

## THE APPLICATION OF STANDING IN REVIEWING TAXATION DECISIONS

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*A central aspect of the reform of administrative law in the 1970s was to provide increased administrative accountability by way of review of a range of administrative decisions and processes. However such review or appeal rights only subsist if a party has standing to seek such review or appeal. This paper examines the application of 'standing' to seek review of taxation decisions. The paper focuses in particular on the decision in *Allan v Transurban City Link* to highlight how a narrow approach to statutory interpretation in relation to the issue of standing may undermine the taxpayer's right of review.*

### I INTRODUCTION

The mid-1970s was a watershed period for administrative law reform, with the codification of many of the common law actions, the intended outcome being a more transparent and more accountable government administration. A central aspect of this increased accountability provided for review of a range of administrative decisions and processes, in particular by means of the Administrative Appeals Tribunal<sup>1</sup> (AAT), and by way of judicial review.<sup>2</sup>

In broad terms, an application for review could be made to the AAT by a "person whose interests are affected"<sup>3</sup> by the decision, while an application for judicial review of a decision becomes available to a "person aggrieved by a decision."<sup>4</sup> There has been some judicial consideration as to the breadth of persons encompassed within these terms, with the paper outlining the outcomes from this judicial deliberation. The paper then explores the scope of the circumstances which allow for review or appeal of administrative decisions, in particular decisions relating to tax liability.

In examining the issue of limitation of the right to seek review, the discussion focuses on the High Court decision of *Allan v Transurban City Link Limited*.<sup>5</sup> The discussion seeks to highlight the possibility of the legislature being able to subvert the underpinning rationale for the administrative remedies, albeit with the assistance of favourable court decisions.

### II THE ISSUE OF STANDING

There have been a number of cases where the courts have considered the question of standing, with this review of judicial considerations highlighting some of the significant decisions which underlie the general principles applying to standing. In addition to these general principles, there are further legislative requirements for

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<sup>1</sup> Created by the *Administrative Appeals Tribunal Act 1975* [AAT Act].

<sup>2</sup> By means of the *Administrative Decisions (Judicial Review) Act 1977* [(AD(JR) Act].

<sup>3</sup> AAT Act s 27(1).

<sup>4</sup> AD(JR) Act s 5(1).

<sup>5</sup> (2001) 48 ATR 253.

standing in the tax context, and these are examined in the following section of the paper.

In the decision in *Boyce v Paddington Borough Council*,<sup>6</sup> Buckley J identified two circumstances where a plaintiff had a right to sue without joining the Attorney-General:

... first, where the interference with the public right is such as that some private right of his is at the same time interfered with ... and secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right.<sup>7</sup>

Subsequent cases have sought to ameliorate the complexity associated with application of these rules, with standing seen as not requiring special damage in the traditional sense, but requiring a plaintiff "... having a special interest in the subject matter of the action."<sup>8</sup> However the application of such a principle would depend on the circumstance, since "The cases are infinitely various and so much depends in a given case on the nature of the relief which is sought, for what is a sufficient interest in one case may be less than sufficient in another."<sup>9</sup>

A further question for consideration has arisen from recognition that interests may be affected directly or indirectly, since "... a decision which affects interests of one person directly may affect the interests of others indirectly. Across the pool of sundry interest, the ripples of affection may widely extend."<sup>10</sup> In determining whether the strength of indirect interests is sufficient:

The character of the decision is relevant, for if the interests relied on are of such a kind that a decision of the given character could not affect them directly, there must be some evidence to show that the interests are in truth affected.<sup>11</sup>

This issue of the relative strengths of indirect interests was addressed in *Australian Foreman Stevedores Association v Crone*,<sup>12</sup> with Pincus J recognising that:

A decision favourable to one citizen may affect others: some directly, and some more remotely. There is a point, which must be fixed as a matter of judgement in each case, beyond which the Court must hold that the interests of those affected are too indirectly affected to be recognised.<sup>13</sup>

Where a statute provides recourse to review for a 'person aggrieved' or a 'person whose interests are affected,' statutory interpretation has a role to play, the court in *Alphafarm Pty Ltd v Smithkline Beecham (Australia) Pty Limited*<sup>14</sup> suggesting that:

... it is important not to draw ... any general proposition which may be translated to the instant dispute. In each case, the content of the terms 'affect' and 'interest' are to be seen in the light of the scope and purpose of the particular statute in issue.<sup>15</sup>

This approach was again affirmed by Gummow J in *Australian Institute for Marine and Power Engineers v Secretary Department of Transport*,<sup>16</sup> whereby "... given the diversity of statutory provisions, no general proposition is to be established from these

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<sup>6</sup> [1903] 1 Ch 109.

<sup>7</sup> Ibid at 114.

<sup>8</sup> *Wentworth v Attorney-General (NSW)* (1984) 154 CLR 518, per Gibbs CJ at 527.

<sup>9</sup> *Robinson v Western Australian Museum* (1977) 138 CLR 383 per Mason J at 327-8.

<sup>10</sup> *Re McHattan and Collector of Customs* (1977) 18 ALR 154 per Brennan J at 157.

<sup>11</sup> Ibid.

<sup>12</sup> (1989) 20 FCR 377.

<sup>13</sup> Ibid at 382.

<sup>14</sup> (1994) 49 FCR 250.

<sup>15</sup> Ibid per Gummow J at 272.

<sup>16</sup> (1986) 13 FCR 124.

examples.”<sup>17</sup> Further, “... the nature of the interest required in a particular case will be influenced by the subject matter and context of the decision under review.”<sup>18</sup>

### III STANDING IN TAX ADMINISTRATION

One of the factors creating difficulties in judicial review of the question of standing in taxation matters has been the different terminology in different legislation setting the threshold requirement for standing.

The initiation of proceedings for review or appeal of an income tax assessment is provided in s 175A Income Tax Assessment Act 1936, which creates the right to object against an assessment for “a taxpayer who is dissatisfied with an assessment made in relation to the taxpayer”. A literal reading of the provisions would suggest three threshold requirements to create the right to object, these being:

- a taxpayer
- dissatisfied with an assessment
- where the assessment is made ‘in relation to’ the taxpayer.

Section 175A directs dissatisfied taxpayers to Part IVC of the Tax Administration Act for objection procedures, and the subsequent review and appeal procedures if there is an unfavourable objection decision. Part IVC of the Tax Administration Act provides a uniform code of procedures which apply for objections, reviews and appeals under all Commonwealth tax statutes, thus applying to income tax, fringe benefits tax, goods and services tax, and the superannuation guarantee charge. The application of a uniform code means that the threshold issue of standing will be the same for taxpayers seeking review under any of these taxing provisions.

The requirements for further review or appeal are stated in s 14ZZ Tax Administration Act, with the right for review or appeal being available for “the person dissatisfied with the Commissioner’s objection decision ...”.

In the majority decision in *McCallum v FCT*<sup>19</sup>, Lehane J concluded that:

There can, I think, be no doubt that ‘the person’ referred to in s 14ZZ ... is the same person as the one referred to in s 14ZU itself ... and subs 14ZL(1) makes it clear that ‘the person’ concerned is the taxpayer referred to in s 175A ... who is dissatisfied with an assessment ‘made in relation to the taxpayer’.<sup>20</sup>

In a case involving a taxpayer seeking review of a private ruling, Hill J found in *CTC Resources v FCT*<sup>21</sup> that:

There is no definition of ‘dissatisfied’ in this context but the word must bear more than its ordinary dictionary meaning of ‘displeased with’ or ‘not contented with’. More is required than mere lack of satisfaction with the objection decision. ... In my opinion a person will only be ‘dissatisfied’ in the relevant sense if that person is a person to whom the ‘ruling’ is still capable of having legal effect. ... so that the ruling can not affect the taxation liability of a putative appellant, that person, no matter how discontented, will not be a ‘person dissatisfied’.<sup>22</sup>

At issue in *McCallum v FCT* was whether a bankrupt taxpayer had standing to appeal or seek review. Hill J, in a minority decision, noted the range of terminology

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<sup>17</sup> Ibid at 131.

<sup>18</sup> *United States Tobacco Company Minister for Consumer Affairs* (1988) 20 FCR 520 at 529.

<sup>19</sup> 97 ATC 4509.

<sup>20</sup> Ibid at 4521.

<sup>21</sup> 94 ATC 4072.

<sup>22</sup> Ibid at 4100.

relating to standing, including the expressions 'person dissatisfied', 'person interested', 'person affected', and 'person aggrieved'. His Honour concluded that the divergent expressions may be seen to indicate shades of difference, such that it would "... not be wholly safe to extrapolate from decisions on the one set of words the outcome where dependent upon another set of words."<sup>23</sup>

The majority decision<sup>24</sup> in *McCallum* held that while a bankrupt taxpayer did not satisfy the requirement for review or appeal in their own name, the trustee in bankruptcy did have standing. The decision was based on the High Court decision in *Cummins v Claremont Petroleum*<sup>25</sup>, with Whitlam J following the view in *Cummins* that it is fundamental to the law of bankruptcy that the bankrupt is divested of liability for his provable debts, and as the taxation debt is a provable debt of which the bankrupt is divested, "... he will not be the person to whom 'the objection decision' is still capable of having legal effect"<sup>26</sup>.

In a strong dissenting view, Hill J noted that Ellicott J in *Tooheys v Minister for Business and Consumer Affairs*<sup>27</sup> suggested that "The words 'a person who is aggrieved' should not, in my view, be given a narrow construction."<sup>28</sup> Hill J was inclined to the view that 'dissatisfaction' provided a broader gateway than 'aggrieved', warning that if the criteria for review were set narrowly, the objects of administrative review could be frustrated.<sup>29</sup> His Honour was of the view that, while dissatisfaction required more than a mere intellectual or emotional interest,<sup>30</sup> there should be no requirement to demonstrate that a legal right was affected to make out 'dissatisfaction'.<sup>31</sup>

Lehane J argued against this broader interpretation, suggesting that it was not easy to see that a test of dissatisfaction with a decision should confer standing on a taxpayer to a more generous extent than a right of appeal does for a party adversely affected by a decision.<sup>32</sup> His Honour noted that a taxpayer who lacked standing, as with a bankrupt, wanted to challenge an assessment, the Court could exercise its power to prevent injustice or oppression.<sup>33</sup>

The warning by Hill J as to the dangers of a narrow interpretation of expression granting standing, and the potential for a narrow approach to defeat the objects of administrative review, may have been prophetic, given the long running legal battle which ultimately ended in the High Court as *Allan v Transurban*.<sup>34</sup> The progress of this case is charted below, with a review of the question of standing at each stage of the proceedings.

#### IV ALLAN V TRANSURBAN CITY LINK

The case involving Peter Allan's quest to be recognised as having standing as a 'person affected' followed a long, and ultimately futile, path. After commencing in

<sup>23</sup> *McCallum v FCT* 97 ATC 4509 at 4515.

<sup>24</sup> Lehane & Whitlam JJ.

<sup>25</sup> (1995) 185 CLR 124.

<sup>26</sup> *McCallum v FCT* 97 ATC 4509 at 4518.

<sup>27</sup> (1981) 36 ALR 64.

<sup>28</sup> *Ibid* at 79.

<sup>29</sup> *McCallum v FCT* 97 ATC 4509 at 4516.

<sup>30</sup> See for example *ACF v Commonwealth* (1980) 146 CLR 493.

<sup>31</sup> *McCallum v FCT* 97 ATC 4509 at 4516.

<sup>32</sup> *Ibid* at 4522.

<sup>33</sup> *Ibid* at 4523.

<sup>34</sup> *Allan v Transurban City Link Ltd* [2001] HCA 58; (2001) 48 ATR 253.

the AAT in the mid 1990s, the case progressed through the Federal Court to the Full Federal Court, from whence it was remitted to the AAT, and again progressed through the Federal Court and Full Federal Court, until eventually reaching the High Court.

The decision against which Allan sought review was a decision of the Development Allowance Authority (DAA), a body created under the *Development Allowance Authority Act* (DAA Act) for the purpose of issuing certificates which granted tax concessions where privately funded large public infrastructure projects met certain criteria. Under s 93O of the DAA Act, where the DAA was satisfied that the conditions had been met there was no discretion to refuse a certificate.

Additionally, the applicant for a certificate was the only party with a right to be heard by the DAA, the only party from which the DAA could seek information and documents, and the only party to which notice of the decision had to be given, there being no requirement for public notification of receipt of an application or a decision on the application.

The provision of the DAA Act at issue was s 119, which provided in relevant part:

*(1) A person who is affected by a reviewable decision may, if dissatisfied with the decision, by notice given to the DAA ...*

*... request the DAA to reconsider the decision.*

*(3) Upon receipt of the request, the DAA must reconsider the decision ...."*

Section 120 of the DAA Act provided that:

"Applications may be made to the AAT for review of decisions of the DAA that have been confirmed or varied ...."

The DAA decision for which Allan sought review involved the issuing of a certificate for construction of a freeway to within one hundred metres of his home. Allan requested the DAA to reconsider its decision, under s 199 of the DAA Act, the response from the DAA being to decline to reconsider on the basis that Allan was not a 'person who is affected by the decision.'

### *A First Round of Hearings*

#### *1 AAT*

On the basis that the failure by the DAA to reconsider its decision amounted to a confirmation of the decision, Allan applied to the AAT for a review of the DAA decision.

At first instance in the AAT, the Tribunal considered that the degree of adverse affection was too remote for Allan to be classed as a 'person whose interests are affected', and as he was not therefore a 'person affected by a reviewable decision', the AAT had no jurisdiction to hear the matter.

Undeterred by this setback, Allan took the case to the Federal Court,<sup>35</sup> where it was first heard by Mansfield J.

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<sup>35</sup> *Peter Allan v Development Allowance Authority* [1997] 738 FCA.

## 2 Federal Court

From a consideration of the authorities, Mansfield J concluded that ultimately the question turned on what Parliament intended by the expression 'a person who is affected by ...' the decision in s 119 of the DAA Act. While assuming that Allan was a person who had suffered 'special damage' within the terms of *Boyce*, His Honour concluded that Allan was not encompassed as a 'person affected' within the meaning of the Act, and as such the DAA and AAT were correct in their assertion. The meaning ascribed to the Act in the following broad areas led to this conclusion.

Firstly, only the applicant for a certificate had input to the decision process. On this basis His Honour considered that:

... it is not likely that the parliament contemplated by s 119 that a person who had chosen not to participate in these primary determinative processes ... should by reason of special interests of the nature claimed have another opportunity to achieve indirectly what the person had not achieved directly.<sup>36</sup>

Further, as only the applicant for the certificate was entitled to notification of the DAA decision, with no requirement for public notification, the intention of the legislature was that the decision process be private.

Additionally, as the Act provided a period for review of twenty-one days after the decision came to the person's attention, His Honour felt that the intention was to limit review to the applicant. To adopt a different interpretation would leave open-ended the period for review, which would not have been the intention of Parliament.

Finally, His Honour considered that the decision under complaint was not the decision directly causing the special damage of which Allan complained, as the decision at issue had an outcome of the project attracting finance and tax concessions.

For these reasons Mansfield J concluded that s 119 of the DAA Act should have a narrow interpretation, with "a person who is affected" being limited basically to the original applicant for a DAA certificate. His Honour found this conclusion to be apparent both from the legislative provision, and from general principles enunciated by the High Court.

## 3 Full Federal Court

On appeal to the Full Federal Court, the decision of Mansfield J was overturned by all members of the Court.<sup>37</sup> The decisions of Wilcox and R D Nicholson JJ are examined below, Finn J being substantially in agreement with them.

In the view of Wilcox J, the fundamental defect in the argument of the respondent was failing to draw the distinction between the criteria relevant to the statutory decision, and the subject matter of the litigation challenging the decision. His Honour found that, using ordinary language, a person whose residential amenity would likely be diminished is a person affected by the decision, which raised a question of degree, as a special interest is required to confer standing. Where His Honour differed from Mansfield J was that he did not agree with the further requirement that the special interest be related to the objects, scope or purpose of the legislation under which the decision had been made.

In reviewing the authorities, His Honour considered that *Boyce* was the seminal decision in the area, and the second leg of the standing rule proposed by Buckley J

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<sup>36</sup> Mansfield J at 12 of 14.

<sup>37</sup> *Allan v Development Authority* [1998] 112 FCA; Wilcox, R D Nicholson, and Finn JJ.

had been reformulated by Gibbs J in *ACF* to refer to a person “having a special interest in the subject matter of the action.”<sup>38</sup> In explanation of this special interest, Gibbs J noted that “... an interest for present purposes, does not mean a mere intellectual or emotional concern.”<sup>39</sup> Rather, a special interest required the plaintiff gaining some advantage other than general satisfaction if the action succeeded, or suffering some disadvantage if it did not.

The majority of the Court in *Onus v Alcoa*<sup>40</sup> adopted this concept of ‘special interest’, with Gibbs CJ expounding on the meaning as “... an interest in the subject matter of the present action which is greater than that of other members of the public.”<sup>41</sup> In explanation of the concept, Stephen J saw it involving “... a curial assessment of the importance of the concern which a plaintiff has with particular subject matter and of the closeness of that plaintiff’s relationship to that subject matter.”<sup>42</sup>

Further, in *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs South Australia*,<sup>43</sup> (SDAEA), the Full High Court suggested that the “... rule is flexible and the nature and subject matter of the litigation will dictate what amounts to a special interest.”<sup>44</sup>

The point made by Wilcox J was that in none of these cases was it suggested that the nature of the special interest was to be determined by reference to the scope and purpose of the legislation. Additionally:

In none of the High Court cases is there any suggestion that the concern that amounts to a special interest must be the same concern as that which motivated the legislature in enacting the legislation out of which the action arose ... it was enough that members of the appellant organization had an interest in the validity of the certificates that transcended that of the public generally.<sup>45</sup>

On the basis of these authorities, Wilcox J was able to determine that Mansfield J had erred in finding a legislative intent that a ‘person who is affected’ in terms of s 119(1) was limited to the applicant for a certificate. Wilcox J further noted that Mansfield J had assumed that Allan had suffered special damage, which in the view of Wilcox J would make Allan a ‘person who is affected.’

The order proposed by His Honour was to allow the appeal, but remit the matter to the AAT for the making of a finding as to the position of Allan.

R D Nicholson J concurred with the orders made by Wilcox J. His Honour found that the test for standing from *Shop Distributive and Allied Employees Association* was whether the plaintiffs could establish the existence of a special interest in the subject matter of the litigation,<sup>46</sup> and that it was apparent from the authorities that the “... concept of special interest is wider than the concept of special damage.”<sup>47</sup>

His Honour relied on the finding in *Onus* that:

Whether a plaintiff has shown a sufficient interest in a particular case must be a question of degree, but not a question of discretion ... At least the plaintiff must be able to show that success in the action would confer on him ... a benefit or advantage greater than the benefit or

<sup>38</sup> Ibid at 3 of 16 referring to *ACF v Commonwealth* (1980) 146 CLR 493 per Gibbs J at 527.

<sup>39</sup> *ACF v Commonwealth* (1980) 146 CLR 493 per Gibbs J at 530.

<sup>40</sup> (1981) 149 CLR 27.

<sup>41</sup> Ibid per Gibbs CJ at 36.

<sup>42</sup> Ibid per Stephen J at 42.

<sup>43</sup> (1995) 183 CLR 552.

<sup>44</sup> Ibid at 558.

<sup>45</sup> *Allan v Development Authority* [1998] 112 FCA at 4 of 16.

<sup>46</sup> *SDAEA v Minister for Industrial Affairs South Australia* (1995) 183 CLR 552 at 558.

<sup>47</sup> *Allan v Development Authority* [1998] 112 FCA per Nicholson J at 12-13.

advantage conferred upon the ordinary member of the community; or alternatively that success in the action would relieve him of a detriment or disadvantage ... to an extent greater than the ordinary member of the community.<sup>48</sup>

This test was considered to be met in the instant case, since “The special damage lies within the point in the pool of sundry interest at which the affection is not remote.”<sup>49</sup>

Further, His Honour found no basis for the limitation by inference drawn from the legislation by Mansfield J, by which the provision operated to limit the class of applicants who could seek review.

### *B Second Round of Hearings*

The case, then, returned to the place from whence it had started its journey, coming again before the AAT for the determination of whether Allan was a person affected within the terms of s 119(1) of the DAA.

#### *1 AAT*

Further complexity arose at the AAT hearing when the issue of Allan having moved his residence was raised. This then broached the additional question as to the temporal nature of standing, and whether Allan was no longer a person affected by the DAA decision, the issue being whether standing was required only at the time the person was affected by the decision, or whether the requirement is ongoing.

In essence, the AAT concluded that to have standing, Allan needed to demonstrate that at the time of this further hearing he retained a special interest in the subject matter of the DAA decision. By virtue of having moved residence, the AAT was not satisfied that Allan met the requirement for such an interest, and affirmed the decision under review, being the initial AAT decision that Allan was not a person affected by the DAA decision.

Interestingly, the AAT affirmed the previous decision, although it did so by the consideration of different facts, which arguably was not what the referral from the Full Federal Court had asked of it.

#### *2 Federal Court*

Allan again appealed against the decision of the AAT, with the matter again returning to the Federal Court,<sup>50</sup> this time before Merkel J.

In looking to the AAT Act, His Honour determined that ss 27 and 29 required only that standing exist at the date on which application for review is made to the AAT, there being nothing to indicate that the requirement for standing was ongoing. Additionally His Honour saw the “... concept of standing being ‘lost’ or ‘gained’ according to the circumstances existing from time to time (as) an unsatisfactory basis for determining a person’s right to commence and continue a proceeding ....”<sup>51</sup>

While the AAT had based its decision on the ACF test enunciated by Gibbs J, Merkel J considered that this framed the question in narrow terms, importing a test that would not be “... accepted as necessarily applicable to all cases of standing to

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<sup>48</sup> *Onus v Alcoa* (1981) 149 CLR 27 per Brennan J at 75.

<sup>49</sup> *Allan v Development Authority* [1998] 112 FCA per Nicholson at 15.

<sup>50</sup> *Allan v Development Allowance Authority* [1999] FCA 426.

<sup>51</sup> *Ibid* at para 39.



seek administrative review.”<sup>52</sup> Rather, His Honour concluded that more recent cases evidenced a more flexible test based on a special interest greater than, or different in kind from, ordinary members of the community,<sup>53</sup> with s 27 of the AAT Act being flexible in its application.

By confining its enquiry into whether Allan had actually proved special damage, Merkel J found that the AAT had erred in law by approaching the issue of special damage or sufficiency of interest too narrowly. His Honour considered that Allan’s standing arose from an accrued right to reconsideration of the DAA decision, with that standing not being affected by the change in residence.<sup>54</sup>

As a result, the decision in the case held that the AAT had erred in law by failing to consider whether Allan was a person affected by the DAA decision, being the matter which had been referred for determination to it by the Full Federal Court. Merkel J again remitted the matter to the AAT for determination of this issue.

### *3 Full Federal Court*

By this stage of the proceedings it came as no great surprise when, instead of returning to the AAT, the matter progressed on appeal yet again to the Full Federal Court,<sup>55</sup> on this occasion sitting as a five-member bench.<sup>56</sup>

#### *(a) Reconsideration by Full Federal Court*

Before consideration of the substantive matter at issue, the Court deliberated on the question of whether the Court should reconsider a previous Full Court decision. While the Court was of the view that “It is not in doubt that a Full Court of this Court has power to decline to follow the previous decision of a differently constituted Full Court,”<sup>57</sup> it was felt that “Decisions of a Full Court of this Court are entitled to due respect and will not be lightly departed from.”<sup>58</sup> In reaching this conclusion, regard was had to the judgement in *Nguyen v Nguyen*<sup>59</sup> where it was observed that “Where a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong.”<sup>60</sup>

From a review of the authorities the Court determined that “... we do not think it possible, or even desirable, to formulate exhaustive criteria upon which this Court should act when asked to reconsider an earlier decision,”<sup>61</sup> with the arguments and circumstances being among the determining factors. The Court found some unusual features in the circumstances in the case, not least that Transurban had not been a party to the previous case yet had a serious interest, and that the previous Full Court would have been assisted by the arguments advanced by Transurban.

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<sup>52</sup> Ibid at para 55.

<sup>53</sup> Ibid at para 56.

<sup>54</sup> Ibid at para 68.

<sup>55</sup> *Transurban City Link Ltd v Allan* [1999] FCA 1723.

<sup>56</sup> Black CJ, Hill, Sundberg, Marshall and Kenny JJ.

<sup>57</sup> *Transurban City Link Ltd v Allan* [1999] FCA 1723 at para 27.

<sup>58</sup> Ibid.

<sup>59</sup> *Nguyen v Nguyen* (1990) 169 CLR 245.

<sup>60</sup> Ibid per Dawson, Toohey & McHugh JJ at 268-269.

<sup>61</sup> *Transurban City Link Ltd v Allan* [1999] FCA 1723 at para 31.

On this basis the Court took the view that the "... circumstances provide sufficient reason for the Court to embark upon a consideration of whether the previous decision was wrongly decided."<sup>62</sup>

*(b) The question of standing*

Having satisfied itself that it was not inappropriate for the Court to reconsider a previous Full Court decision, the Court turned to address the issue of standing.

The Court looked to the decision in *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Ltd*,<sup>63</sup> a decision subsequent to the previous Full Court decision in the current case, and noted that the leading judgement<sup>64</sup> pointed out that it was significant in matters of standing to have regard to the considerations upon which equity intervenes in public law cases, the basis for such intervention being found in the public interest in the maintenance of due administration.<sup>65</sup> It was noted that this judgement approved of the finding in *Shop Distributive and Allied Employees Association* where it had been noted that the danger of adopting a precise formula for determining what was sufficient for a special interest could have the effect of unduly restricting the availability of equitable remedies to support the public interest in due administration.<sup>66</sup>

Also from the *Aboriginal Community Benefit Fund*, McHugh J had noted that a special interest in the subject matter of the proceedings sufficed to give standing.<sup>67</sup> This suggested that for the Court to disturb the previous Full Court decision would require a finding that Allan had no special interest in the subject matter, where four previous judges had found there was such an interest.

The Court relied on the test for standing from ACF, requiring a special interest greater than others in the community. In looking to the factors of relevance in this consideration, the Court drew on the decision in *North Coast Environment Council Ltd v Minister for Natural Resources*,<sup>68</sup> where the view of Aickin J was that to qualify as special interest, the interest must be related to the relief claimed. Following this view, the Court considered that if granting relief did not further the interests of the plaintiff, or failure to grant relief did not cause harm, then "... common sense would suggest that the applicant for judicial review would lack standing."<sup>69</sup>

While the Court could find no support for this view in later High Court cases, with *Onus* suggesting the relationship should be between the applicant and the subject matter of the proceedings rather than between the applicant and the outcome of the proceedings, neither could the Court find anything to suggest consideration of the outcome would be irrelevant. On this basis the Court was able to conclude that "... there will be no standing where the actual outcome of the review will not affect the applicant."<sup>70</sup>

In applying these considerations to the current case, the Court took the view that the subject matter of the review was the decision to issue certificates which affected the

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<sup>62</sup> Ibid.

<sup>63</sup> (1998) 194 CLR 247.

<sup>64</sup> Gaudron, Gummow and Kirby JJ.

<sup>65</sup> *Transurban City Link Ltd v Allan* [1999] FCA 1723 at para 38.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid at para 39.

<sup>68</sup> (1994) 55 FCR 492.

<sup>69</sup> *Transurban City Link Ltd v Allan* [1999] FCA 1723 at para 46.

<sup>70</sup> *Transurban City Link Ltd v Allan* [1999] FCA 1723 at para 50.

tax treatment of the infrastructure borrowings, so for Allan to establish standing for review of that decision it was necessary for him to demonstrate an interest in the decision as to the tax treatment for a borrower or lender. Further, in terms of the outcomes, it was relevant to consider whether at the time of application, the interest he claimed would be advanced or harmed by the outcome of the review.

By taking this narrow approach, the Court was able to determine that Allan had no greater interest in the tax treatment of the loans than any other member of the community, and while he did have an interest in whether the infrastructure project should proceed, that interest was too remote from the decision for which he sought review.<sup>71</sup>

In highlighting the significance to be attached to the outcome from the review in determining standing, the Court did allow that the object, scope and purpose of the legislation was relevant, but denied that it could be the only relevant matter.<sup>72</sup>

Nevertheless, largely on the basis that he had no special interest in the outcome of the decision, narrowly construed, the Court reversed the previous decision of the Full Federal Court and found that Allan was not a person affected by the decision, and accordingly lacked standing.<sup>73</sup>

### *(c) Approach of Full Federal Court*

The finding of the Court is an interesting decision in a number of areas, with some of these briefly examined before returning to the continuing Allan saga, which was nearing its conclusion.

The Court paid regard to the decision in *Aboriginal Community Benefit Trust*, particularly to the view of Gaudron, Gummow and Kirby JJ that in determining standing, regard should be had to considerations upon which equity intervenes in public law, the basis for intervention being the public interest in the maintenance of due administration. The considerations of public interest suggest a broad interpretation being given to the special interest required for standing, with the impression being created that the Court would have regard to this broad public interest view in deciding the instant case.

However, while noting the comments from *Shop Distributive and Allied Employees Association* as to the danger of adopting a precise formula as to the requirements for special interest, the danger being to constrict the remedies available, the Court then appears to overlook the High Court cases as to the requisite relationship to establish special interest and standing, and draws instead on a Federal Court decision.

Further, the comments relied on from the decision in *North Coast* may arguably appear at odds with the High Court authority, the decision suggesting that it is the outcome from the proceedings, rather than the subject matter of the proceedings, which is determinative. By setting this as the criteria, the decision of the Court may be at odds with the warning from *Shop Distributive and Allied Employees Association* as to adopting too precise a formulation as to the sufficiency for special interest and standing.

Finally, in applying the 'outcome' test, the Court arguably takes a quite narrow interpretation of the decision in question. While the decision as to the issue of a certificate by the DAA does determine the tax treatment for the infrastructure loan,

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<sup>71</sup> *Transurban City Link Ltd v Allan* [1999] FCA 1723 at para 52-54.

<sup>72</sup> *Transurban City Link Ltd v Allan* [1999] FCA 1723 at para 55.

<sup>73</sup> *Transurban City Link Ltd v Allan* [1999] FCA 1723 at para 57.

this in turn then directly impinges on the undertaking of the project subject to the financial agreement. By drawing a line at the tax treatment as being the only outcome from the decision to issue a certificate, the Court has taken a narrow literal approach arguably at odds with the public interest approach commended in *Shop Distributive and Allied Employees Association*.

The Court recognised that Allan had an interest in whether the project proceeded, and by segmenting this decision from the decision as to tax treatment for the funding arguably creates an artificial divide where none existed, as the issuing of a certificate led inexorably to the conferral of tax advantages and the commencement of the project. The creation of segmentation between the two resultant outcomes which arguably follow together may be seen as adopting an approach which is both narrow and legalistic.

However the Court found that it was able to make such a fine distinction.

#### *4 High Court*

As an example of "... the fortitude required by a citizen who wishes to draw upon administrative law procedures for enforcement of modern public statutory duties against public authorities and large corporations,"<sup>74</sup> there is no better example than this case, with such fortitude amply illustrated with an ultimate appeal to the High Court.<sup>75</sup>

However the fortitude was not to be rewarded, with a 5:1 majority of the High Court finding against Allan.

##### *(a) Majority judgement*

In the joint judgement of the majority,<sup>76</sup> there were two questions which would determine the appeal. The first was whether s 119 of the DAA Act, providing for review of a DAA decision, had any application in respect of a decision by the DAA to issue a certificate, or whether it only applied where issue of a certificate had been refused. Following from this, if the section allowing review was equally relevant to all decisions, the question arose as to whether Allan was a person 'affected by' the decision to issue a certificate.

From its consideration of the first of these questions, it may appear that the majority avoided the issue of standing. Section 119 of the DAA Act provided for a person affected by a reviewable decision to request reconsideration of the decision. The majority judgement effectively concluded that a decision by the DAA to issue a certificate was not a reviewable decision, and as such the question of standing for Allan did not arise. It would seem that the majority judgement considered that only a decision to refuse a certificate could amount to a reviewable decision, and as a certificate had been issued in this instance, there was no reviewable decision and no basis for reconsideration. This is what the majority appear to suggest in finding that "What is fatal to Mr Allan's case is that he sought involvement in a decision to issue a certificate."<sup>77</sup>

However, while having determined there was no reviewable decision, thus ending the matter, the majority did go on to consider the question of standing. The phrase in s

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<sup>74</sup> *Allan v Development Allowance Authority* [1999] FCA 426 at para 1 per Merkel J.

<sup>75</sup> *Allan v Transurban City Link Ltd* [2001] HCA 58; (2001) 48 ATR 253.

<sup>76</sup> Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ.

<sup>77</sup> *Allan v Transurban City Link Ltd* [2001] HCA 58 at para 38.

119 referring to a person 'who is affected by a reviewable decision' was seen to have an ambulatory operation, and "What serves to identify a person as one affected by a reviewable decision will vary having regard to the nature of the reviewable decision itself."<sup>78</sup> In looking to identify persons who would be affected in terms of the current legislative framework, the majority concluded that Allan could not come within this category.

The judgement noted that there was no provision in the legislative regime for giving notice to the public, or anyone other than the applicant for a certificate, and this was seen to demonstrate that "The legislation is not concerned with broader public interests such as those relating to the environmental, engineering, social or other aspects of the proposed infrastructure project."<sup>79</sup>

Further, if members of the public could seek reconsideration of a decision up to 21 days after becoming aware of the decision, this left open the potential for reconsideration at a delayed time, even to the extent of being after completion of the project.<sup>80</sup> Additionally, as the applicant for the certificate was the borrower, the majority considered that it would be an odd result if s 119 allowed Allan to seek reconsideration in circumstances where the lender, a party immediately affected by the decision, had not been a party to the original application.<sup>81</sup>

With the majority rejecting the appeal, at no stage had the matter been considered on the merits, even after two Tribunal hearings and five court cases.

*(b) Dissenting view*

Kirby J delivered a strong dissenting judgement broadly centred around the shortcomings which he perceived in the application of statutory construction, being critical of a narrow approach to statutory interpretation, particularly where this approach limited review of administrative decision making. His Honour considered that where, as in the current case, interpretation of federal legislation was required, ambiguity arose, with "Neither interpretation propounded (being) incontestably correct or incorrect."<sup>82</sup> Rather, the court needed to choose the preferable construction, being in his view "... the one that strikes the decision-maker as best achieving the object of the legislation, as derived from the language in which it is expressed."<sup>83</sup>

His Honour noted that the approach to resolving the ambiguity in legislative provisions can influence the outcome, with an approach focusing on certain words and phrases resulting in the appeal being dismissed, whereas a broader interpretation of the words within their context may produce an opposite result. In considering these alternatives, Kirby J considered that "... it is undesirable that a class of persons who may enlist the remedial provisions of such legislation should be unnecessarily narrowed ...".<sup>84</sup>

In looking to the right of Allan to request the DAA to reconsider its decision, and the AAT to review the decision of the DAA, His Honour considered that it was not correct to use as a starting point the decision in *Boyce*, and the previous High Court

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<sup>78</sup> Ibid at para 17.

<sup>79</sup> Ibid at para 34.

<sup>80</sup> Ibid.

<sup>81</sup> Ibid at para 36.

<sup>82</sup> Ibid at para 40.

<sup>83</sup> Ibid.

<sup>84</sup> Ibid at para 41.

decisions concerning the general law of standing. Rather, he saw the starting point as a close analysis of the legislation.<sup>85</sup>

In contradistinction to the approach taken by other judges involved in this case, Kirby J took the view that:

There is a contemporary tendency ... to avoid or postpone such statutory analysis out of a preference for the general observations of judges concerning identical or analogous legislative provisions or principles of the common law. In a case such as the present the correct answer is likely to be masked by such an approach.<sup>86</sup>

His Honour referred to reviews of the law of standing conducted by the Australian Law Reform Commission, and while conceding that much contemporary federal legislation reflected the common law principle requiring interference with a private right, or special damage, many federal statutes adopted a different formula. This led to the view that “The tendency of federal legislation is to move away from authorising only particular persons ... or persons limited by a controlling adjective (aggrieved, interested), to ‘any person’ ...”.<sup>87</sup> Accordingly, the “... solution to the problem in a particular case must always take as its starting point the language and structure of the legislative prescription in question.”<sup>88</sup>

In regard to the instant case, His Honour identified two main controlling devices, the first being in s 119 DAA Act that the person seeking reconsideration be one ‘who is affected’, and the second being that the person making application to the AAT being one ‘whose interests are affected’. The question for determination was seen as whether these requirements had been met at the relevant time, being when the request was made to the DAA for reconsideration, and when the application was made to the AAT.

His Honour argued for a broad interpretation of the legislation, the trend of federal legislation being to “... enlarge the scope of rights to initiate administrative review,”<sup>89</sup> and applying a narrow interpretation ran the risk of turning back the clock, and departing from the legislative intent of widening “... the circle of persons who could exercise privileges under the applicable administrative law.”<sup>90</sup>

In arguing for this broad application of the legislation, which His Honour considered in this case would grant Allan standing, the point was made that the broad language in ss 119 and 120 of the DAA Act demonstrated the Parliamentary intention to permit access to the review process. If such had not been the intent of Parliament, then Parliament had it within its power to have omitted the review provisions, or to have confined them within a narrow reach.

Urging a public policy perspective, Kirby J saw the systems of review in the DAA Act and AAT Act as providing greater transparency in public administration in the federal sphere. In relation to the outcomes from the DAA decision, the view expressed suggested that inconvenience or disruption to the tax position of others, or to the project itself, could ultimately outweigh the duty of officers and entities of the Commonwealth to comply with the law.

Despite the plea by Kirby J against narrow legislative construction, the majority found that Allan lacked standing, and the appeal against the decision of the second Full Federal Court was dismissed.

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<sup>85</sup> Ibid at para 53-54.

<sup>86</sup> Ibid at para 54.

<sup>87</sup> Ibid at para 56.

<sup>88</sup> Ibid at para 56.

<sup>89</sup> Ibid at para 65.

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<sup>87</sup> Ibid at para 56.

<sup>88</sup> Ibid at para 56.

<sup>89</sup> Ibid at para 65.

<sup>90</sup> Ibid at para 65.

## V JUDICIAL REASONING

While of the five court decisions, three proved unfavourable to the applicant Allan in that he was denied standing, the courts in each of the decisions differed in their reasoning as to how this result was achieved. Each of the courts looked to statutory construction to assist in determining the issue, and while the outcome in each case may have been the same, it is instructive to review the alternative interpretations of the statute which led to a common result.

In the Federal Court at first instance, the conclusion of Mansfield J was that if Allan was a 'person affected' within the meaning of s 199 of the DAA Act, this being "... apparent whether one looks only to the legislation for the answer to the question, or whether one looks to the more general principles enunciated by the High Court ...".<sup>91</sup> His honour had regard to both of the nominated sources in reaching the conclusion.

In interpreting the relevant legislation, his Honour adopted the narrow interpretation that the review provided by the legislation was intended by Parliament basically only for those who were involved as applicants for a DAA decision, or required to be informed of the outcome of a decision, and that as Allan was not part of this loop, he had no standing to seek review.

From the principles from the High Court cases, an approach against which Kirby J warned, Mansfield J concluded that Allan needed to show special damage, and that this had not been done in this case.

The second Full Federal Court adopted a potentially narrower view of the scope of the legislation. The decision of the Court found that the question of standing would be determined by the interest Allan had in the decision under review, and that the subject matter of review was the decision to issue a certificate, the effect of which was to transfer tax benefits. As Allan had no interest greater than others in the community as to the tax benefits granted, he lacked sufficient interest in the decision.

By adopting this limiting view of the decision, the Court arguably narrowed the scope further, as it appeared to limit the outcome of the decision to immediate outcomes.

On reaching the High Court, it may appear arguable that the Court again narrowed further the interpretation of legislation granting rights of review.

The majority were able to determine the matter without having to decide on Allan's standing, effectively determining that there was no reviewable decision in terms of s 119 of the DAA Act. In a narrow reading of the legislation, the majority judgement concluded that the legislation intended that only a refusal to issue a certificate would be a reviewable decision, with a decision to issue a certificate bringing the matter to an end.

In further reasoning the decision did address the question of standing, the majority suggesting that other aspects of the legislation, such as there being no requirement to give notice of a decision to the public, and the potential delay from the 21 day period to lodge requests for reconsideration, also served to suggest that the legislation had no concern with broader public interests. However, these further considerations do not appear critical to the majority decision which rested on the narrow concept of what constituted a reviewable decision under s 119 of the DAA Act.

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<sup>91</sup> *Peter Allan v Development Allowance Authority* [1997] 738 FCA at 14.



## VI THE STANDING OF 'STANDING' IN TAX DISPUTES

The function performed by statutory rules requiring a person to have standing to seek review of an administrative decision is to limit access to the courts or tribunals, by acting as a formal filter operated by the judiciary. Such a filtering device serves a number of purposes, including, among others, to preclude frivolous actions, to forestall the use of courts as a forum for espousing political ideology, and not least to deny access to the courts "to a mere busybody who is interfering in things which do not concern him."<sup>92</sup>

The formal filter provided by the standing rules operates in addition to the more informal filters which operate to limit access to the courts, the most readily apparent being the cost of litigation. In the taxation context, such an informal filter operates to ensure that only those disputes which are genuine, and involve significant sums of tax in dispute, will proceed to the court system.<sup>93</sup>

However, as noted in the earlier discussion, Part IVC of the Tax Administration Act provides a less costly and more readily available access for review of taxation decisions. These provisions deal with review not only of income tax decisions, but decisions in relation to all Commonwealth taxes, including goods and services tax and fringe benefits tax. With the review provisions being more readily accessible, and the increasing range of Commonwealth taxes falling for review under these provisions, the 'floodgates' argument would suggest that there would need to be some threshold mechanism for access to review, and this threshold is provided in this context by the rules for standing.

It would be expected that a taxpayer, or a taxpayer's representative, would normally meet the requirement for standing to seek review of a taxation decision in relation to the taxpayer's own affairs, no matter how narrowly the statute defined standing, or how narrowly the courts construed the requirement. The issue then becomes how wide a scope there is for other interested parties to be able to instigate a review of a taxation decision relating to another taxpayer, and under what circumstances another person may seek to have a taxation decision relating to a different taxpayer reviewed.

The discussion that follows raises some circumstances where such an issue may arise.

One situation where others would have an interest in the outcome of any existing taxation dispute of a taxpayer is in the area of bankruptcy and liquidation. The earlier discussion examined those cases which have held that a bankrupt taxpayer is an exception to the general rule, in that the taxpayer does not have standing to seek review of a taxation decision relating to the taxpayer's own affairs, but rather the trustee in bankruptcy has standing. This may appear an anomalous result in some ways, as it may not always be the case that the interests of the bankrupt taxpayer and the interests of the trustee in bankruptcy would coincide. As an example, the trustee in bankruptcy may not consider that review of an existing or putative taxation dispute would be worth pursuing, while the taxpayer may be better served by seeking review of an adverse taxation decision, as a successful outcome from the review may significantly ameliorate the financial distress of the taxpayer.

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<sup>92</sup> *R v Greater London Council; Ex parte Blackburn* [1976] 1 WLR 550, Lord Denning at 559.

<sup>93</sup> The Australian Taxation Office test case program will also allow for cases involving small amounts of tax in dispute, but which involve a significant issue of law, will be an exception to this; see for example *FCT v McNeil* (2007) HCA 5 which involved a sum of around \$500 but proceeded to the High Court.

Further to this example, the issue also arises as to whether standing would be available to a creditor in the liquidation of a taxpayer. It may well be that creditors could be 'dissatisfied' or 'aggrieved' in relation to an adverse taxation decision affecting the taxpayer, and a reversal of the taxation decision on review may have a significant impact on the potential outcome from the liquidation, thus giving the creditors an interest in the dispute. If the taxpayer is denied standing to seek review of the decision, and the trustee in bankruptcy or liquidator decides against seeking review of the adverse taxation decision, the creditors may wish to seek review of the adverse taxation decision. However, a narrow interpretation of the standing requirement would see creditors precluded from being granted standing to pursue review of the decision, even though their interests are affected.

Another situation where one taxpayer would have an interest in the outcome of a taxation dispute involving another taxpayer potentially arises in relation to entities with some common ownership. While the consolidation provisions, which effectively treat a group with common ownership as a single entity, may limit the cases where this could arise, not all commonly owned groups would be consolidated. Even if a group has consolidated, there may be an entity with some common ownership which is not part of the group as it does not satisfy the taxation grouping rules.

If one of the entities subject to common ownership was subject to an adverse taxation decision, but was not seeking review of the decision, it may be arguable that a related entity could also be 'dissatisfied' or 'aggrieved' by the decision as the effects of the taxation decision could impact adversely on the related entity. In such a case the related entity may wish to instigate review of the adverse taxation decision. It may be expected that the narrow approach to standing taken by the courts would suggest that the courts would be reluctant to allow a related entity to seek review of a taxation decision relating to the taxpayer, even though the interests of a related party may be detrimentally affected by the taxation decision relating to the taxpayer.

While the scope to be afforded to the standing rules in relation to taxation decisions remains to be fully tested in the courts, the judicial considerations in relation to standing in taxation cases to date would suggest that the courts have been adopting a narrow approach to the interpretation of the standing provisions. However, as the simple examples illustrate, there may be an argument for a broadening of the application of the standing rules where taxpayers, other than the taxpayer subject to the taxation decision, are adversely impacted by the taxation decision.

## VII CONCLUDING REMARKS

The question remaining as a result of the court deliberations in the cases is whether the arguably narrow legislative interpretations can be reconciled with the ideals of transparency and accountability of administrative decision making.

In looking to the legislative provisions considered in this case, there would appear to be a clear progression in that the threshold conditions for review become more demanding at higher levels in the review hierarchy. For reconsideration of a DAA decision, as provided in s 119 of the DAA Act, the requirement is "a person who is affected by a reviewable decision." Section 121 of the DAA Act provided for further recourse to the AAT where threshold conditions had been met, the requirement from s 27(1) of the AAT Act being a person "whose interests are affected". The wording of the provisions suggests a gradation in scale from the DAA Act to the AAT Act, which would be expected as the review process progresses further up the hierarchy.

As noted by Kirby J, this view is reinforced when looking to the next level of review under the terms of the ADJR Act, the threshold requirement for which is prescribed in s 5(1) of the ADJR Act as being a “person who is aggrieved by a decision.” This again connotes a more stringent requirement at higher levels of review.

The reconsideration sought in this case was by the DAA, where it might be expected that a ‘person who is affected by a reviewable decision’ would be given a wide reading and interpretation, reflecting the fact that this body sat at the base level of the review hierarchy.

However the Courts at each level declined to adopt a broad interpretation, in each case limiting the scope of the provision, although as noted above, arguably for different reasons. The result from such a constricting interpretation is to “... (authorise) administrators, by the very substantial decisions they make, to place themselves beyond external review.”<sup>94</sup>

Given that Parliament has the power to constrain or restrict external review if such is its intention, it may be seen as a surprising result that where Parliament has not done this by clear language, the assumption being that the intention is to leave scope for the operation of the administrative law review provisions, the Courts have nevertheless been prepared to apply a narrow interpretation and constrict administrative review. Such an approach would appear to be at odds with the intent of the rationale behind the administrative review regime, and it remains to be seen whether provisions hailed as providing transparency and accountability continue to do so, or are emasculated by narrow literal interpretations.

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<sup>94</sup> *Allan v Transurban City Link Ltd* [2001] HCA 58 per Kirby J at para 88.

