LITTER CHARGE</u>

That in relation to clean up of liquor related litter generated by liquor take-away outlets, pursuant to section 157 of the Local Government Act 2008 in respect of the financial year ending 30th June 2010, Council hereby declares the following charges:

(a) For land occupied by a liquor take-away outlet located within the CBD
$60,000 per annum

(b) For land occupied by a liquor take-away outlet with a drive-through facility
$60,000 per annum

(c) For land occupied by a liquor take-away outlet not located within the CBD
$ 7,500 per annum"

[21] The plaintiffs have applied to this Court for a declaration that that challenge is invalid. The invalidity is said to rest on two basis, namely:

> "(a) The Liquor Litter Charge is not a charge authorised or permitted to be made under section 157 of the *Local Government Act* 2008 on the basis that the work or provision of services in respect of which the liquor litter charge is imposed on the plaintiffs, are not works or provision of services provided by the defendant for the benefit of the plaintiffs' lands but rather for the benefit of all of the land and ratepayers in the municipality of Alice Springs.
>
> (b) The defendant acted *ultra vires* in declaring the Liquor Litter Charge pursuant to section 157 of the Local Government Act 2008 at its ordinary Council meeting on the 25th of May 2009, in so far as the defendant took into account irrelevant considerations by way of the determining that takeaway liquor outlets in the municipality of Alice Springs were the source of liquor related litter in the municipality, when the source of liquor related litter is the person or persons who dispose of packaging material in such a manner that it hereby constitutes litter."

The plaintiffs' submissions

[22] The plaintiffs submit that when Council declares a charge under s 157, it is necessary for Council to form a view as to (a) the work and services to which the charge relates and (b) the land or occupiers of the land which will benefit, in order to decide what land is to be charged.

[23] The plaintiffs rely on the Council resolutions, the Draft Municipal Plan, the Council's response to submissions by the Braithwaites, the media release, and the report by the Director Finance to assert that there is no evidence that Council had ever formed a view that this charge would benefit the occupiers of the land in question (or of the land itself) in any way other than as part of

the general benefit to the whole community. The plaintiffs submit that these documents show that the charge was clearly intended to benefit all ratepayers and the community generally by funding what was a long standing function of the Council namely, picking up litter from public places.

[24] The plaintiffs submit that it is not open to the Council to apply a charge to some only of land which will be benefited and exclude other land where there is no rational basis for considering that land on which the charge is levied will benefit whereas like, "uncharged" land will not.

[25] They say that any such charge must be levied on all land which will benefit not on land which led to the need for the work being done, and that the benefit must be identified at the time of making the charge, or it would be impossible for the Council to rationally decide which land must bear the charge.

[26] It is not sufficient, say the plaintiffs, for the charge to be levied on land which the Council considered had led for the need for the work being done and then to identify *ex post facto* some benefit which might conceivably be said to accrue to that land as a result of the charge. Such a process of reasoning involves the Council taking into account irrelevant considerations (namely which land led to the need for the work) and ignoring relevant considerations (namely which land - or the occupiers of which land - will benefit from the work).

[27] The plaintiffs also say that the Council took into account a further irrelevant consideration, namely their belief that it was the occupiers of the land who created the litter rather than the purchasers of the products who later used them and discarded the packaging material as litter.

[28] In summary the plaintiffs say that the work identified by the Council was to clean up litter in town, particularly liquor litter. The charge levied was to defray part of the cost to Council of carrying out that task. The benefit identified by Council in its own documents was a clean and tidy town for all. The land to be charged was 12 liquor outlets selling liquor to the general public.

[29] It is plain from those documents, say the plaintiffs, that not all land to which the identified benefit would accrue was to be charged. Rather Council decided to charge land which they thought gave rise to the need for the service and not the land or occupiers who would benefit from the service.

Council's Submissions

[30] ASTC concedes that the basis for imposing the charge was that the sources of the rubbish should be charged for the collection of the rubbish. ASTC submitted that that rubbish collection is *ipso facto* for the benefit of the person who created the rubbish.

[31] Counsel for ASTC conceded that there must be some rational basis for the view that the service provided (namely the collection of rubbish) provided

an additional benefit to the occupiers of the land being charged over and above that provided to the general public, but submitted that, if it is demonstrated that there is a rational basis to suppose there was such an additional benefit to the occupiers, that is sufficient. There is no need for the Council to prove that any particular rational basis for the view was one that was in the mind of the Council at the time the charge was levied. He submitted that unlike jurisdictions in which the power to levy such a charge was dependent upon the Council forming a particular opinion (e.g. that the service would provide a special benefit to particular land) the jurisdictional fact under s 157 is the objective existence of such a benefit, not the existence of Council's opinion that such a benefit would accrue. For that reason it was not necessary for the Council to have formed the relevant opinion at the time the rate was charged. He did concede that the identified benefit must be "a real benefit" or "a benefit of substance".

[32] Having said that, counsel for ASTC submitted that one could conclude that the Council did in fact form the view that the service of litter collection would provide a benefit to the liquor takeaway outlets before levying the charge from the Draft Municipal Plan which contains the following paragraph:

> "Charges are a method Council can use to ensure a user pays approach, so that those who are benefiting from specific services provided by Council are charged for that benefit."

[33] He submitted further that the Court should give a great weight to the opinion of the Council (being an elected body) as to the existence of such a benefit.

[34] In my view the quoted extract from the Draft Municipal Plan is not evidence that the Council held any opinion about whether the collection of litter around town would benefit occupiers of the takeaway outlets in any way other than the benefit provided to the general community. No such benefit is specified in the Draft Municipal Plan. The entire thrust of the resolutions and Draft Municipal Plan is to impose a charge on land occupied by those whom the Council considers to be responsible for production of the litter. Moreover, when it was specifically challenged by the Braithwaite submission asserting that the land in question does not benefit from provision of the service, ASTC's response did not assert that that land did benefit; it simply repeated that it was going to adopt "a user pays approach to acknowledge the fact that properties with liquor takeaway outlets create a substantial part of the liquor litter challenge facing the town liquor litter challenge", and "ask those property owners to take some financial responsibility".

[35] In the affidavit of 25 January 2010 the Mayor of Alice Springs, Damien John Ryan, deposed as follows:

> "11. Council does not therefore accept that the land subject to the liquor litter charge has to be specially benefited from the provision of the services for which the charge was imposed vis a vis the rest of land in the municipality, although Council holds the view that such benefit may be said to arise. Council considers that section 157 does not properly construed, require

> the Council to charge the same amount over all allotments receiving the same service and that it was open and proper in coming to its decision to charge a different and higher amount on certain land, to take into account the commercial activities conducted on that land and the effect of those activities, in terms of the need for and the cost of the service.
>
> …
>
> 15. Finally, Council formed the view that even if the contrary view expressed by those with vested interests who objected to the charge was right, being that the litter liquor charge had to be in respect of a special benefit or service to the land affected in order, special benefit lay, at least in part, in the effect of removing from the waste stream the substantial proportion, generated by take away liquor retailers, in fostering and preserving community and business tolerance for business continuation on the land within the municipality, thus preserving the land's commercial rental value."

[36] It seems to me that the assertion in paragraph 11 of the Mayor's affidavit is entirely consistent with the documentation produced by Council in the period leading up to the levying of the charge. It is significant that in paragraph 15 the Mayor does not state the time at which Council formed the view that "special benefit lay, at least in part, in the effect of removing from the waste stream the substantial proportion, generated by take away liquor retailers, in fostering and preserving community and business tolerance for business continuation on the land within the municipality, thus preserving the land's commercial rental value". It must be remembered that "the Council" is not a biological organism capable of having private opinions. The only way in which "the Council" (as distinct from individual councillors) can be said to have an opinion is for the Council as a body – in

a meeting – to pass a resolution or otherwise record a consensus view. There is nothing in ASTC's documents to suggest that "the Council" held the opinion that the clean up of litter was for the benefit of the occupiers carrying on the business of take away liquor sales on the land in question – whatever the mayor's private opinion may be or may have been. In light of all of these matters, it seems to me that the view expressed by the mayor in paragraph 15 as to the benefit accruing to the land, was an *ex post facto* rationalisation.

[37] Counsel for ASTC submitted that effectively making the occupiers "do the right thing" by contributing to the cost of cleaning up liquor generated litter was sufficient benefit. He argued that fulfilling a moral obligation of the occupiers to contribute towards cleaning up the mess sourced from their businesses, enhanced community acceptance of their businesses and hence their goodwill (or at least diminished negative public perceptions of their businesses by removing the unsightly fall out).

[38] There are two difficulties with this submission. First, it ignores the fact that the proposed charge, being levied on the owners of the land, would not in fact force the occupiers to do the right thing. It is the owners not the occupiers who would be forced to contribute. Secondly, on this reasoning, it would be the charge not the service of litter collection that would be of benefit to the occupiers.

[39] ASTC submitted further that the litter collection service potentially relieved the occupiers of liability for public nuisance or liability under the *Waste Management and Pollution Control Act*. Counsel for ASTC submitted that it was not for the Court to second guess the Council and that provided the view that such a benefit would accrue to the occupiers was not unreasonable (in the *Wednesbury*[1] sense), it is not open to the Court to interfere with the Council's decision.

[40] Counsel for the Council pointed out that the plaintiffs had called no evidence that they were not guilty of a public nuisance or did not feel any moral obligation to clean up their litter or that there was no benefit to the goodwill of their businesses from the clean up of the liquor litter. He submitted that it was necessary for them to either prove those matters as a matter of fact or to demonstrate that any opinion which may have been held by Council that such benefits would accrue was manifestly hopeless or intrinsically unreasonable.

[41] This submission appears to be at odds with ASTC's primary submission that the "jurisdictional fact" which empowers the Council to declare a charge under s 157, is the fact of benefit to land rather than the Council forming an opinion that particular land would benefit – and that there was, therefore, no need for the Council to have formed an opinion on the matter at the time of declaring the charge.

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

[42] In summary, counsel for ASTC submitted that the plaintiffs were inviting the Court to over-rule an elected council's decision made after considerable deliberation that collection of litter would be of benefit to those who are the source of it. He submitted that the errors in that approach were:

(a) to assume that the existence of a general benefit precludes the existence of a special benefit to the occupiers;

(b) to assume that a person who is the source of the litter can never benefit from its collection and that any opinion of Council to the contrary was unreasonable;

(c) to assume that s 157 specifies an opinion as the jurisdictional fact and thereby to focus overly on an opinion at the time the charge was levied; and

(d) because of the last mentioned mistake to call no evidence in relation to the non-existence of the jurisdictional fact (i.e. no evidence to show that collection of litter did not provide the occupiers with a benefit).

Plaintiffs' reply

[43] In reply, counsel for the plaintiffs submitted that the argument based on moral benefit or doing the right thing assumed that occupiers of takeaway liquor outlets have a moral responsibility to pick up litter on public land – which she disputed.

[44] Secondly, counsel for the plaintiffs submitted that once it is shown that there is a general benefit to all land in the municipality, the charge should attach to all. She submitted that if there is an additional benefit to the occupiers which is a real benefit or a benefit of substance (which she did not concede), the charge would be valid if (and only if) the work and services were performed for that benefit. Under s 157 the purpose of the work or services has to be for the benefit of the land or occupiers. The Council's documents show that the purpose of the work was for the general benefit of the community.

Conclusion

[45] In my view, the charge is invalid for the reasons complained of by the plaintiffs. Section 157 empowers the Council to declare a charge on land if it carries out work, or provides services, for the benefit of that land, or the occupiers of that land. The Council's own documents show that Council collects litter in the Alice Springs area for the benefit of the whole town – not for the benefit of the 12 lots on which the charge has been declared.

[46] I seriously doubt whether the occupiers in question (or any other retailers) could successfully be sued in public nuisance or made liable under the *Waste Management and Pollution Control Act* as a result of purchasers of their products littering the packaging after consuming those products. I doubt further that, if they could be so sued, they would be saved from liability by the fact that the Council clears away the litter.

[47] However, even if they could be made so liable, and even if their potential liability were reduced as a result of the Council's litter collection service, I do not think that would render the charge valid. In no real sense could it be said that ASTC provides the service of cleaning up litter in the town for the benefit of the occupiers of those 12 lots – ie to save them from potential liability for nuisance or breach of statutory duty. It is not sufficient to identify some extremely hypothetical possible benefit to rationalise the imposition of the charge. For the charge to be lawfully levied, the service to which it relates must be genuinely, in a real or substantial sense, be performed for the benefit of the land to be charged.

[48] In general, collecting litter from land is done, in a real and substantial sense, for the benefit of the land from which the litter is collected; for the citizens of the town who frequent that land (and visitors); and for the benefit of neighbouring land. In no real or substantial sense is it performed for the benefit of the people who are the source of the litter (ie the litterers), let alone for the benefit of the people from whom the litterers bought the products the packaging of which they carelessly discard (or for that matter, the manufacturers or advertisers of those products: why the buck should stop with the retailers is not immediately obvious).

[49] I do not accept the submission of ASTC that it is sufficient to identify some benefit to the land or occupiers (being a real benefit or a benefit of substance) to validate the rate and that it was not necessary for the Council to have identified that benefit at the time of declaring the rate. The power

is to declare a charge on land where services have been performed for the benefit of that land (or its occupiers). In a practical sense, it would not be possible for the Council to identify the land to be charged unless and until it had identified the land for the benefit of which (or the occupiers of which) the services are to be performed.

[50] If I am wrong on this, it does not affect the result. In this case I find as a fact that the Council, as a body, did form an opinion about who would benefit from the collection of rubbish in the municipality and for whose benefit that service was being performed. ASTC communicated that opinion to the public in its media release in the following terms:

> "**The Alice Springs Town Council is adopting a unique approach to combating the highest-rating concerns for its ratepayers – litter, cleanliness, and a tidy town for all to enjoy.**"

That states accurately what the Council saw as the purpose of the litter collection service.

[51] In any case, I do not consider that the hypothetical "benefit" to the occupiers identified by counsel for ASTC (namely fulfilling a moral obligation or reducing their potential exposure to an action for public nuisance or liability under the *Waste Management and Pollution Control Act*) could be said to be "a real benefit" or "a benefit of substance" – as counsel for ASTC conceded the benefit must be for the charge to be valid.

[52] It is true that the land on which the charge was declared also benefited from the provision of the rubbish removal service in the sense of sharing the general benefits of a clean and tidy town. However, that is not sufficient to validate the charge. Where the Council performs services for the benefit of land or the occupiers of land, s 157 authorises the Council to declare a charge on the land – ie the land for the benefit of which (or the benefit of the occupiers of which) the service was performed. In this case that would be (at the very least) the land from which the litter is collected and all of the land contiguous to the areas in which litter is collected. The section does not authorise the declaration of a charge on some only of the land for the benefit of which the service was performed.[2]

[53] The whole thrust of the statements made by ASTC (and its officers) in its various documents (set out above) is that the charge is to be levied on the 12 lots on a "user pays" basis – ie because the Council believed the liquor retailers are responsible for creating the liquor related litter. That is to say, the Council took into account an irrelevant consideration. It did not ask, "For whose benefit is the service of rubbish removal performed (ie for the benefit of what land/occupiers)?" but rather, "What was the (ultimate) source of much of the rubbish?" The plaintiffs say that the Council got the answer to this question wrong, since the source of the litter was the litterers – not the retailers of the products from which the discarded packaging came.

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[2] This is a logical conclusion based on the wording if the section. The same conclusion was also reached in relation to legislation which is not materially different: *Parramatta City Council v Pestell* (1972) 128 CLR 305 per Barwick CJ at p 313 and per Menzies J at p 322-323; *Australand Land and Housing No 5 (Hope Island) Pty Ltd v Gold Coast City Council* [2006] QSC 332 per Chesterman J at paragraphs [35] and [38] - affirmed on appeal (2008) 1 Qd R 1

In my view there is substance to this criticism, but even if one assumes that the land in question was in some sense the "source" of the litter, s 157 does not authorise the Council to declare a charge on land which creates a need for a particular service – only on the land for the benefit of which (or the occupiers of which) the service is performed.[3]

Orders:

1. I declare that Part 5 of the Declaration of Rates and Charges for the financial year ended 30 June 2010 declared by the defendant at a council meeting on 25 May 2009 purportedly pursuant to s 157 of the *Local Government Act* and comprised in rates notices issued by the defendant pursuant to s 159 of the Act is invalid.

2. The question of costs be adjourned to a date to be fixed.

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[3] Again, the same conclusion was reached in relation to equivalent legislation in Queensland: *Shanvale Pty Ltd v Council of the Shire of Livingstone* (1999) 105 LGERA 380; [1999] QCA 483 per Derrington J at paragraph [67]