HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

PETER ALLAN APPELLANT

AND

TRANSURBAN CITY LINK LIMITED RESPONDENT

Allan v Transurban City Link Limited [2001] HCA 58
11 October 2001
M90/2000

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation:

M A Dreyfus QC with D S Joseph and R A Heath for the appellant (instructed by Simon Northeast)

A C Archibald QC with P R Hayes QC and T P Murphy for the respondent (instructed by Baker & McKenzie)

CATCHWORDS

Allan v Transurban City Link Limited

Administrative law – Judicial review – Standing – Legislation providing review process – Under legislation application for review may be made by a "person who is affected by a reviewable decision" – Whether applicant is such a person is to be determined by construction of the legislation not by general considerations respecting "standing".

Administrative law – Judicial review – Reviewable decision – Legislation establishing tax incentive scheme by issue of tax certificates in respect of "infrastructure borrowings" – Issue of tax certificate – Whether application for review may be brought in respect of a decision to issue a tax certificate.

Words and phrases – "reviewable decision", "person who is affected by a reviewable decision".

Development Allowance Authority Act 1992 (Cth), ss 93A-93ZG, 93AA, 119, 120.
Administrative Appeals Tribunal Act 1975 (Cth), ss 25, 27.
Income Tax Assessment Act 1936 (Cth), ss 159GZZZZD-159GZZZZH.
Melbourne City Link Act 1995 (Vic).

1 GLEESON CJ, GAUDRON, GUMMOW, HAYNE AND CALLINAN JJ. The respondent ("Transurban") is the "Link corporation" for the purposes of the *Melbourne City Link Act* 1995 (Vic) ("the Link Act")[1]. Section 14(1) of the Link Act provides for the ratification and taking effect, as if it had been enacted in the statute, of the agreement made with effect from 20 October 1995 for the construction and operation of what is known as the Melbourne City Link Project ("the Project"). A copy of this agreement ("the Agreement") is set out in Sched 1 to the Link Act. The parties to the Agreement include Transurban and the State of Victoria. The Project involves a toll road comprising roads, tunnels and bridges for the moving of traffic in the Melbourne metropolitan area.

2 The Project at one end commences at the extremity of the Tullamarine freeway. Between January 1996 and January 1997, the appellant ("Mr Allan") owned and lived at a house in Hooper Street, situated some 200 metres from the Tullamarine freeway. As part of the works involved for the Project, the Tullamarine freeway was widened by the construction of six additional lanes in the area between the freeway and Mr Allan's house. Mr Allan has asserted injurious affection of the Hooper Street premises. He also has claimed that, as a member of the Australian Conservation Foundation, he was concerned about the environmental impact of the Project as a whole. The freeway widening works near Hooper Street were commenced in April 1997, that is to say after Mr Allan ceased to live there. By 10 December 1999, when the Full Court of the Federal Court gave the decision from which the present appeal is taken[2], the freeway widening works near Hooper Street had been substantially completed and the Project had been officially opened. In January 1997, Mr Allan, after selling the Hooper Street property, had moved into premises at Brunswick. The Full Court (Black CJ, Hill, Sundberg, Marshall and Kenny JJ) in its joint judgment approached the matter on the footing that it was common ground that Mr Allan's new dwelling was in no way affected by the Project[3].

3 Clause 2.7 of the Agreement stipulated various conditions precedent. These included satisfaction of items (i)-(xvi) in par (d). Item (iii) was the receipt by parties including Transurban of:

---

1 Section 10(1) of the Link Act so states.

2 *Transurban City Link Ltd v Allan* (1999) 95 FCR 553.

3 (1999) 95 FCR 553 at 557.

> "certification by the Development Allowance Authority ['the Authority'] of all infrastructure borrowings made or to be made, and the indirect infrastructure borrowings proposed to be entered into between members of each of the Commonwealth Banking Group, Westpac Banking Corporation group and the Australia and New Zealand Banking Group Limited group, for the purposes of the Project, to qualify such infrastructure borrowings for concessional taxation treatment under the Income Tax Assessment Act 1936".

4 The Authority is a "single-person statutory office" created by s 94 of the *Development Allowance Authority Act* 1992 (Cth) ("the Authority Act"). The Authority Act empowers the Authority to make decisions under a number of provisions in Chs 2 (ss 3-93), 3 (ss 93A-93ZG) and 4 (ss 93AA-123) of the statute and classifies them as "reviewable decision[s]" (s 93AA). The issue of the certificates with which this litigation is concerned was pursuant to s 93O, a provision in Div 1, Pt 3 of Ch 3. The applications were made by Transurban as a person proposing to borrow money as an "infrastructure borrowing" within the meaning of s 93N(1). Because, to the satisfaction of the Authority, the conditions specified in s 93O(1) were met, the Authority was obliged to issue the certificates. If the Authority had been satisfied that there was in force a law which would prohibit or restrict the operation of other facilities "in competition with" the infrastructure facilities to be provided by the Project, it would have been obliged by s 93O(2) not to issue the certificates.

5 The federal legislative design was to provide an incentive for lenders to finance the Project at an interest rate lower than that which otherwise would be charged to Transurban. Section 93A, the opening provision in Ch 3, states:

> "The object of this Chapter and the infrastructure borrowings provisions of the *Income Tax Assessment Act 1936* [(Cth) ('the Tax Act')] is to provide tax incentives for genuine private sector investment in publicly accessible infrastructure facilities and related facilities."

It will be observed that the lenders, who derive the immediate income tax benefit, are not applicants under the certification system established by Pt 3. It is the person who proposes to borrow who makes the application for a certificate.

6 The Authority issued the relevant certificates on 19 and 30 January 1996. The consequence of the issue of the certificates was that, while Transurban, as borrower, would be denied deductions under the Tax Act for interest payments on its borrowings, interest received by the lenders on the accommodation they provided for the construction of the Project would be exempt from income tax.

7 The issue of the certificates had further significance. This touched Mr Allan's environmental concerns and the utility of any relief that might have been available to him or members of the general public. It was explained by the Full Court as follows[4]:

> "Assuming that the other conditions precedent [in cl 2.7 of the Agreement] to the operation of the Agreement were also satisfied, then the Agreement, which was given statutory force by virtue of s 14 of [the Link Act], came into operation. Thereafter, the rights of the parties were determined by the Agreement and [the Link Act]. The Agreement made provision for various events which might adversely affect the parties, but the withdrawal or declaration of invalidity of a certificate under [the Authority Act] was not one of them. As it turns out, upon a challenge to the issue of the certificate, there was nothing Mr Allan or any other member of the public could do that would adversely affect the rights of the parties to the Agreement and, in particular, prevent performance of the Agreement and the construction of the Project. Further, if there be any doubt about the matter, we note that by an Agreement dated 4 March 1996, to the production of which no objection was taken, the parties to the Agreement agreed that conditions precedent to the Agreement, including that in cl 2.7(d)(iii), had either been satisfied or waived. It follows that by the time Mr Allan sought review of [the Authority's] decision on 13 March 1996, the relevant condition precedent was to be regarded as satisfied or waived."

8 As indicated above, on 13 March 1996, Mr Allan requested the Authority to reconsider its decisions to issue the certificates. He did so in purported reliance upon s 119 of the Authority Act. He maintained that, within the meaning of s 119(1), these were "reviewable decision[s]" and that he was "[a] person who [was] affected by" those decisions. On 11 April 1996, the Authority notified Mr Allan that it would not reconsider its decisions because he was not a "person affected" in the necessary statutory sense. By force of s 119(4), that was treated as confirmation of the decisions.

9 Section 25 of the *Administrative Appeals Tribunal Act* 1975 (Cth) ("the AAT Act") states that an enactment (a term defined in s 3(1) so as to include a statute of the Parliament of the Commonwealth) may provide for the making of

---

4 (1999) 95 FCR 553 at 565-566.

applications to the Administrative Appeals Tribunal ("the AAT") for review of decisions made in exercise of powers conferred by that enactment. In that event, s 27(1) of the AAT Act operates. This authorises the making of an application to the AAT by or on behalf of a person "whose interests are affected by the decision". Section 120 of the Authority Act provides for the making of applications to the AAT for the review of decisions by the Authority under s 119. By this means, the operation of the AAT Act is engaged.

10 On 10 May 1996, Mr Allan applied to the AAT for review of the decision made by the Authority under s 119. On 13 November 1996, the AAT determined that Mr Allan was not a person affected by the decisions of the Authority to grant the certificates. An application by Transurban to be joined as a party had been refused by the AAT.

11 Section 44 of the AAT Act provides for an "appeal" to the Federal Court "on a question of law" by a party to a proceeding before the AAT from any decision of the AAT in that proceeding. Section 44 is a law supported by ss 76(ii) and 77(i) of the Constitution. The regime established by s 44 may be contrasted with the jurisdiction respecting mandamus and prohibition for which provision is made in s 75(v) of the Constitution. The alleged error of law which founds an application under s 44 of the AAT Act may be non-jurisdictional error (and may not amount to a constructive failure to exercise jurisdiction) and thus will fall outside the reach of s 75(v). Thus, at least in this respect, the jurisdiction conferred upon the Federal Court by s 44 is broader than that enjoyed by this Court under s 75(v) of the Constitution. It follows that the judicial power of the Commonwealth is engaged in a different measure by the provisions referred to. In this case the legislation is not to be construed on the footing that, if a remedy in the AAT and the Federal Court were not available to Mr Allan, he necessarily would have a remedy under s 75(v).

12 In a proceeding heard in the Federal Court on 16 May 1997, the parties to which were Mr Allan and the Authority, Mansfield J held that Mr Allan was not relevantly a person affected within the meaning of s 119 of the Authority Act. That decision was given on 7 August 1997. It was reversed on appeal by Mr Allan to the Full Court of the Federal Court (Wilcox, R D Nicholson and Finn JJ)[5]. On 27 February 1998, the Full Court set aside the orders made by Mansfield J, allowed the "appeal" against the decision of the AAT, set aside the AAT's decision and remitted to the AAT, for determination in accordance with law, Mr Allan's application for review of the decision of the Authority.

---

5 *Allan v Development Allowance Authority* (1998) 80 FCR 583.

13 Before the next hearing in the AAT, Transurban became a party. Transurban informed the AAT that, in January 1997, Mr Allan had moved from Hooper Street. Both Mansfield J and the Full Court had proceeded on the footing that Mr Allan was still the owner and occupier of the Hooper Street premises. Mr Allan was unsuccessful at that further hearing by the AAT. He then again "appealed" to the Federal Court. Merkel J set aside the decision of the AAT and ordered that the matter be remitted to the AAT to be determined according to law. It was against that decision of Merkel J that the differently constituted Full Court gave the decision now under appeal before this Court. The Full Court set aside the decision of Merkel J and upheld the decision of the AAT rejecting Mr Allan's case.

14 The questions, the answers to which determine the appeal to this Court, may be shortly stated. The first question is whether s 119(1) has any application in respect of decisions to issue certificates under s 93O; if s 119(1) applies only in respect of dissatisfaction by reason of affection by decisions refusing certificates, that is the end of the present matter. The second question assumes that s 119(1) applies to all decisions under s 93O. It is whether Mr Allan was, within the meaning of s 119(1), a person who was "affected by" the decisions of the Authority under s 93O to issue the certificates upon the applications by Transurban so that, being dissatisfied with the decisions, he was authorised by s 119(1) to request the Authority to reconsider them.

15 The expression "affected by" and cognate terms appear in a range of laws of the Commonwealth. This is not the occasion for a disquisition on that topic. It is necessary to answer the questions posed above in respect of s 119(1) of the Authority Act by reference to the subject, scope and purpose of that statute, rather than by the application of concepts derived from decisions under the general law respecting what has come to be known as "standing". "Standing" is a metaphor to describe the interest required, apart from a cause of action as understood at common law, to obtain various common law, equitable and constitutional remedies[6].

16 In *Re McHattan and Collector of Customs (New South Wales)*[7], Brennan J stated that "[a]cross the pool of sundry interest, the ripples of affection may

---

6 *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 624-632 [88]-[107].

7 (1977) 1 ALD 67 at 70.

widely extend". However, as Davies J pointed out in *Alphapharm Pty Ltd v SmithKline Beecham (Australia) Pty Ltd*[8], Brennan J "did not propose that any ripple of affection would be sufficient to support an interest". A particular statute may establish a regime which specifically provides for its own measure of judicial review on the application of persons meeting criteria specified in that statute[9]. The present case involves such a statute. The starting point, as indicated by several authorities in the Full Court of the Federal Court[10], is the construction of the Authority Act with regard to its subject, scope and purpose.

17 Transurban correctly submitted that the phrase in s 119(1) of the Authority Act "who is affected by a reviewable decision" has an ambulatory operation. 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. There is a range of such decisions by the Authority. For example, Ch 2 has as its object, with the development allowance provisions of the Tax Act, the provision of tax incentives for investment in large Australian projects which cost $50 million or more (s 3). Chapter 2 provides for the giving by the Authority of written directions (s 11) and for certain consequences to follow if the Authority is "satisfied" that a particular state of affairs exists (ss 11, 17, 19), and for the determination of applications for registration (ss 26-34). Chapter 2 also provides for the grant, upon application, of what in Pt 4 of Ch 2 (ss 35-41) are identified as "pre-qualifying certificates relating to plant expenditure". Various sections in Ch 2 provide for the giving by the Authority of written notice of its decision to the applicant in question (ss 39, 45, 52, 62, 72, 81, 82).

18 Part 4 (ss 111-114) of Ch 4 contains special provisions whereby applications under Chs 2 or 3 may be accompanied by an application that certain information be treated as "commercial-in-confidence information" under Pt 4 (s 111(1)). Likewise the giving of information or the production or the giving of a copy of a document to the Authority in certain circumstances may be

---

8 (1994) 49 FCR 250 at 259.

9 *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 266 [48].

10 *Alphapharm Pty Ltd v SmithKline Beecham (Australia) Pty Ltd* (1994) 49 FCR 250 at 261, 272; *Edwards v Australian Securities Commission* (1997) 72 FCR 350 at 367-369; *Byron Environment Centre Inc v Arakwal People* (1997) 78 FCR 1 at 4-5, 34-37.

accompanied by an application that some or all of the information or the contents of the document or copy be treated on the same footing (s 111(2)).

19 Chapter 3, in which s 93O is found, was introduced by the *Taxation Laws Amendment (Infrastructure Borrowings) Act* 1994 (Cth). The same statute amended the Tax Act and the *Taxation Administration Act* 1953 (Cth). In particular, the amendments to the Tax Act produced Div 16L of Pt 3 of the Tax Act in the form it took at all relevant times. The issue of certificates giving rise to tax concessions under Div 16L was terminated for new cases by the *Taxation Laws Amendment (Infrastructure Borrowings) Act* 1997 (Cth) ("the 1997 Act"). Nothing presently turns upon that change in the legislation.

20 Reference has already been made to the statement in s 93A of the object of Ch 3 of the Authority Act. It is apparent from the text that it treats both Ch 3 and Div 16L as having a coincident object, namely the provision of certain tax incentives. What was at stake in the issue of certificates to Transurban was the obtaining of tax benefits by the providers of finance to the Project, with consequential commercial advantage to Transurban as the Link corporation. Section 93A identifies the tax incentives as provided for certain "genuine private sector investment". The term "genuine" receives its content from the balance of Ch 3. This indicates the particular requirements which the Parliament imposed for the provision of the tax incentives, those investments answering those conditions thus meriting the attribute "genuine".

21 Chapter 3 is divided into six parts. Part 3 (ss 93N-93ZB) is headed "CERTIFICATES" and comprises two divisions. Division 1 (ss 93N-93Y) deals with the issue, variation and transfer of certificates, and Div 2 (ss 93Z-93ZB) with the cancellation of certificates.

22 Section 93B sets out what it identifies as a "simplified outline" of the scheme of Ch 3. This is detailed in pars (a)-(e). These state:

> "(a) a person may apply to [the Authority] for the issue of a certificate in relation to a proposed borrowing that the person considers to be an infrastructure borrowing [s 93N];
>
> (b) [the Authority] will issue the certificate if it is satisfied that the borrowing is an infrastructure borrowing and that certain other criteria are met [ss 93O, 93P];
>
> (c) it is a condition of the issue of the certificate that the holder must use the money borrowed in the way proposed in the person's

application and must comply with certain other requirements [s 93R];

(d) if the certificate holder wishes to transfer to another person all of its interests and liabilities in relation to the borrowing or any facilities acquired or constructed with the money borrowed and certain criteria are met, [the Authority] must agree to transfer the certificate [ss 93U, 93V, 93W];

(e) [the Authority] may cancel the certificate if the conditions applying to it are contravened, or if the holder fails to comply with certain other requirements of the Chapter [ss 93Z-93ZB]. In such a case, the holder will be liable to pay an amount that recoups some or all of the tax benefits of the certificate [Tax Act, s 159GZZZZH]."

23 Whilst the applicant for issue of a certificate is the proposed borrower, not the proposed lender, where what is sought is the transfer of a certificate under ss 93U-93W, the applicants are identified in s 93U as the holder and the proposed transferee of the certificate. If transfer was refused, then both parties would appear to be "affected by" that decision for the purposes of s 119.

24 Section 93C details, using borrowing to finance a tollway as a typical example, how Ch 3 works. The section posits a bond issue, the interest paid to bondholders being exempt from income tax or rebatable, whilst the interest is not an allowable deduction for the company which obtained the issue of the certificate under Ch 3 and which has constructed the tollway. It is apparent that Ch 3 operates, through the provision of the incentive, to assist but not to require or guarantee the implementation of infrastructure projects.

25 The Authority must advise the applicant for a certificate that it will issue the certificate only upon provision of an undertaking that the applicant comply with conditions attached to the certificate by s 93R (s 93P). Once a certificate has been granted subject to the conditions imposed by s 93R, the holder of the certificate may apply to the Authority for variation of those conditions (s 93S). The Authority must, in writing, vary the conditions if it is satisfied that, had the original conditions been as proposed to be varied, the Authority would still have issued the certificate and it is reasonable to vary the certificate (s 93T). Thus, a dissatisfied applicant for variation under s 93S would be a "person who is affected by a reviewable decision" under s 119(1).

26 However, once the certificate is issued, s 93Q(2) applies to it. This sub-section states:

"The certificate:

(a) may not be varied or revoked, but may be cancelled in accordance with this Part; and

(b) remains in force at all times after its issue until it is cancelled in accordance with this Part."

27 The reference to cancellation is to Div 2, Pt 3 of Ch 3. Section 93Z provides for the Authority by written notice given to the holder of a certificate to cancel the certificate if one or other situations obtain. The first is that the certificate holder fails to comply with a request under s 93ZC that the Authority be provided with information or documents. The second is a failure by the holder of the certificate to provide annual progress reports to the Authority as required by s 93ZE. Certificates also may be cancelled by written notice to the holder where the Authority is satisfied that the holder has not complied with conditions applying to the certificate (s 93ZB). False or misleading statements made by a certificate holder in connection with the operation of certain provisions of Ch 3 enliven the power of the Authority under s 93ZA, by written notice to the holder, to cancel the certificate.

28 These provisions, beginning with the stipulation in s 93Q(2) that a certificate remains in force until cancelled in accordance with the provisions of Div 2, suggest the particular relationship between s 93O and s 119. At all relevant times, s 93O stated:

"(1) Subject to subsection (2) and section 93P, [the Authority] must issue the certificate if:

(a) in any case – [the Authority] is satisfied that:

(i) the proposed borrowing is an infrastructure borrowing; and

(ii) the dates specified in the application in accordance with subsection 93N(3) are reasonable; and

(b) in the case of an indirect infrastructure borrowing where a certificate is not in force in relation to the other borrowing mentioned in subparagraph 93G(b)(i) – [the Authority] decides to issue such a certificate at the same time as it

issues the certificate in relation to the indirect infrastructure borrowing.

(2) If:

(a) the borrowing is a direct infrastructure borrowing; and

(b) there is in force, at the time at which [the Authority] proposes to issue the certificate in relation to the borrowing, a law that [the Authority] is satisfied will prohibit or restrict the operation of other facilities in competition with the infrastructure facilities concerned;

[the Authority] must not issue the certificate."

Section 119 appears in Pt 6 of Ch 4. Part 6 is headed "REVIEW OF DECISIONS" and the section states:

"(1) A person who is affected by a reviewable decision may, if dissatisfied with the decision, by notice given to [the Authority] within:

(a) the period of 21 days after the day on which the decision first comes to the attention of the person; or

(b) such further period as [the Authority] allows;

request [the Authority] to reconsider the decision.

(2) The reasons for making the request must be set out in the request.

(3) Upon receipt of the request, [the Authority] must reconsider the decision and may, subject to subsection (4), confirm or revoke the decision or vary the decision in such manner as [the Authority] thinks fit.

(4) If [the Authority] does not confirm, revoke or vary a decision before the end of the period of 40 days after the day on which [the Authority] received the request under subsection (1) to reconsider the decision, [the Authority] is taken, at the end of that period, to have confirmed the decision under subsection (3).

(5) If [the Authority] confirms, revokes or varies a decision before the end of the period referred to in subsection (4), [the Authority] must, by notice given to the applicant, inform the applicant of the result of

the reconsideration of the decision and the reasons for confirming, revoking or varying the decision, as the case may be."

29 The first question which arises is whether, on its proper construction, s 119 provides for the reconsideration by the Authority of decisions favourable to applicants for certificates under Ch 3, as well as to refusals to issue certificates. This question should be answered in the negative. That answer means that Mr Allan, who was seeking reconsideration of decisions to issue certificates, not to refuse certificates, was in no position to rely upon s 119.

30 Two points are significant here. They stem from s 93X. This deals generally with applications under Div 1 of Pt 3 of Ch 3. Sub-sections (8) and (9) state:

"(8) [The Authority] must give written notice of the decision to each applicant.

(9) A notice of a refusal of an application must set out the reasons for the refusal."

31 Notice of a refusal, but not of a grant, must set out the reasons for the decision. This suggests that where, as here, the decision is one to grant, the legislation treats that as the end of the matter, save for the potential operation of the variation and cancellation provisions. This is confirmed by s 93Q(2), the text of which has been set out.

32 Further, there is no provision for the giving of notice to the public or to any person other than the applicant. This, in turn, throws light upon the apparently unfixed operation of the temporal requirement of s 119(1)(a). This requires that the person affected by a reviewable decision make the request for reconsideration within the period of 21 days after the date on which the decision first comes to the attention of that person. Paragraph (a) has a sensible operation if, with respect to decisions under Ch 3, the persons affected by the decision are those to whom the written notice must be given.

33 It was suggested in argument that the expression in s 119(1) "[a] person who is affected by a reviewable decision" might, if Transurban's submissions were correct, have been rephrased as "the applicant for a reviewable decision". However, as indicated earlier in these reasons, the nature of the decision-making powers conferred upon the Authority by the statute is such that the Authority on occasion may move of its own accord and without any application. An obvious example is provided by the cancellation provisions to which reference has been

made above. Those provisions, it should be noted, provide for the giving of written notice to the holder of the certificate in question.

34 The absence of provisions for public inquiries or for public participation in the process of consideration of applications is not surprising given that the system for the provision of certificates is concerned with the provision of certain financial incentives. 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. If the position were that a member of the public could seek reconsideration of a decision to issue a certificate within 21 days of that person becoming aware of the decision, there would be a potential for reconsideration at a delayed time of a decision to issue a certificate. This might even be later than the completion of the infrastructure project.

35 The provisions of s 93Y of the Authority Act also are a significant pointer[11]. Section 93Y(1) empowered the specification by regulation of an amount as the intended maximum cost to the Commonwealth for any financial year of the taxation consequences of the issue of certificates. Such a regulation was made under reg 4 of the Development Allowance Authority Regulations[12]. This specified a maximum for the financial year 1994/1995 of $50 million. The cap rose to $200 million for the financial year 1997/1998. Transurban correctly submitted that the legislation would establish a curious regime if, whilst it stipulated for caps, the effect of the reconsideration provisions of s 119 was to permit late intervention by third parties so that it would not be known by the Revenue with certainty whether or not the cap had or had not been met in any particular year.

36 There is a further consideration. As indicated earlier in these reasons, the applicant for the certificate is the borrower, not the lender who derives the immediate taxation advantage. It would be an odd result if accommodation could be provided on the faith of the certificate and a third party in the position of Mr Allan was empowered by s 119(1) to apply for reconsideration of the decision to issue the certificate, in circumstances where the lender itself, the party immediately affected by the decision, had not been a party to the original application. The legislation is designed to achieve confidence in the outcomes

---

11 Section 93Y was repealed by the 1997 Act, with effect from 30 June 1997, but this was after the events with which this litigation is concerned.

12 SR No 30/1995.

for which it provides so as to encourage the financing of the facilities with which it deals.

37 Finally, it is significant that the certificates are issued not by the Commissioner of Taxation but by the Authority. Whilst the Authority must advise the Commissioner in writing of all certificates issued and all other matters relevant to the operation of Div 16L of Pt III of the Tax Act (s 93ZF), the Authority answers directly to the Minister (s 116). Once issued, the certificate cannot be disregarded by the Commissioner. It is for the Authority thereafter to exercise its powers of cancellation, with notice to the holder of the certificate. To that decision, the certificate holder, who certainly is "affected by" the decision, may respond by a request for reconsideration under s 119(1). The response of the Revenue to the cancellation is catered for in s 159GZZZZH of the Tax Act. This provides for the making or amendment of assessments by the Commissioner.

38 It is unnecessary to determine the operation of s 119(1) where the initial decision of the Authority under s 93O is to refuse to issue a certificate. It may be that the financier or others whose commercial interests in the proposed project are prejudiced by the refusal, in addition to the borrower, are relevantly "affected by" the refusal. What is fatal to Mr Allan's case is that he sought involvement in a decision to issue certificates.

39 The appeal should be dismissed with costs.

40 KIRBY J. This appeal concerns the interpretation of federal legislation. As with most such cases that reach this Court, there is an ambiguity. Neither interpretation propounded is incontestably correct or incorrect[13]. The task of the Court is to choose the preferable construction. This will be 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[14].

41 The resolution of the ambiguity in the present appeal may be influenced by the presuppositions with which one approaches the legislation. If one focuses on certain of the words and phrases, a result can be reached requiring that the appeal be dismissed. But if one considers that the context requires a broader interpretation of those words and phrases, the opposite result will follow. I take the latter view in this case because of the opinion I hold about the importance of the large reforms to administrative law enacted in the federal sphere, including by the statutes in question in this appeal. In my opinion, it is undesirable that the class of persons who may enlist the remedial provisions of such legislation should be unnecessarily narrowed, particularly where the object of those persons is to uphold the compliance of the administrator with the law as made by the Parliament.

The facts, legislation and common ground

42 The facts are stated in the reasons of Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ[15]. So are relevant provisions of the *Development Allowance Authority Act* 1992 (Cth) ("the DAA Act")[16] and the *Melbourne City Link Act* 1995 (Vic) ("the City Link Act")[17]. The most important provisions in question are those of ss 119(1) and 120(1) of the DAA Act and s 27(1) of the *Administrative Appeals Tribunal Act* 1975 (Cth) ("the AAT Act"). Those provisions state, respectively (with the key words emphasised):

> "119(1) A person who is *affected* by a reviewable decision may, if dissatisfied with the decision, by notice given to the DAA within:

---

13 See *Emanuele v Australian Securities Commission* (1997) 188 CLR 114 at 140.

14 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518.

15 Reasons of Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ at [1]-[13] ("the joint reasons").

16 See joint reasons at [5], [22], [26], [28], [30].

17 See joint reasons at [3].

> (a) the period of 21 days after the day on which the decision first comes to the attention of the person …
>
> request the DAA to reconsider the decision.
>
> …
>
> 120(1) Applications may be made to the AAT for review of decisions of the DAA that have been confirmed … under subsection 119(3)."

Section 27(1) of the AAT Act states:

> "Where [an] enactment … provides that an application may be made to the [AAT] for a review of a decision, the application may be made by or on behalf of any person … whose *interests are affected* by the decision."

43 Section 25 of the AAT Act states that "[a]n enactment may provide that applications may be made to the [AAT] … for review of decisions made in the exercise of powers conferred by that enactment"[18]. Where that occurs, s 25(3) provides that the enactment:

> "(a) shall specify the person or persons to whose decisions the provision applies;
>
> (b) may be expressed to apply to all decisions of a person, or to a class of such decisions; and
>
> (c) may specify conditions subject to which applications may be made".

44 Power is conferred on the Administrative Appeals Tribunal ("the AAT") "to review any decision in respect of which application is made to it under any enactment"[19].

45 Following the issue of the infrastructure borrowing certificates ("the certificates") by the Development Allowance Authority ("the DAA") in January 1996 in purported compliance with Ch 3 of the DAA Act, an attempt was made by Mr Peter Allan ("the appellant") to obtain review by the AAT of the decision to issue the certificates. The appellant complied with all formal requirements. An application for reconsideration was first made by him to the DAA. The DAA

---

18 AAT Act, s 25(1)(a).

19 AAT Act, s 25(4).

declined to reconsider its decision. It did so on the basis that the appellant was not "affected by" the decision to issue the certificates to Transurban City Link Limited ("the respondent").

46 The appellant's application for review of the DAA's decision was refused by the AAT. It upheld, in effect, the DAA's contention that the appellant was outside the scope of the persons permitted by s 119 of the DAA Act to set in train the review provisions of that Act. I will not trace the course which the litigation then took[20]. Eventually, for a second time, it reached a Full Court of the Federal Court of Australia ("the second Full Court"). Reversing a decision of Merkel J[21], the second Full Court unanimously upheld the submission of the respondent[22]. It concluded that the appellant's interest in the DAA's decision to issue the certificates was insufficiently proximate to entitle him to review of the decision by the AAT.

47 In reaching this conclusion, the second Full Court not only differed from Merkel J but also from the approach taken by the first Full Court[23]. It falls to this Court to resolve the differences that emerged in the Federal Court.

Upholder of law and good administration or intermeddler?

48 Behind the arguments about the entitlement of the appellant to have review lie a number of questions concerned with what might be called the merits. Neither side has yet had a trial on the merits. For the appellant, the issue which he contended entitled him to reconsideration by the DAA of its decision to grant the certificates to the respondent (and review by the AAT of the DAA's refusal in that regard) was that such decisions were contrary to law (specifically s 93O(2) of the DAA Act) and had helped produce, as a matter of practicality, the widening of the Tullamarine Freeway by construction of the City Link roadway ("the City Link") which adversely affected his property interests.

49 Section 93O(2) provides that the DAA must not issue a certificate under the DAA Act in any case where "there is in force, at the time at which the DAA proposes to issue the certificate … a law that the DAA is satisfied will prohibit or restrict the operation of other facilities in competition with the infrastructure

---

20 See joint reasons at [12]-[13].

21 *Allan v Development Allowance Authority* (1999) 93 FCR 264.

22 *Transurban City Link Ltd v Allan* (1999) 95 FCR 553 per Black CJ, Hill, Sundberg, Marshall and Kenny JJ.

23 *Allan v Development Allowance Authority* (1998) 80 FCR 583 per Wilcox, R D Nicholson and Finn JJ.

facilities concerned". The appellant wished to contend that this provision (said to have followed the Hilmer Report on competition policy[24]) had been breached by the provisions of the City Link Act. That Act provides for the ratification of an agreement between the Crown in right of the State of Victoria, the respondent and other bodies which is to take "effect as if it had been enacted in this Act"[25]. The appellant argues that, by the clauses of the Agreement, provision is made that effectively prohibits, or restricts, the operation of any facilities that would compete with the toll road envisaged by the City Link Act. Most notably the appellant relies on the provisions obliging the State of Victoria to indemnify the respondent (and others) against losses in toll revenue incurred by the establishment of an alternative connection between the Melbourne Airport and the city, for example, by a rail service such as has been built to and from other major Australian airports[26].

50 From these provisions, and others envisaging restriction of the use of non-toll roads adjacent to the City Link, the appellant wishes to contend that the legal prerequisites to the issue by the DAA of the certificates had not been met. Competition with the infrastructure facilities, the subject of the certificates, is prohibited or restricted by law. Therefore, so the appellant suggests, any lawful and reasonable decision of the DAA on an application for the issue of the certificates required that it "must not issue the certificate"[27]. The appellant has not yet been able to obtain an authoritative ruling on this point.

51 For the respondent, the merits (broadly stated) saw the appellant as a person intermeddling in concerns between the respondent and the DAA, by virtue of which the respondent had secured the certificates that had the practical effect of reducing the cost to it of borrowing capital to fund the City Link. Because the reduction of the cost of borrowings depended upon taxation relief that could be offered to lenders of capital to the respondent, the appellant was seeking to interfere in a decision which only truly affected the DAA, the respondent and, perhaps, the revenue. The relevant part of the City Link roadway had been completed. It was fully operational. No decision of the AAT could now alter that fact. Nor could it change the amenity of the appellant's past or present neighbourhood. Such facts as these demonstrated the inadmissibility of the appellant's asserted rights.

---

24 Australia, *National Competition Policy: Report by the Independent Committee of Inquiry*, (1993) ("the Hilmer Report").

25 City Link Act, s 14; Sched 1: Agreement for the Melbourne City Link ("the Agreement").

26 The Agreement, cl 2.4(e).

27 DAA Act, s 93O(2).

52 The supervening change in the appellant's dwelling, and his removal from close physical proximity to the City Link[28], indicated, in the respondent's submission, that his persistence with his application was frivolous and vexatious. Apart from everything else, this Court was urged to terminate the appellant's endeavours on the lastmentioned footing. For the respondent, the appellant was the classic officious bystander whom the law should send packing.

The correct approach: statutory analysis

53 The question presented by the appeal, both in this Court and in the Federal Court, could thus be described, in general terms, as one concerned with the right of the appellant both to request the DAA to reconsider its decision (under s 119 of the DAA Act) and to make application to the AAT for review of the decision of the DAA (under s 120 of the DAA Act and s 27 of the AAT Act). However, with all respect to the second Full Court, it was not correct to regard the "starting point"[29] for the resolution of the problem presented by the appeal as the decision in *Boyce v Paddington Borough Council*[30] or the holdings of this Court concerning the general law of standing in *Australian Conservation Foundation v The Commonwealth*[31], *Onus v Alcoa of Australia Ltd*[32], *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)*[33] or *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd*[34] as their Honours appeared to have thought[35].

54 The true starting point for analysis was a close examination of the legislation in question. In this respect I agree with the approach adopted by the

---

28 The facts are stated in the joint reasons at [2].

29 *Transurban City Link Ltd v Allan* (1999) 95 FCR 553 at 561 [33].

30 [1903] 1 Ch 109 ("*Boyce's Case*").

31 (1980) 146 CLR 493 at 527, 541, 547.

32 (1981) 149 CLR 27 at 35-36, 41, 74.

33 (1995) 183 CLR 552.

34 (1998) 194 CLR 247.

35 *Transurban City Link Ltd v Allan* (1999) 95 FCR 553 at 561-562 [33]-[35].

joint reasons[36]. There is a contemporary tendency, noted in other cases[37], 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.

55 In *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd*[38], I noted the extensive reviews of the law of standing in federal jurisdiction conducted by the Australian Law Reform Commission[39]. Those reviews demonstrate that much contemporary federal legislation continues to reflect the principle of the common law that a party, invoking the jurisdiction of a court in respect of an alleged interference with a public right, must show that some private right of that party has been interfered with or that such party has suffered "special damage peculiar" to him- or herself[40]. Yet closer analysis demonstrates that many federal statutes have adopted different formulae. They have defined the power to initiate court and other proceedings in terms of a broader range of persons and a wider range of circumstances.

56 Once one moves from the commencement of proceedings in a federal court, where the constitutional necessity of demonstrating the existence of a "matter" imposes some constraints on the law of standing[41], substantial scope for permitting the initiation of tribunal proceedings by a broader range of persons in a wider range of circumstances, is available to the federal lawmaker. The

---

36 Joint reasons at [15]-[16].

37 See *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)* (2001) 75 ALJR 1342 at 1351 [46]; 181 ALR 307 at 319; *Victorian WorkCover Authority v Esso Australia Ltd* [2001] HCA 53 at [63]; cf *Brodie v Singleton Shire Council* (2001) 75 ALJR 992 at 1038 [231]-[232]; 180 ALR 145 at 209-210.

38 (2000) 200 CLR 591 at 640 [131].

39 Australian Law Reform Commission, *Standing in Public Interest Litigation*, Report No 27, (1985); Australian Law Reform Commission, *Beyond the door-keeper: Standing to sue for public remedies*, Report No 78, (1996).

40 *Boyce's Case* [1903] 1 Ch 109 at 114; see also *Gouriet v Union of Post Office Workers* [1978] AC 435; *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493; *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 281 [95].

41 *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 639 [129].

tendency of federal legislation is to move away from authorising only particular persons (such as Ministers, statutory agencies or officers) or persons limited by a controlling adjective ("aggrieved", "interested"), to "any person" (as now appears in several federal laws[42]). This tendency adds to the need for caution about approaching the issue of "standing" as if it always presents a generic problem. In one sense it does. But 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.

57 In the present case, two main controlling devices have been enacted by the Parliament to limit the range of persons who might obtain review of a DAA decision to grant a certificate of the kind that the appellant now wishes to challenge before the AAT. The first device is the requirement, in s 119 of the DAA Act, that the person initiating the first step (seeking reconsideration by the DAA of its own decision) must be one "who is affected" by a reviewable decision. The second is that the person making application to the AAT must be one "whose interests are affected by the decision"[43].

58 There are common features in these two gateways. Each of them refers to a "decision". In each, the relevant "decision" must be one made under an enactment that renders the decision reviewable by the AAT. And each of the legislative formulae uses the verb "affected". However, there are also some differences. The requirements arise at different times. That in s 119(1) of the DAA Act arises earlier in time, when the "reviewable decision"[44] is made by the DAA. That in s 27 of the AAT Act arises when the validity of "an application … to the [AAT] for a review of a decision" is questioned. That under s 119(1) of the DAA Act talks generally of "[a] person who is affected". But that under s 27(1) of the AAT Act requires that the person's "interests" must be affected by the decision in question. On the face of this statutory language, contrary to the view adopted in the joint reasons, s 119(1) of the DAA Act is concerned with a wider question of affection. Its focus is upon the entire person in question, who may then set in train a course of events leading to, if necessary, application to the AAT for review[45]. Yet to engage the powers of the AAT, it is not apparently sufficient that the *person* is affected. It is necessary that that person's *interests* must be affected.

---

42 eg *Motor Vehicle Standards Act* 1989 (Cth), s 35; *National Health Act* 1953 (Cth), s 67A(1); *Ozone Protection Act* 1989 (Cth), s 56; *Petroleum Retail Marketing Sites Act* 1980 (Cth), s 12(1).

43 AAT Act, s 27.

44 Defined in DAA Act, s 93AA.

45 DAA Act, s 120.

59 The foregoing differentiation may suggest a narrowing of the range of those who can initiate statutory action for review when one gets to the stage of the AAT. Whatever "interests" mean (and they may, depending on the statute, go far beyond the traditional property interests with which the common law and equity were typically concerned) they tend to narrow the focus of those who may lawfully engage the powers of the AAT and oblige it to conduct a review.

60 This is not such a surprising differentiation. One could readily appreciate a legislative policy that permitted a larger entitlement in persons (those "*affected* by a reviewable decision") to require the DAA to reconsider the decision and a narrower class (those "whose *interests* are affected by the decision") alone to have the power to initiate review before the AAT. The language of the two Acts, particularly when read in juxtaposition, suggests that this is the way in which they were expected to operate together. Each of the statutory provisions is stated in the present tense. Each, if fulfilled, has immediate consequences. In the case of s 119(1) of the DAA Act, it triggers the obligation ("must reconsider the decision") provided later in the section[46] and other procedures, including time limits for a decision by the DAA and an entitlement to make application to the AAT[47]. In the case of the AAT Act, where the person's interests are affected by the decision, that person may make application to the AAT. And if the person "is entitled to apply to the [AAT] for a review of the decision", various consequences follow immediately[48]. Most especially, once a valid application is made, the AAT has power to review a decision that is otherwise within its jurisdiction[49].

61 It is because of the consequences that follow successive satisfaction of the requirements of ss 119 and 120 of the DAA Act and ss 25 and 27 of the AAT Act, that the question of whether the criteria of affection have been satisfied must be decided at the respective times referred to. In the case of s 119 of the DAA Act, this is the time of the "request [to] the DAA to reconsider the decision"[50]. In the case of the application to the AAT, the time is that when such application is made[51]. This was the view taken of the latter provisions by Brennan J, as

---

46 DAA Act, s 119(3).

47 DAA Act, s 120(1).

48 AAT Act, s 28.

49 AAT Act, s 25(4).

50 DAA Act, s 119(1).

51 DAA Act, s 120; AAT Act, ss 25, 27.

President of the AAT, in *Re McHattan and Collector of Customs*[52]. His Honour there said[53]:

> "The interest of which s 27(1) speaks is an interest which is affected by the decision to be reviewed, not by the review. The outcome or possible outcome of the proceedings is not the criterion for determining whether the proceedings have been duly instituted, and the relevant interest must be one which is affected by the demand[54] whatever the outcome of a review might be."

62 In the same case, Brennan J acknowledged that use of the word "affected" described a zone of connection. But it did not do so in terms of scientific precision. Sometimes, it will be plain that the interests of a person are affected (and similarly that a relevant person is affected). Sometimes the effect will be direct and sometimes indirect. His Honour went on[55]:

> "Across the pool of sundry interests, the ripples of affection may widely extend. The problem which is inherent in the language of the statute is the determination of the point beyond which the affection of interests by a decision should be regarded as too remote for the purposes of s 27(1). 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."

63 The foregoing remarks illustrate the reasons why the second Full Court erred in this case by approaching the problem, as it did, as one in which definitive light would be cast by general observations in this and other courts on the common law rules of standing. Especially because such observations were (as in *Boyce's Case*) written in an earlier time, for a different purpose, with different presuppositions about court proceedings and a different context of public interest litigation, the adoption of such a "starting point" was likely to mislead, as I think it did here. Similarly, reference to remarks written for the purposes of judicial review, which operates in Australia (at least in federal

---

52 (1977) 18 ALR 154.

53 (1977) 18 ALR 154 at 157.

54 The decision there under review was a "demand" of the Collector of Customs. In the present case it is a "request" to the DAA.

55 (1977) 18 ALR 154 at 157.

matters) within constitutional restraints particular to the judiciary[56] and commonly under a different legislative regime[57], was also likely to mislead, as I think it did.

64 The proper starting point for analysis in this case was thus close attention to the requirements of the legislation in question. It alone would yield the answers to the present problem. In the analysis of Australian legislation, references to judicial comments about the law of standing in English decisions and in Australian case law in other contexts, if mentioned at all, should be kept to the minor purpose of affording an historical background or providing illustrative analogies. This was particularly important in the present case because, as I view them, both the DAA Act and the AAT Act deliberately adopted approaches to the entitlements of persons to initiate statutory entitlements which are considerably broader than those adopted in the common law cases or even in cases involving constitutional or federal judicial review.

The appellant and his interests were affected

65 *Large statutory formulae*: As Gummow J acknowledged in *Alphapharm Pty Ltd v SmithKline Beecham (Australia) Pty Ltd*[58]: "The day is long gone when there was any general presumption that in such statutes the 'interests' concerned must be proprietary or even legal or equitable in nature, or that the affectation be of a nature as understood in private law." I agree. Whilst the focus should therefore be upon the operation of the legislation in question, the construction of the legislation need not ignore a general trend of Australian federal legislation in recent years to enlarge the scope of rights to initiate administrative review. This was certainly the intention of those who planned the creation of the AAT[59]. It is reflected, for example, in the broader expression of the right to initiate proceedings under the AAT Act than is provided under s 5 of the ADJR Act. In the latter provision it is necessary for the person seeking review to show that he or she "is aggrieved by a decision". This phrase imports understandings long discussed in the common law[60]. Both the DAA Act and the AAT Act departed

---

56 The requirement of a "matter" within the meaning of Ch III of the Constitution was considered in *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 646-653 [144]-[163].

57 *Administrative Decisions (Judicial Review) Act* 1977 (Cth), s 5 ("the ADJR Act").

58 (1994) 49 FCR 250 at 272 ("*Alphapharm*").

59 Australia, Commonwealth Administrative Review Committee Report 1971 (Kerr Committee Report), Parliamentary Paper No 144.

60 eg *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 at 526, 548.

from that approach. Such departure was obviously deliberate. Its purpose was presumably to widen the circle of persons who could exercise privileges under the applicable administrative law. This Court should not put back the clock. Confining narrowly the entitlements to initiate administrative review, both internal and external, runs the risk of doing so.

66 *Juxtaposition of "person" and "interests"*: Whilst it is true that the phrase "[a] person who is affected" in s 119 of the DAA Act must be given meaning in its context, that context is obviously intended to attract, in case of dissatisfaction with the DAA's decision, a facility of review of such decision by the AAT. This is made plain by the clear inter-relationship, signified in the cross-referencing, between s 120 and s 119. It is reinforced by the fact that both sections appear in Ch 4 Pt 6 of the DAA Act. They do so under the heading "REVIEW OF DECISIONS". In short, s 119 feeds into s 120.

67 In confirmation of the last point, it should be understood that the scheme of the AAT Act is quite particular. It does not deem all decisions by officers of the Commonwealth to be reviewable. Only those are reviewable that are brought within the powers of review belonging to the AAT by or under legislation expressly enacted by the Parliament[61]. It would have been possible for the Parliament to have omitted the provisions for review of decisions which it provided in Ch 4 Pt 6 of the DAA Act. Alternatively, it would have been open to it to have confined such review to reconsideration by the DAA alone. As a further possibility, the Parliament, whilst providing for reconsideration by the DAA and review by the AAT, could have excluded the issue of the certificates under s 93O from the decisions specified as "reviewable" under s 93AA.

68 The fact that the Parliament elected to afford review of such decisions and to do so in the broad language of s 119 of the DAA Act and of s 27 of the AAT Act suggests that the general purpose of the Parliament in this area of decision-making was to permit access to the beneficial facility now common across a broad spectrum of federal administrative decisions. This envisages initial reconsideration by the primary decision-maker and review by the AAT. Each avenue of review is available to a class of persons affected that is broader than was traditionally the case under the common law rules of standing. This ought not be a matter of surprise or complaint. It is one of the major achievements of Australian law in recent decades[62]. It is innovative and protective of the rights of

---

61 AAT Act, s 25(1).

62 Mason, "Administrative Review: The Experience of the First Twelve Years", (1989) 18 *Federal Law Review* 122 at 126; Finn, "The Abuse of Public Power in Australia: Making Our Governors Our Servants", (1994) 5 *Public Law Review* 43 at 49; Skehill, "The Impact of the AAT on Commonwealth Administration: A

(Footnote continues on next page)

citizens and others in Australia affected by administrative decisions made under federal legislation. Because the AAT Act has very broad operation across the board of federal administrative decisions, its language should not be narrowly construed. Nor, in the context of the DAA Act, should s 119 be narrowly defined given that it is clearly designed, by its language and context, to trigger the facility of review in the AAT if internal review does not satisfy the applicant for review and the applicant can show some "interests" that are affected.

69 *Avoiding undue narrowing of affection*: Much concern was expressed during argument about the suggested disruptive effects involved in the construction urged by the appellant. If the construction is required by the true meaning of the words of the legislation, it must, subject to the Constitution, be adopted. There is no constitutional inhibition in the Parliament's expressly narrowing, or even eliminating altogether, the facility of AAT review if that were truly its purpose. When the AAT Act was introduced, and indeed long after, the criticisms of its beneficial provisions by some officers, and indeed by some Ministers[63], emphasised the costs and suggested inconvenience of the system of review thereby introduced and the disruption which it could occasionally cause. But if review is available as a matter of law, disruption and inconvenience are not valid objections. Sometimes a measure of disruption is warranted in important administrative decisions to ensure public ventilation of serious questions and to uphold adherence by public officers to the rule of law. That is what the appellant asserts he has been seeking in this case.

70 One of the frequently given reasons for expanding standing rights by legislation is that, under the previous law, there would quite often be no desire by those who enjoyed formal standing to challenge the decision in question. The relevant Minister who might bring, or consent to, a legal challenge, acting as a politician, might have no interest or desire to do so. Take the present case. The only person to whom notice of the decision in question had to be given under the DAA Act was the respondent, relevantly the applicant for the issue of the certificates under s 93O[64]. True, such notice would enliven a right of reconsideration and review by an unsuccessful applicant[65]. But where, as here,

---

View from the Administration", in McMillan (ed), *The AAT – Twenty Years Forward*, (1998) 56 at 57-58.

63 Walsh, "Equities and Inequities in Administrative Law", (1989) 58 *Canberra Bulletin of Public Administration* 29; Kirby, "The AAT: Back to the Future", in McMillan (ed), *The AAT – Twenty Years Forward*, (1998) 359 at 370.

64 DAA Act, s 93X(8).

65 cf ss 93U-93W, where an unsuccessful applicant's proposed lender may also be "affected" in this sense: see joint reasons at [23].

the respondent succeeded, there was no possibility whatever that it would want to request the DAA to reconsider its decision or to have the AAT review it. The theory of the DAA Act propounded by the respondent is one that effectively removes the avenue of review of decisions which the Parliament had gone to the trouble of enacting. At least it does so wherever the decision was favourable to the applicant concerned.

71 This construction (which the majority favours) involves such a constriction of the facilities of review as to render them worthless in many cases and to eliminate altogether the possibility of review where an affirmative decision was taken on an application. This is a view of the public interest in good administration by the DAA which I would not adopt. At least I would not do so without very clear legislative language to support it.

72 The system of review instituted by ss 119 and 120 of the DAA Act and ss 25 and 27 of the AAT Act is not, in my opinion, designed only to afford satisfaction to those who make applications. It is also established, more neutrally, to provide greater transparency in public administration in the federal sphere. By the process there established, it aims to put in place better administration on the part of officers and entities of the Commonwealth. The construction urged by the appellant achieves these beneficial objectives. That propounded by the respondent frustrates or defeats them. Why should one adopt a construction that accepts a narrow approach when this may exclude consideration, say, of a fundamental objection to the legality of the administrative decision? Why would one assume that the Parliament would afford review only to such a narrow class of interests? Why, above all, would one reach that conclusion when the worst that can occur, in the first instance, is an internal reconsideration by the DAA of its own decision and then only if the request is made by a person who is in some way "affected"?

73 *Occasional inconvenience of legality*: Disruption and inconvenience to those who are issued certificates under s 93O of the DAA Act and potentially to those who provide them finance (considerations that weigh most heavily with the majority) must be considered against the serious outcome which the respondent's construction of the legislation envisages. This is that an arguable and significant legal defect in a decision of the DAA is insusceptible to a requirement of reconsideration by the DAA or to review by the AAT. Inconvenience and the possibility of retrospective disruption of the taxation position of another person, cannot ultimately outweigh the duty of officers and entities of the Commonwealth to comply with the law. This is demonstrated by the fact that a person "aggrieved by a decision" could initiate proceedings for this purpose under the ADJR Act despite the inconvenience and disruption that might cause[66].

---

66 cf *Alphapharm* (1994) 49 FCR 250 at 255, 270-271.

74 Moreover, such questions could not be excluded from the supervision of this Court pursuant to a constitutional writ issued under s 75(v) of the Constitution. Whatever doubts might exist concerning the reach of s 75(v)[67], where, as here, the AAT refused to exercise its jurisdiction, such a refusal if unlawful would, under current doctrine, amount to a constructive failure to exercise jurisdiction. In this respect I depart from the analysis of the majority[68]. Compliance by the executive government with legislative preconditions to the making of administrative decisions is a serious obligation. Compliance by the Commonwealth and officers of the Commonwealth with the law in such matters is a fundamental postulate of the Constitution.

75 The propositions urged by the respondent, if correct, would therefore frustrate and prevent the enlivening of any obligation of the DAA to reconsider its decision and the resolution of any continuing difference by the AAT. The fact that no amount of inconvenience and disruption could exclude this Court's jurisdiction under the Constitution where it otherwise applies makes it unlikely that considerations of inconvenience are to hold decisive legal weight in construing s 119 of the DAA Act. Especially is this so as the AAT Act has its own checks against the pursuit of frivolous or vexatious claims[69]. The rule of law extracts a price. It is sometimes measured in terms of inconvenience to those who are called to conform to it, especially for those who are in breach of the law.

76 *Affection and commonsense*: When the language of s 119 of the DAA Act is put under the spotlight, it is important to remember the injunction, oft expressed in this Court, that words in legislation must not be taken in isolation. The natural medium by which meaning is communicated in the English language is the sentence. Dissecting statutory language, word by word, can therefore lead to error[70]. Looked at in its entirety, and read in its context, s 119 of the DAA Act is expressed in broad terms. Its purpose is apparently to achieve the beneficial result of entitling a person, as defined, to enlist the review of important administrative decisions made under the Act. In this way, the Parliament has rendered the relevant officers of the executive government accountable to individuals, ultimately by procedures of merits review that are added to the

---

67 See *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 74 ALJR 1348 at 1367-1369 [81]-[89], cf at 1356-1357 [29]-[32]; 174 ALR 585 at 609-612, 594-595.

68 cf joint reasons at [11].

69 AAT Act, s 42B.

70 *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 396-397 applying *R v Brown* [1996] AC 543 at 561.

traditional, but limited, ones that exist in the courts. There is no reason to read such provisions down. There is every reason to give them a full and ample operation.

77 Section 119(1) is not confined in terms to affection that is "direct" or of a particular quality. It would be quite wrong for this Court to introduce adjectival limitations that the Parliament has not enacted. I agree with the remarks of Davies J, then President of the AAT, in the context of ss 27 and 30 of the AAT Act, which apply by analogy, as well, to s 119 of the DAA Act[71]:

> "In other contexts, dicta in cases have used the adjectives 'real', 'genuine' and 'direct' to describe the relationship required between the decision and the interest. Sections 27(1) and 30(1) do not make use of adjectives but they do require that the applicant demonstrates genuine affection of an interest which attaches to him. The nature of the interest required in a particular case will be influenced by the subject matter and context of the decision under review."

78 In this case, the decision under review is one which, in practical terms, was arguably a prerequisite to the funding of the City Link. If this could be established as a matter of fact, the appellant was arguably so "affected" when living in close proximity to the City Link, a proximity enhanced by the expansion of the previous freeway to within 100 m of the boundary of his property. The suggestion that the necessary causal relationship between the "decision" and the effect on the appellant was not shown, depends upon notions of causation about which minds could differ[72]. But if the criterion to be applied for resolving such questions is that of "commonsense", that test favours the appellant[73]. As a matter of "commonsense", it would be open to the AAT to decide that the appellant's interests were "affected" by the DAA's decision to issue the certificates, affording tax benefits which were an essential practical ingredient of financing during the early stage of construction of the City Link. This was so because, in that early period, the respondent would not have had an income flow against which to deduct the costs of borrowing. It was therefore to its great advantage (indeed arguably essential) to secure cheaper rates of interest procured as a result of the tax advantages consequent upon the issue by the DAA of the certificates. It is therefore unnecessary to pursue the description of the certificates as a condition

---

71 *Re Control Investment Pty Ltd and Australian Broadcasting Tribunal [No 1]* (1980) 3 ALD 74 at 79; see also *Re Control Investments Pty Ltd and Australian Broadcasting Tribunal* (1981) 39 ALR 281 at 285 per Morling J.

72 cf *Chappel v Hart* (1998) 195 CLR 232 at 269 [93].

73 *March v Stramare (E & M H) Pty Ltd* (1991) 171 CLR 506 at 533.

precedent to the Agreement, which could, in some circumstances, be waived[74]. In short, without the certificates, the construction would probably not proceed. Once the certificates were granted, the respondent was obliged to proceed[75].

79 *Constitutional review and inconvenience*: The provisions of s 119(1) of the DAA Act also evidence a requirement for a measure of expedition in enlisting the review process. Prompt notice must be given by the objector to the DAA, that is, within a period of "21 days after the day on which the decision first comes to the attention of the person; or … such further period as the DAA allows"[76]. Whilst it is true that such "attention" might not arise until some considerable time after the decision had been made, that could be a consideration taken into account by the AAT in determining its review or in responding to an application to dismiss proceedings before it[77]. Ultimately, such delay cannot govern the interpretation of the legislation, although I accept that it is a consideration to be kept in mind in deriving a sensible meaning. One reason why it cannot be determinative is because the provision of constitutional writs, which lie in the background of proceedings pursuant to the DAA Act and the AAT Act, are not subject to inflexible time limitations. Time is there governed by court rules and by the nature of the remedies, which are discretionary[78].

80 *Time of affection of applicant*: To the respondent's suggestion that the appellant was obliged to demonstrate that his interests were affected by the decision in question throughout the review process, the answer must be given that this is not what the legislation says. It is certainly not the way in which the AAT Act has been interpreted[79]. That does not mean that a supervening change in the position of the person applying for review of the decision, or in that person's "interests", would be irrelevant to a final decision of the AAT or, indeed, as to whether a decision would be made by it[80]. But it is irrelevant to the

---

74 The Agreement, cl 2.7, set out in joint reasons at [3].

75 DAA Act, s 93R(b).

76 DAA Act, s 119(1)(a) and (b).

77 AAT Act, s 42B.

78 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 75 ALJR 52 at 54 [5], 64-65 [54], 77 [122], 81-82 [145]-[148], 86 [172], 93-94 [217]; 176 ALR 219 at 221, 236, 252, 259, 265, 275; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 75 ALJR 889 at 907 [106]-[107], 916 [149]-[153], 929-930 [223]-[224]; 179 ALR 238 at 262, 274-275, 294.

79 *Re McHattan and Collector of Customs* (1977) 18 ALR 154 at 157 per Brennan J.

80 AAT Act, s 42B.

establishment of the preconditions to the initiation of review for which ss 119 and 120 of the DAA Act and ss 25 and 27 of the AAT Act respectively provide.

81 *Contextual trend of federal review*: The fact that a person such as the appellant should have a right to enlist reconsideration of a decision affecting him and to seek review of that decision where still dissatisfied with it, is not very surprising. In consequence of the City Link Act, the appellant lost certain entitlements to review under Victorian environmental legislation of general application[81]. Within the contemplation of the indirect consequences of the issue of a certificate under s 93O of the DAA Act could be just such elimination of, or restrictions on, rights of review in relation to the environmental impact of infrastructure developments made possible by the issue of a certificate. Permitting any person who is affected to initiate review of the federal administrative decisions that may be crucial to such developments going ahead, is therefore both rational and understandable. Indeed, given the recent trend of federal and State law to enlarge such rights, it is unremarkable.

82 *Conclusion: appellant affected*: In light of these considerations, I regard the better view of the entitlements conferred by ss 119 and 120 of the DAA Act and ss 25 and 27 of the AAT Act as that they permit the appellant to initiate the procedures of review. These are those envisaged by Ch 4 Pt 6 of the DAA Act and under the AAT Act. At the relevant time, the appellant was a person affected by a reviewable decision under the DAA Act. At the time he made his application to the AAT, his "interests" were also affected. Even if such "interests" were confined to those akin to a property interest (and I do not myself so confine them) the amenity of his home at the time of his application to the AAT was clearly of the necessary character. The decision of the second Full Court to the contrary was too narrow and wrong in law.

The arguments for the respondent are unpersuasive

83 With all respect, I find the contrary arguments advanced by the respondent unpersuasive. Whilst a statute may establish its own procedures for judicial review[82], no statute providing for actions of the Commonwealth, or officers of the Commonwealth, can exclude review in this Court under the constitutional writs[83]. This is reason to pause before assuming a federal legislative purpose, in its own statutory scheme, to forbid review for legal error striking at the

---

81 City Link Act, s 57; cf *Planning and Environment Act* 1987 (Vic). There was a limited public environmental inquiry in which the appellant took part.

82 Joint reasons at [16].

83 Constitution, s 75(v). See also s 75(iii).

availability of the certificates – particularly through the informal procedures of administrative review that might expose such a fundamental error.

84 I agree with the general approach of *Alphapharm*. It is consistent with the statutory approach that I favour. Indeed, the requirement of interpreting legislation by taking into account its scope and purpose is unremarkable. It involves seeing a particular provision in the context of an entire statutory scheme. But in applying such criteria to this case it is still necessary to decide whether a person is affected by a decision, and, further, whether a person's interests are affected by a decision. This Court should not take an unduly narrow view of such provisions. The chosen words are expressed widely. It must be appreciated that what is involved in the present statute is the public revenue. A person's interest as a taxpayer is not enough to enliven review. But a person's affected interest as an adjoining landowner does, in my view, fall within the applicable words and enliven the review provisions of the DAA Act and the AAT Act when those statutes are read as a whole.

85 The provision of tax concessions, envisaged by the *Taxation Laws Amendment (Infrastructure Borrowings) Act* 1994 (Cth), is correctly perceived by the majority as the statutory context in which the DAA Act and the AAT Act must be understood. But under the Constitution[84], tax legislation cannot create a cosy arrangement for commercial beneficiaries rendering them immune from independent scrutiny. In this country the rule of law is more robust. This Court cannot, for example, be excluded where proceedings before it are properly initiated. Once that is appreciated, the prospect, unpleasant to some, of viewing the appellant as "affected by" the decision made by the DAA, so as to engage internal and external administrative review, is not really so shocking. Indeed, it seems quite natural.

86 It is true that notice of a decision must be given only to "each applicant"[85]. But to suggest that this fact puts the "decision" to grant a certificate beyond review requires cutting away from the right of review a sizeable number of persons who are "affected". The DAA Act clearly differentiates between service of the notice (a narrow class) and affection authorising a review (a wider class). The suggested surgery, for the benefit of recipients of significant financial advantages at the ultimate cost of Australian taxpayers, is not expressed in the DAA Act as I read it. Why should this Court read that Act so restrictively – so that "decision" means only "unfavourable decision"? And any "person affected" means only an applicant who is refused? If the Parliament had such narrow purposes, it would have said so more clearly.

---

84 s 75(v). See also s 75(i) and s 76(i) read with *Judiciary Act* 1903 (Cth), s 30(a).

85 Joint reasons at [30] referring to DAA Act, s 93X.

87 The absence of statutory provisions for public inquiry[86] is a reason for enhancing and not reducing administrative scrutiny. At least objections by a person, who must be "affected", will then be given consideration by the DAA and, if further conditions are fulfilled, by the AAT. The contrary hypothesis puts the administrator's conduct beyond such reconsideration and review. I am not persuaded that the scheme of the DAA Act warrants that conclusion. To the contrary, it suggests the opposite construction.

88 The cap on maximum cost to the Commonwealth and the possibility of disappointment of the lender of capital[87] are, with respect, the least convincing arguments for adopting a constricted approach to the entitlement to administrative review. Some such review is plainly envisaged. It must therefore be postulated that occasionally, if a review is upheld, costs will need to be reconsidered and annual disbursements by the DAA (and the Parliament[88]) may be affected. To hold otherwise is to read the DAA Act as authorising administrators, by the very substantial financial decisions they make, to place themselves beyond external review. This cannot ultimately apply to judicial review because of the terms of the Constitution. I fail to see why it should be an argument against administrative review which, after all, is only designed to uphold legality and good administration.

Conclusion and orders

89 The respondent submitted that if, as a matter of law, this Court reached the conclusion that the appellant was entitled to reconsideration by the DAA and review by the AAT, it should nonetheless dismiss the appeal on the basis that the appellant's proceedings before the AAT were now futile and therefore bound to fail. That submission should be rejected.

90 The AAT initially determined that it did not have power to entertain the application and so could not decide it on its merits. In the view that I take, that decision was incorrect in law. The role of the courts is confined in such cases to correcting legal error and remitting the matter to be determined by the AAT in accordance with law. The applicable power to dismiss applications on the ground that variation or setting aside of the primary decision is not warranted or

---

86 Joint reasons at [34] referring to DAA Act, s 119(1)(a).

87 Joint reasons at [35]-[36].

88 By s 93Y, fixed by regulation, a cap is imposed on such tax benefits: see Development Allowance Authority Regulations 1995 (Cth), reg 4; joint reasons at [35].

that a proceeding is frivolous or vexatious or otherwise uncorrectable belongs not to the courts but to the AAT. It would be an error of law for this Court to purport to exercise the AAT's power of disposition or otherwise to perform the function of decision-making that belongs to the AAT. In the view that I take, it would be open to the respondent to agitate its arguments about relief before the AAT. It is not available in this Court.

91 The appeal should therefore be allowed. The judgment of the Full Court of the Federal Court of Australia should be set aside. In place thereof, it should be ordered that the appeal to that Court from the judgment of Merkel J be dismissed. The respondent should pay the appellant's costs in this Court and in the second Full Court of the Federal Court.