IW

v.

City of Perth

HIGH COURT OF AUSTRALIA
31 July 1997
[1997] HCA 30; 191 CLR 1; (1997) 94 LGERA 224; (1997) 146 ALR 696; (1997) 71 ALJR 943

BRENNAN CJ AND McHUGH J. The principal question in this appeal is whether the City of Perth unlawfully discriminated against an association incorporated under the *Associations Incorporation Act* 1987 (WA) by refusing planning approval for the use of premises for persons infected with the Human Immunodeficiency Virus ("HIV") which can lead to Acquired Immune Deficiency Syndrome ("AIDS").

The appeal is brought against an order of the Full Court of the Supreme Court of Western Australia which held that the Equal Opportunity Tribunal of that State had erred in law in finding against the City of Perth ("the City") on that issue. Section 66K(1)(a) of the *Equal Opportunity Act* 1984 (WA) ("the Act") provides that it is unlawful for a person who provides services to discriminate against another person on the ground of that person's impairment by refusing to provide that person with those services. The appellant is a member of the association, People Living With Aids (WA) Inc ("PLWA"), and contends that he has standing to bring an action for breach of s 66K(1)(a). He also contends that the City refused to approve the change of use because many of those who would be attending the premises were HIV infected and the Full Court erred in finding that the refusal was not a discriminatory refusal of a service that the Council provided to ratepayers.

PLWA seeks Council approval for a drop-in centre

In January 1990 PLWA applied to the Town Planning Committee of the City for approval for the use of the premises as a day time drop-in centre for persons who were HIV infected. Approval was needed because the premises were in an area zoned for shopping use. The City Planner reported to the Town Planning Committee that the proposed use was compatible with the requirements of the City Planning Scheme and would not adversely affect the amenity of the area. He recommended that the application be approved. Nevertheless, on 19 February 1990, the Committee resolved to recommend to the Council that the application be refused. Later that day the Council rejected a motion to refuse the application. However, it sent the matter back to the Committee for further consideration. On 1 March 1990, the Committee resolved to refer the application to the Council for determination. By 13 votes to 12, the Council rejected a motion that the application be approved for a trial period of 12 months. The Council gave no reasons for its decision.

On 21 March 1990, PLWA appealed to the relevant Minister against the Council's decision. The Minister allowed the appeal and approved the application. PLWA, and later the appellant and two others, lodged a complaint with the Commissioner for Equal Opportunity alleging that the Council had contravened s 66K of the Act.

The statutory provisions

Section 66A is entitled "Discrimination on ground of impairment" and relevantly provides:

"(1) For the purposes of this Act, a person (in this subsection referred to as the 'discriminator') discriminates against another person (in this subsection referred to as the 'aggrieved person') on the ground of impairment if, on the ground of -

(a) the impairment of the aggrieved person;

(b) a characteristic that appertains generally to persons having the same impairment as the aggrieved person;

(c) a characteristic that is generally imputed to persons having the same impairment as the aggrieved person; or

(d) a requirement that the aggrieved person be accompanied by or in possession of any palliative device in respect of that person's impairment,

the discriminator treats the aggrieved person less favourably than in the same circumstances, or in circumstances that are not materially different, the discriminator treats or would treat a person who does not have such an impairment.

(2) For the purposes of subsection (1), circumstances in which a person treats or would treat another person who has an impairment are not materially different by reason of the fact that different accommodations or services may be required by the person who has an impairment.

(3) For the purposes of this Act, a person (in this subsection referred to as the 'discriminator') discriminates against another person (in this subsection referred to as the 'aggrieved person') on the ground of impairment if the discriminator requires the aggrieved person to comply with a requirement or condition -

(a) with which a substantially higher proportion of persons who do not have the same impairment as the aggrieved person comply or are able to comply;

(b) which is not reasonable having regard to the circumstances of the case; and

(c) with which the aggrieved person does not or is not able to comply."

The appellant relies on s 66A(1) which is concerned with direct discrimination rather than s 66A(3) which is concerned with indirect discrimination[1].

Section 66K is entitled "Goods, services and facilities" and relevantly provides:

"(1) It is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person's impairment -

(a) by refusing to provide the other person with those goods or services or to make those facilities available to the other person;

(b) in the terms or conditions on which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person; or

(c) in the manner in which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person."

The Act does not define the phrase "on the ground of" in s 66K. However, s 5 states:

"A reference in Part II, III, IV or IVA to the doing of an act by reason of a particular matter includes a reference to the doing of an act by reason of 2 or more matters that include the particular matter, whether or not the particular matter is the dominant or substantial reason for the doing of the act."

Section 4(1) defines "impairment" as follows:

"'impairment' in relation to a person, means one or more of the following conditions -

(a) any defect or disturbance in the normal structure or functioning of a person's body;

(b) any defect or disturbance in the normal structure or functioning of a person's brain; or

(c) any illness or condition which impairs a person's thought processes, perception of reality, emotions or judgment or which results in disturbed behaviour,

whether arising from a condition subsisting at birth or from an illness or injury and includes an impairment which presently exists or existed in the past but has now ceased to exist".

The history of the litigation

Where the Commissioner for Equal Opportunity believes that a complaint cannot be resolved by conciliation, s 93(1) of the Act requires him to refer the complaint to the Equal Opportunity Tribunal which is established by s 96. In accordance with s 93, the Commissioner referred the complaint of PLWA and the other parties to the Tribunal. After a nine day hearing, the Tribunal held that the Council (and thus the City) had discriminated against the complainants[2]. The Tribunal found that the votes of five councillors who constituted the majority of 13 were "grounded on the AIDS factor" and that another councillor who did not vote had encouraged councillors to vote against the motion "because of the AIDS factor". These six councillors are the second to seventh respondents to the present appeal. The Tribunal held that the votes of five of these six councillors were "causative in terms of the decision of the Council ... in that but for them that decision would not have been made."

The Tribunal made orders under s 127(b)(i) requiring the respondents to pay the appellant and other parties damages by way of compensation for loss or damage suffered by reason of their conduct.

The Council and the second to seventh respondents appealed[3] to the Supreme Court of Western Australia. Murray J heard and dismissed the appeal[4]. But on further appeal the Full Court of the Supreme Court of Western Australia (Ipp, Wallwork and Scott JJ) held that the Tribunal had erred in law[5]. Ipp J held that the test for discrimination on the grounds of

impairment required a comparison between the way in which the aggrieved person was treated and the way in which "in the same circumstances, or in circumstances that are not materially different" the alleged discriminator has treated or would treat some person not having the impairment[6]. His Honour held that the comparison is between the treatment of the impaired aggrieved person and a notional person who does not have the impairment as defined, but who has one or more of the characteristics set out in s 66A(1)(b) to (c) or the requirement set out in s 66A(1)(d). The Tribunal failed to apply this test. Accordingly, his Honour held that the Tribunal had erred in law in reaching its decision. His Honour also held that the states of mind of the five councillors could not be attributed to the City because only a state of mind possessed collectively by a majority of councillors voting could be attributed to the City. The state of mind of an individual councillor was relevant only to the extent that it was a state of mind common to all those councillors who voted against the application[7]. Accordingly, the City had not committed an unlawful act under s 66K(1) of the Act.

Wallwork J also held that the states of mind of the five councillors could not be attributed to the City[8].

Scott J held that only PLWA, and not the individual complainants had been refused services. His Honour also held that the Tribunal had misdirected itself on the comparison issue for reasons broadly similar to Ipp J. Scott J declined to deal with the state of mind issue because, the Council having given no reasons, the true ground of its decision could not be ascertained[9].

The critical issue

The appellant contends that the judges of the Full Court erred in their reasons for holding that the City had not discriminated against the appellant on the ground of his impairment. In our opinion, it is not necessary to deal with the issues raised in the Notice of Appeal because one of the grounds relied on in the respondents' Notices of Contention should be upheld. That ground is that, on the proper construction of the Act, the Council did not refuse to provide a service within the meaning of s 66K(1) of the Act.

The meaning of "services"

The term "services" has a wide meaning. The *Macquarie Dictionary* relevantly defines it to include "an act of helpful activity"; "the providing or a provider of some accommodation required by the public, as messengers, telegraphs, telephones, or conveyance"; "the organised system of apparatus, appliances, employees, etc., for supplying some accommodation required by the public"; "the supplying or the supplier of water, gas, or the like to the public"; and "the duty or work of public servants". But wide as the definition is, in our opinion it is not capable of including a refusal to exercise the statutory discretion provided for by the *Town Planning and Development Act* 1928 (WA) and Clause 40 of the City of Perth City Planning Scheme to approve the use of premises for use other than as a shop.

Section 4(1) of the Act contains an inclusive definition of services. It provides that unless the contrary intention appears:

"'services' includes -

(a) services relating to banking, insurance and the provision of grants, loans, credit or finance;

(b) services relating to entertainment, recreation or refreshment;

(c) services relating to transport or travel;

(d) services of the kind provided by members of any profession or trade;

and

(e) services of the kind provided by a government, a government or public authority or a local government body".

Section 18 of the *Interpretation Act* 1984 (WA) requires preference to be given to the construction of a written law that would promote the purpose or object underlying that law to a construction that would not promote that purpose or object. One of the objects[10] of the Act is:

"to eliminate, so far as is possible, discrimination against persons on the ground of sex, marital status or pregnancy, race, religious or political conviction or impairment in the areas of work, accommodation, education, the provision of goods, facilities and services and the activities of clubs".

Consequently, the provisions of the Act should as far as possible be given a construction that would eliminate discrimination on the ground of impairment.

In applying s 18 of the *Interpretation Act,* however, it must be kept in mind that the Act, like many anti-discrimination statutes, defines discrimination and the activities which cannot be the subject of discrimination in a rigid and often highly complex and artificial manner[11]. As a result, conduct that would be regarded as discriminatory in its ordinary meaning may fall outside the Act. The object referred to in s 3(a) of the Act must, therefore, be understood by reference to the definitions of discrimination which occur in various parts of the Act.

The injunction contained in s 18 of the *Interpretation Act* is reinforced by the rule of construction that beneficial and remedial legislation, like the Act, is to be given a liberal construction[12]. It is to be given "a fair, large and liberal" interpretation rather than one which is "literal or technical"[13]. Nevertheless, the task remains one of statutory construction. Although a provision of the Act must be given a liberal and beneficial construction, a court or tribunal is not at liberty to give it a construction that is unreasonable or unnatural. But subject to that proviso, if the term "service", read in the context of the Actand its object, is capable of applying to an activity, a court or tribunal, exercising jurisdiction under the Act, should hold that that activity is a "service" for the purpose of the Act.

Did the Council provide a service of giving planning approval?

As the definition of services in s 4 recognises, councils provide services to the ratepayers and residents of their municipality or borough. The collection of garbage and the supply of water, gas and electricity are common examples of services which councils, depending on their

statutory powers, provide to ratepayers and others. Discrimination in the provision of these services is unlawful under theAct. Moreover, in an appropriate case allowing the use of property or facilities owned by or under the control of the Council may constitute the provision of a service by that Council. Providing use of libraries, parks and sporting facilities, for example, may constitute the provision of a service which attracts the operation of the Act. So too may the provision of intangibles such as advice and information in respect of building and town planning matters.

Furthermore, the Act is not necessarily inapplicable to a council activity because the council, acting as a deliberative body, makes a decision refusing to provide the relevant service or because the refusal is made in the exercise of a statutory power or duty. Thus, in *Attorney General of Canada v Cumming*[14], Thurlow ACJ accepted that in assessing taxes under the *Income Tax Act*[15] the Department of National Revenue was engaged in the provision of services within the meaning of s 5 of the *Canadian Human Rights Act*[16]. Similarly, in *Savjani v Inland Revenue Commissioners*[17], the English Court of Appeal decided that the Inland Revenue was providing "services" to the public in carrying out a statutory duty to determine whether a taxpayer was entitled to a deduction for a dependent child and in disseminating and giving advice to taxpayers to enable them to claim that tax relief. Templeman LJ said[18]:

"[I]t does not necessarily follow that the board and the inspector are not voluntarily, or in order to carry out their duty, also performing services for the taxpayer. The duty is to collect the right amount of revenue; but, in my judgment, there is a service to the taxpayer provided by the board and the inspector by the provision, dissemination and implementation of regulations which will enable the taxpayer to know that he is entitled to a deduction or a repayment, which will entitle him to know how he is to satisfy the inspector or the board if he is so entitled, and which will enable him to obtain the actual deduction or repayment which Parliament said he is to have. For present purposes, in my judgment, the inspector and the board provide the inestimable services of enabling a taxpayer to obtain that relief which Parliament intended he should be able to obtain as a matter of right subject only to proof."

In *R v Entry Clearance Officer; Ex parte Amin*[19], however, the House of Lords (by a 3-2 majority) held that a clearance officer who vetted aspiring immigrants to the United Kingdom was not providing a facility or service within the meaning of s 29(1) of the *Sex Discrimination Act* 1975 (UK). Lord Fraser of Tullybelton, with whose speech Lord Keith of Kinkel and Lord Brightman relevantly agreed, said[20] that the entry clearance officer was "not providing a service for would-be immigrants; rather he was performing his duty of controlling them." Lord Fraser said[21] that, properly viewed,*Savjani* turned on the finding that the Inland Revenue "performed two separate functions - first a duty of collecting revenue and secondly a service of providing taxpayers with information." In our view that is the correct explanation of that decision.

In *Farah v Commissioner of Police of the Metropolis*[22], the English Court of Appeal held that those duties of a police officer that involve assistance to or protection of the public constitute "services to the public" for the purposes of the *Race Relations Act* 1976 (UK). Otton LJ said[23]:

"[P]olice officers perform duties in order to prevent and detect crime and to bring offenders to justice. They are also vested with powers to enable them to perform those duties. While

performing duties and exercising powers they also provide services in providing protection to the victims of crimes of violence."

Otton LJ also said[24] that, like Templeman LJ in *Savjani*[25], he would "be slow to find that the effect of something which is humiliatingly discriminatory in racial matters falls outside the ambit of the Act." With respect, while we think that *Farah* was rightly decided, that is not the correct approach in determining questions under the *Equal Opportunity Act* 1984 (WA). In a case like *Farah,* the first question is whether the activity which the person refused to provide is capable of being regarded as a service which that person or his or her employer provides to other citizens. If it is, and a holding to that effect would promote the objects of the Act, then the court or tribunal should hold that it is a service within the meaning of the Act. But, given the artificial definitions of discrimination in the Act and the restricted scope of their applications, the court or tribunal should not approach the task of construction with any presumption that conduct which is discriminatory in its ordinary meaning is prohibited by the Act. The Act is not a comprehensive anti-discrimination or equal opportunity statute. The legislature of Western Australia, like other legislatures in Australia and the United Kingdom, has avoided use of general definitions of discrimination such as the one that Gaudron and McHugh JJ gave in *Castlemaine Tooheys Ltd v South Australia*[26] and to which McHugh J referred in *Waters v Public Transport Corporation*[27]:

"A law is discriminatory if it operates by reference to a distinction which some overriding law decrees to be irrelevant or by reference to a distinction which is in fact irrelevant to the object to be attained; a law is discriminatory if, although it operates by reference to a relevant distinction, the different treatment thereby assigned is not appropriate and adapted to the difference or differences which support that distinction. A law is also discriminatory if, although there is a relevant difference, it proceeds as though there is no such difference, or, in other words, if it treats equally things that are unequal - unless, perhaps, there is no practical basis for differentiation."

Those legislatures have also deliberately confined the application of anti-discriminatory legislation to particular fields and particular activities within those fields.

No doubt most anti-discrimination statutes are legislative compromises, resulting from attempts to accommodate the interests of various groups such as traders, employers, religious denominations and others to the needs of the victims of discrimination. As the evils of discrimination in our society have become better understood, legislatures have extended the scope of the original anti-discrimination statutes. Many persons think that anti-discrimination law still has a long way to go. In the meantime, courts and tribunals must faithfully give effect to the text and structure of these statutes without any preconceptions as to their scope. But when ambiguities arise, they should not hesitate to give the legislation a construction and application that promotes its objects. Because of the restricted terms of a particular statute, however, even a purposive and beneficial construction of its provisions will not always be capable of applying to acts that most people would regard as discriminatory.

Thus, when a council is called on as a deliberative body to exercise a statutory power or to execute a statutory duty, it may be acting directly as an arm of government rather than as a provider of services and its actions will be outside the scope of the Act. This is particularly so when councillors are acting as representatives of their constituencies in making by-laws or resolutions that will have the force of law throughout the municipality or borough. Such "legislative" acts have to be contrasted with the acts involved in making operational decisions

as to whether a particular service should be provided to certain individuals or to a section of the community.

Similarly, when a council is required to act in a quasi-judicial role in exercising a statutory power or duty, it may be inappropriate to characterise the process as the provision of a service for the purpose of the Act even in cases where the product of the process is the provision of a benefit to an individual. This is likely to be the case where the council, before making a decision, is required to consider matters that affect the public interest. In such a case, the Council may be providing a "service" in a very general sense because its ratepayers ultimately benefit from the process. But that may not be sufficient to bring the process within the scope of Part IVA of the Act.

Section 66A provides that a person does not discriminate on the ground of impairment in providing a service unless that person "treats the aggrieved person less favourably than in the same circumstances, or in circumstances that are not materially different, the discriminator treats or would treat a person who does not have such an impairment." This section makes it clear that the "services" to which s 66K refers are those services which are provided or would be provided to other individuals in the same or like circumstances. The fact that the public or a section of the public benefits from the operation of an activity or the execution of a process of a council does not necessarily mean that the council provides a service for the purposes of the Act. To succeed in a claim under s 66K(1)(a) of the Act, the aggrieved person must establish that he or she has been refused a service that the alleged discriminator provides or would provide to another person in the same circumstances or circumstances that are not materially different.

In the present case, the Tribunal held that the administration of the town planning scheme was itself a service. The Tribunal said:

"Taking the 'broad view', there can be no doubt that in administering a town planning scheme within its municipal area, regulating the use of land to the best possible advantage, securing provision for traffic and the other factors mentioned in s 2 [of the *Town Planning and Development Act* 1928 (WA)] and clause 5 of the City Planning Scheme, and generally implementing or enforcing measures directed to the amenity of the area, the municipality of the City of Perth is providing a service to residents. In this context, the *exercise of a discretion to give planning approval* to allow the use of premises for a particular purpose in a specific locality *is part of that service and is itself a 'service'* within the meaning of s 4(1) of the Act. The statutory definition is inclusive, not exclusive, and where it is reasonably capable of having a sufficiently wide meaning to encompass a situation which would prima facie advance the objects and purposes of the Act, that interpretation is to be preferred (see eg *N M Superannuation Pty Ltd v Young*[28])." [emphasis added]

Adopting this analysis, the appellant contends that, in performing its functions as responsible authority for the purposes of the relevant town planning scheme, the City was providing services of the kind provided by a public authority or a local government body within the meaning of par (e) of the definition of "services" in s 4(1). He contends that "the refusal to approve the change of use was clearly capable of constituting the refusal of a service." He submits that, if approving a change of use was capable of being a service, then the Tribunal had not erred in law[29] in finding as a fact that the City had refused to provide a service for the purpose of the Act. In our opinion, this submission must be rejected because the City did not provide any service of giving planning approval.

In determining whether a person has refused to provide a service within the meaning of the Act, it is necessary to identify with precision what service has allegedly been refused to that person and what service or services the alleged discriminator provides[30]. The appellant does not assert, and the Tribunal did not find, that the relevant service which the City provides was the consideration of an application for approval. There was clearly no refusal to provide such a service. Rather, the appellant asserts that it was the refusal *to approve* the application that was the refusal of the service which the Council provided. However, the City did not provide any service of giving approvals. Conversely, it did not provide any service of refusing approvals. The Council, acting on behalf of the City, merely had a duty to consider applications and a discretionary power to refuse or approve those applications unconditionally or on conditions.

Clause 34(1) of the City of Perth City Planning Scheme prohibited any use or development of land including the subject premises "without first having applied for and obtained the town planning approval of the Council under the Scheme." Clause 34(5) required an application to be in the form prescribed in the First Schedule to the Scheme and to be accompanied by certain plans and information. If the Council did not convey its approval within 60 days or such further time as should be agreed upon, the application was "deemed to have been refused"[31]. Clause 40(1) imposed a duty on the Council to examine applications taking into consideration such matters as "the orderly and proper planning of the locality and the preservation of the amenities of the locality", and gave it a discretion to refuse or grant the application "unconditionally or subject to such conditions as it may deem fit." Thus, the granting or refusal of an application was the end product of a deliberative process. Approval of an application no doubt conferred a benefit on an applicant. But it misdescribes the process to say that the Council provided a service of giving approvals. Certainly the process was not an "*exercise of a discretion to give planning approval* to allow the use of premises for a particular purpose in a specific locality[32]" as the Tribunal held. Consequently, the Tribunal erred in law and the Full Court, although for different reasons, was correct in setting aside the Tribunal's decision.

The claim under s 66K(1)(c)

In the Points of Claim filed with the Tribunal, the appellant also alleged that the City exercised its discretion in a discriminatory manner. This was a claim under s 66K(1)(c) and not s 66K(1)(a). That claim necessarily identified the service provided by the Council as the process which the Council undertook in considering and ultimately refusing or approving applications. However, the Tribunal did not deal with this claim. Moreover, it seems not to have been raised before Murray J or the Full Court. That being so, even if we thought that the alternative claim was arguable, we would hesitate to send the case back to the Tribunal to consider it at this late stage in the proceedings. In our opinion, however, the claim could not succeed in any event.

The *process* by which the Council considers applications for approvals is not in our view arguably describable as a service that it provides to applicants for planning approval. Rather it is a power to process applications for the protection and general benefit of the residents of the City. If the Council delays making its decision for more than 60 days, it is deemed to have refused the application. A process that can lead to such a result can hardly be described as providing a service to the applicant. If within the statutory period, the Council considers the application, it is bound to consider various matters and interests which may be contrary to the interests of the applicant and which may result in the refusal of the application. If the

application succeeds, the applicant no doubt receives a benefit or advantage. But not every process or activity which results in a benefit or advantage to an individual is a service that is provided to that individual. When the deliberative and quasi-judicial nature of the application process is identified and analysed, it cannot sensibly be described as a "helpful activity" provided by the Council to applicants for planning approval. The Council is an adjudicator, not a servant of an applicant.

Order

The appeal should be dismissed.

DAWSON AND GAUDRON JJ. The appellant, IW, is and at all relevant times has been a member of People Living with AIDS (WA) Inc ("PLWA"). Membership of that organisation is confined to people who are HIV positive. In January 1990, PLWA sought planning approval from the first respondent, the City of Perth, for the use of certain premises as a daytime drop-in centre for persons infected with or affected by HIV.

The City of Perth is a body corporate constituted pursuant to the *Local Government Act* 1960 (WA) ("the Local Government Act")[33]. Its Council ("the Council") is and was, in 1990, responsible for the administration and enforcement of the City of Perth City Planning Scheme ("the Planning Scheme")[34]. It was pursuant to the Planning Scheme[35] that PLWA sought approval for its drop-in centre. Subject to a qualification that is not presently relevant[36], s 173(8)(b) of the Local Government Act provided for decisions of the Council to be taken by "a majority of the valid votes of the members ... present at [a] meeting". And by s 8A of the *Town Planning and Development Act* 1928 (WA), appeals could be taken from decisions of the Council under the Planning Scheme to the Minister for Planning.

PLWA's application for planning approval came before the Council on 19 March 1990. It was moved that the application be approved for a trial period of 12 months ("the motion"). The motion was lost 13 votes to 12, with one member of Council, Councillor Nattrass, abstaining. On 21 March, PLWA appealed to the Minister and, on 6 April, the appeal was allowed and the application approved.

History of the Proceedings

Notwithstanding the Minister's grant of planning approval, PLWA brought discrimination proceedings in the Equal Opportunity Tribunal ("the Tribunal") against the first respondent (the City of Perth), the thirteen Councillors who voted against the motion and Councillor Nattrass who spoke in relation to the motion but who, as already noted, abstained from voting. As well, certain individual members of PLWA ("the individual complainants"), one of whom was the appellant, instituted proceedings against the same parties.

It was alleged by PLWA and by the individual complainants that the City of Perth discriminated against them contrary to s 66K(1) of the *Equal Opportunity Act* 1984 (WA) ("the Act"). It will later be necessary to refer to the precise terms of that sub-section. For the moment, however, it is sufficient to note that it proscribes discrimination on the ground of impairment in the provision of goods and services.

PLWA's complaint was amended at an early stage by substituting the name of one of its members for that of PLWA. The matter then proceeded before the Tribunal on that

complaint, as a representative complaint, and, except for one which was held to have abated, on the complaints of the individual complainants. The complaints were upheld against the City of Perth and against six of its Councillors, including Councillor Nattrass (together referred to as "the respondents"). However, the Tribunal dismissed the complaints against other members of Council, it being held that they did not vote against the motion on grounds related to the HIV status of PLWA's members.

So far as concerns the six Councillors against whom the complaints were upheld, the Tribunal found that, by voting against the motion on grounds related to the HIV status of PLWA's members and, in the case of Councillor Nattrass, by raising those grounds in speaking on the motion, they, respectively, caused and aided an act of discrimination. By s 160 of the Act they were, thus, to be taken as, themselves, having committed that act[37]. They and the City of Perth were ordered to pay damages by way of compensation pursuant to s 127(b)(i) of the Act[38].

The respondents appealed unsuccessfully to the Supreme Court of Western Australia pursuant to s 134 of the Act[39]. They then appealed to the Full Court. Their appeal to that Court was allowed and the orders of the Tribunal set aside[40]. The appellant now appeals to this Court.

The Legislative Provisions

As already indicated, the complaints alleged discrimination by the first respondent contrary to s 66K(1) of the Act. That sub-section provides:

" It is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person's impairment-

(a) by refusing to provide the other person with those goods or services or to make those facilities available to the other person;

(b) in the terms or conditions on which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person; or

(c) in the manner in which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person."

It is necessary to note the statutory definition of "services" and the statutory concept of "discrimination". "[S]ervices" is defined in s 4(1) of the Act, unless the contrary intention appears, to include:

"(a) services relating to banking, insurance and the provision of grants, loans, credit or finance;

(b) services relating to entertainment, recreation or refreshment;

(c) services relating to transport or travel;

(d) services of the kind provided by members of any profession or trade; and

(e) services of the kind provided by a government, a government or public authority or a local government body".

So far as concerns the statutory concept of "discrimination", the Act proceeds by reference to two apparently separate notions, namely, "direct" and "indirect" discrimination. The complaints in this case were complaints of direct discrimination which, so far as concerns discrimination on the ground of impairment, is defined in s 66A(1) in these terms:

" For the purposes of this Act, a person (in this subsection referred to as the 'discriminator') discriminates against another person (in this subsection referred to as the 'aggrieved person') on the ground of impairment if, on the ground of-

(a) the impairment of the aggrieved person;

(b) a characteristic that appertains generally to persons having the same impairment as the aggrieved person;

(c) a characteristic that is generally imputed to persons having the same impairment as the aggrieved person; or

(d) a requirement that the aggrieved person be accompanied by or in possession of any palliative device in respect of that person's impairment,

the discriminator treats the aggrieved person less favourably than in the same circumstances, or in circumstances that are not materially different, the discriminator treats or would treat a person who does not have such an impairment."

The concept of "circumstances that are not materially different" is elaborated in s 66A(2). Nothing presently turns on the terms of that sub-section. "[I]mpairment" is defined in s 4(1) to mean, amongst other things, "any defect or disturbance in the normal structure or functioning of a person's body".

One other matter should be noted. The notion of discrimination on the ground of impairment was extended in 1993 with the insertion in the Act of s 66A(1a)[41]. The effect of that sub-section is to extend the definition to include discrimination on the ground of the impairment of "any relative or associate of [an] aggrieved person". As the events involved in this case occurred in 1990, s 66A(1a) has no bearing on its outcome.

The issues in the Appeal

It is not in issue that HIV infection falls within the definition of "impairment" in s 4(1) of the Act. And the proceedings have been conducted on the basis that the first respondent discriminated against the appellant by refusing planning approval and not in any other way. Moreover, they have been conducted on the basis that, in terms of s 66K(1)(a), that refusal constituted a refusal "to provide [him] with ... services". On that basis, the question whether the appellant was the subject of unlawful discrimination involves four distinct issues. They are:

(i) whether refusal of planning approval was a refusal to provide services contrary to s 66K(1)(a) of the Act[42];

(ii) whether refusal of planning approval to PLWA constituted an act of discrimination against the appellant, IW, such that he is an "aggrieved person" for the purposes of s 66A(1) of the Act[43];

(iii) whether, in terms of s 66A(1), the first respondent treated the appellant "less favourably than in the same circumstances, or in circumstances that are not materially different, [it] treat[ed] or would treat a person who [is not infected with HIV]". In this regard, the issue is the proper identification of the person or persons with whom an "aggrieved person" is to be compared[44];

(iv) whether, given that five only of the Councillors voted against the motion on grounds related to the HIV status of PLWA's members, the first respondent's refusal to grant planning approval was a refusal "on the ground of" their HIV status[45].

We are of the view that the appellant fails on the first and second issues. It is, thus, unnecessary to deal with the third and fourth issues. Similarly, it is unnecessary to deal with another matter raised in argument, namely, whether, in view of s 680 of the Local Government Act[46], the Councillors against whom adverse findings were made by the Tribunal can be made personally liable under s 160 of the Act[47].

Refusal to provide "services"

In construing legislation designed to protect basic human rights and dignity, the courts "have a special responsibility to take account of and give effect to [its] purpose"[48]. For this reason, the provisions of the Act concerned with discrimination in the provision of goods or services, including s 66K(1), should be construed as widely as their terms permit. In particular, "services", a word of complete generality, should not be given a narrow construction unless that is clearly required by definition or by context.

Although s 4(1) of the Act purports to define "services", it does so by use of the word apparently defined. And it does so by indicating what is included in the definition, not what is excluded. As the matters included in the definition are all matters which fall within the ordinary notion of "services", the definition is to be taken as signifying everything which falls within that notion. And as neither the terms of s 66K(1) nor its context provides any contrary indication, "services" should be read in that sub-section as having its ordinary and broad meaning.

The need for "services" to be construed as having its ordinary broad meaning is, to some extent, confirmed by decisions given with respect to anti-discrimination legislation in the United Kingdom - legislation on which the Act and similar anti-discrimination legislation in other Australian states is largely based. Thus, it has been held that, in its proscription of discrimination in the provision of services, the*Race Relations Act* 1976 (UK) extends to "the provision, dissemination and implementation of regulations" by the Board of Inland Revenue[49]. It has also been held to extend to "those parts of a police officer's duties involving assistance to or protection of members of the public."[50] On the other hand, it has been held, in the context of the *Sex Discrimination Act* 1975 (UK), that in administering the*Immigration Act* 1971 (UK) and the Immigration Rules, the Secretary of State does not provide facilities to a section of the public[51]. Similarly, it was held in *R v Entry Clearance Officer; Ex parte Amin* that, in granting immigration vouchers, an entry clearance officer was

"not providing a service for would-be immigrants; rather he was performing his duty of controlling them."[52]

The word "services", in its ordinary meaning, is apt to include the administration and enforcement by the City of Perth of the Planning Scheme. That being so, the Tribunal was correct in holding that "in administering a town planning scheme ..., regulating the use of land ..., securing provision for traffic ..., and generally implementing or enforcing measures directed to the amenity of the area, ... the City of Perth [was] providing a service to residents."

The Tribunal proceeded from its decision that, in administering and enforcing the Planning Scheme, the first respondent was providing a service to residents to the conclusion that "the exercise of a discretion to give planning approval ... is part of that service and is itself a 'service' within the meaning of s 4(1) of the Act." It followed from that conclusion that refusal of planning approval was a refusal to provide services for the purposes of s 66K(1)(a) of the Act. However, the Tribunal's intermediate conclusion that "the exercise of a discretion to give planning approval ... is itself a 'service' within the meaning of s 4(1) of the Act" involves a false description of the discretion vested in the first respondent. The discretion is not simply a discretion to grant approval. Rather, it is a discretion to grant or withhold approval[53].

Within the context of s 66K(1), a person who provides a service by exercising a discretion to grant or withhold approval may discriminate against a person in the exercise of that discretion by refusing to exercise it at all (par (a)), by imposing terms and conditions (par (b)), or by exercising it in a particular manner (par (c)). Subject to the question whether the appellant is an aggrieved person, it may be that a case can be made that, in refusing PLWA's application, the City of Perth exercised its discretion in a discriminatory manner and, thus, infringed s 66K(1)(c) of the Act. The Points of Claim lodged with the Tribunal asserted such a case. However, it was not dealt with by the Tribunal or in the subsequent appeals.

The appellant's argument that the first respondent's refusal of planning approval was a refusal to provide a service cannot be sustained. Once the service in issue is identified as the exercise of a discretion to grant or withhold planning approval, a case of refusal to provide that service is not established simply by showing that there was a refusal of planning approval. Rather, it is necessary to show a refusal to consider whether or not approval should be granted. And that case is foreclosed by the very matter of which the appellant complains, namely, the Council's refusal to grant approval.

Meaning of "aggrieved person"

We agree with Gummow J that the appellant is not an "aggrieved person" for the purposes of s 66A(1) of the Act. In considering whether the appellant is an "aggrieved person", it is necessary to have regard to the structure of the Act generally and, also, that of Pt IVA, the provisions of which deal with discrimination on the ground of impairment. In that exercise, s 66A(1a), which was inserted with effect from 8 January 1993, can be disregarded.

The Act, in its several Parts, proscribes direct and indirect discrimination on specified grounds, including sex (Pt II), race (Pt III), religious or political conviction (Pt IV) and impairment (Pt IVA). Subject to specified exceptions, it operates, in each Part, by proscribing discrimination in certain fields, including employment, education and the provision of goods,

services and facilities. The proscriptions are effected in each Part by proscribing specified discriminatory conduct by one person or body, usually identified by occupation, undertaking or business activity, against another.

The general pattern of the Act is reflected in Pt IVA. As already indicated, s 66A defines discrimination on the ground of impairment: s 66A(1) defines it by reference to direct discrimination, with some further elaboration in sub-s (2); s 66A(3) defines indirect discrimination. In ss 66A(1) and (3), the person discriminated against is referred to as the "aggrieved person". A special definition of discrimination against the "blind, deaf, partially blind or partially deaf" is contained in s 66A(4). Again, the person discriminated against is referred to as the "aggrieved person". Succeeding provisions proscribe acts of discrimination in various fields of activity, including employment (s 66B), education (s 66I) and the provision of goods, services and facilities (s 66K).

As with other Parts of the Act, the proscriptions of discriminatory conduct are effected in Pt IVA by rendering unlawful specified discriminatory acts by one person or body against another. Thus, it is unlawful "for an employer to discriminate against a person on the ground of the person's impairment" by engaging in conduct falling within s 66B of the Act. Similarly, it is unlawful for a "principal" to discriminate against a "commission agent" or a "contract worker" by conduct falling within ss 66C and 66D respectively. So too, it is unlawful for partnerships, trade unions and employer organisations, qualifying bodies, and employment agencies to discriminate "against a person on the ground of the person's impairment" in the respects specified, respectively, in ss 66E, 66F, 66G and 66H. The pattern is repeated in ss 66I, 66J, 66K, 66L, 66M, 66N and 66P.

It is clear from the structure of the Act generally and, also, from the structure of Pt IVA, that an "aggrieved person" is a person who is discriminated against in a manner which the Act renders unlawful. And when regard is had to the precise terms of s 66K(1), it is clear that the person discriminated against is the person who is refused services, or who is provided with services on terms or conditions or in a manner that is discriminatory. As already indicated, there was no refusal of services in this case. And if anyone was the recipient of treatment which might constitute discrimination, it was PLWA, not the appellant. Accordingly, the appellant was not an "aggrieved person" within the meaning of that expression in s 66A(1) of the Act. And that being so, he is in no position to assert that the City of Perth engaged in unlawful discrimination in the exercise of its discretion to grant or withhold planning approval for PLWA's drop-in centre.

The appeal must be dismissed with costs.

TOOHEY J. The circumstances giving rise to this appeal and the relevant legislation appear in other judgments. I shall avoid undue repetition.

Unhappily, this matter has had a very long history. Since 1991 it has been before the Equal Opportunity Tribunal of Western Australia, judges of the Supreme Court of Western Australia[54], the Full Court of that Court and is now on appeal to this Court.

Before this Court four issues arose for determination. In logical sequence they were as follows:

1. Was the refusal by the Perth City Council to provide planning approval for the use of premises as a "day time drop-in centre" for persons who are HIV positive a refusal to provide "services" within s 66K(1) of the *Equal Opportunity Act* 1984 (WA) ("the Act")?

2. If so, was it a refusal to provide a service to the appellant as distinct from People Living with AIDS (WA) Inc ("PLWA"), an association incorporated under the *Associations Incorporation Act* 1987(WA) and which was the applicant for planning approval?

3. What is the relevant test in order to attribute the ground of impairment referred to in the Act to a decision making body such as the Perth City Council when the application was rejected by 13 votes to 12?

4. Is it necessary that the unimpaired person, to whom the impaired person must be compared by reason of s 66A(1) of the Act, exhibit the characteristics ascribed by the decision making body to the impaired person?

Although this is the logical sequence in which to approach the issues, it should be appreciated that the first two arise from the respondents' notice of contention. It is the third and fourth issues which are the subject of the notice of appeal and which were the basis of the application for special leave to appeal. If either of the first two issues is determined adversely to the appellant, the remaining issues do not have to be resolved; in that event, however, the grant of special leave to appeal rather loses its point.

The objects of the Act, expressed in s 3, include

"to eliminate, so far as is possible, discrimination against persons on the ground of ... impairment in ... the provision of ... facilities and services".

In the interpretation of this provision and any other provision in the Act,

"a construction that would promote the purpose or object underlying the written law ... shall be preferred to a construction that would not promote that purpose or object"[55].

Thus the approach to be taken in the interpretation of any of the provisions of the Act is marked out. Preference is to be given to a construction that would promote its objects. The Act is remedial and should receive "a generous construction"[56].

A refusal to provide services?

Section 66K(1) of the Act makes it unlawful for a person who provides goods or services to discriminate against another person on the ground of that person's impairment, in any of the circumstances identified in pars (a) to (c) of the sub-section. Discrimination is a term of varied meaning but the Act provides its own dictionary. Section 66A spells out when discrimination on the ground of impairment may occur. This case is concerned only with the direct discrimination to which s 66A(1) refers.

Unless there was a failure by the Council or at any rate by the other respondents to provide a relevant service, nothing contrary to the Act took place. The legislature has chosen an inclusive definition of "services"[57], thereby giving the word its ordinary, wide meaning. However par (e) of the definition is directly relevant in that it identifies

"services of the kind provided by a government, a government or public authority or a local government body".

The question whether there has been a refusal to provide a service is a question of fact, to be determined by the Tribunal[58]. An appeal lies from the Tribunal to the Supreme Court "on a question of law"[59]. As it happens, the Tribunal, Murray J and the members of the Full Court all held that the refusal of planning approval was a refusal to provide a service. As mentioned earlier, that particular issue is before the Court by reason of the notice of contention. In the circumstances, the question must be whether there was evidence upon which the Tribunal might properly conclude that there was such a refusal.

Given the breadth of the term "services", it might be readily concluded that a refusal to give planning approval to the application by PLWA was a refusal to provide a service. The contrary argument however is that the service provided by the Council is not the giving of planning approval but the consideration of an application for such approval. It is not encumbent on the Council to give its approval; it may refuse its approval, or grant its approval unconditionally or subject to conditions[60]. The service it provided was to consider the application in question and this it did. This approach to the issue is in my view too narrow.

The Council is responsible for preparing and giving effect to a town planning scheme. In discharge of that responsibility the Council adopted the "City of Perth City Planning Scheme" (1985), the objects of which include the classification and zoning of land within the Scheme Area for use for the purposes described and fostering and controlling development of land within the Scheme Area. The Tribunal said:

"Taking the 'broad view', there can be no doubt that in administering a town planning scheme ... and generally implementing or enforcing measures directed to the amenity of the area ... the City of Perth is providing a service to residents. In this context, the exercise of a discretion to give planning approval to allow the use of premises for a particular purpose in a specific locality is part of that service and is itself a 'service' within the meaning of s 4(1) of the Act."

On appeal from the Tribunal, Murray J held that there was nothing in the Act which required that "services" be given a specialised or restricted meaning. He regarded the conclusion reached on the point by the Tribunal as open to the Tribunal and furthermore that it was "a conclusion of fact and not of law". It followed that no appeal lay on this ground. In the Full Court Ipp J said:

"[T]he granting of a change in use, in the context of the relevant legislation, is a service provided to the community by the City".

But, it is said, the service is not one of granting approval. To say that is to disregard the fact that the Council may grant or refuse an application to rezone so as to permit a hitherto unpermitted use. But how, it is asked, can a refusal of an application be a refusal to provide a service? The answer to this may be found in s 66K(1)(c) of the Act. If the service is seen as the consideration of the application and its disposition and if it appears that the Council refused the application on the ground of impairment, why is that not discrimination "in the manner in which the first-mentioned person provides the other person with those ... services"? Consideration of an application is of itself hardly a service; it is the disposition of

the application which either provides or refuses the service. In the manner of that refusal there may be discrimination.

In the course of argument reference was made to some English decisions. One was *Savjani v IRC*[61] which concerned the Inland Revenue office where information and advice were given to members of the public on their tax affairs. Where tax relief was claimed in respect of a child the office had a policy of accepting a short form of birth certificate which was issued free but, in the case of taxpayers who came from the Indian sub-continent, a full certified copy of the birth certificate costing [sterling]2.50 was required. The Court of Appeal held that this constituted discrimination against the appellant. Lord Denning MR concluded[62]:

"It seems to me that the provisions for granting relief, giving advice, and the advice which is given, are the provision of services."

Templeman LJ drew a distinction between the function of collecting revenue and that of providing information and said[63]:

" Now if the inspector or the board make it more difficult for a taxpayer - who is entitled to relief; he does satisfy all the conditions - to obtain that relief than they do for other taxpayers, they are discriminating in the provision of the service to the public and the service to him of enabling tax relief to be obtained."

This division of function approach was adopted by Lord Fraser in *R v Entry Clearance Officer; Ex parte Amin*[64] and also by Hutchison LJ in *Farah v Commissioner of Police of the Metropolis*[65] who concluded that the words "services to the public"

"are entirely apt to cover those parts of a police officer's duties involving assistance to or protection of members of the public".

In other words, the appellant's real case in this regard is that, in exercising its discretion in the disposition of the application, the Council acted in a discriminatory manner. It may be that this is not the way in which the refusal of services was approached in the Tribunal or in the Supreme Court. However, such a case formed part of the points of claim lodged with the Tribunal. In any event the issue is raised by the notice of contention and the appellant is entitled to answer the notice by reference to any argument that fairly meets the contention.

Is the appellant an aggrieved person?

Part IVA of the Act is entitled: DISCRIMINATION ON THE GROUND OF IMPAIRMENT. Division 1 - General contains s 66A which identifies in general terms what constitutes such discrimination. Sub-section (1) speaks of a person (referred to as the "discriminator") discriminating against another person (referred to as the "aggrieved person") on the ground of impairment.

The complaint to the Tribunal was made by PLWA and by some of its members. When the matter came on for hearing before the Tribunal, PLWA was deleted as a party and DL, a representative member, was substituted, presumably on the basis that the association could not suffer an impairment. Nevertheless PLWA had been the applicant for approval. The appellant now remains as the only complainant. The Tribunal held that the individual members of PLWA were aggrieved persons because they could physically occupy the

premises and their interests would thereby be prejudicially affected if occupation was refused. Murray J again held that there was no error of law on the part of the Tribunal in this regard. In the Full Court Ipp J opted for a broad interpretation of "aggrieved person", pointing out that it was at all times clear that PLWA was acting on behalf of its members. His Honour said:

" It is ... necessary to point out that a person can refuse services to another even if the other person does not expressly ask that the services be provided. I would have thought it all too obvious that persons, who announce publicly that they will refuse to provide services to an identified group of impaired persons, would thereby be refusing to provide those services to the individual members of the group. That would be the case even though none of the individual members requested that the services be provided."

Ipp J held that the then respondents were aggrieved, commenting that if the narrow construction urged by the then appellant was accepted, it would be impossible for discriminatory conduct to occur when refusal to provide services was to a corporate body by reason of discriminatory attitudes towards its members. Wallwork J did not address this issue. Scott J held that the refusal was made to the PLWA, not to the individual members.

By their notice of contention the respondents in effect challenge the finding of the Tribunal. I would accept the appellant's argument in this regard, for the following reasons. The appellant argued that as the benefit of the change of use, if granted, would have gone to the members of PLWA and because the change was for a specific not a general purpose, the refusal was in truth a refusal to provide the benefit of approval (a service) to the members of PLWA. As to "person aggrieved", he relied upon a passage from the judgment of Stephen J in *Koowarta v Bjelke-Petersen* in which his Honour said[66]:

"It is not, I think, to the point that, as a matter of form, what the Minister withheld was approval of a transfer to the Aboriginal Land Fund Commission. The Minister's reasons for refusal disclose that he regarded approval as involving use of the property by Aborigines and refusal of approval as preventing that use."

It is true that the passage must be read in the light of the phrase "second person" in the *Racial Discrimination Act* 1975 (Cth); the question here is one of the interpretation of a different Act. Nevertheless the passage does point up the need to look at substance rather than form in considering such an expression as "person aggrieved". There was never any doubt that the application by PLWA was made on behalf of its members including the appellant.

I agree with Ipp J's approach to this issue and accept the Tribunal's conclusion that the appellant was entitled to assert that there had been discrimination against him[67].

The test to be applied to the Council

Section 5 of the Act provides that a reference in the Parts identified, which include Pt IVA,

"to the doing of an act by reason of a particular matter includes a reference to the doing of an act by reason of 2 or more matters that include the particular matter, whether or not the particular matter is the dominant or substantial reason for the doing of the act".

Sections 66A and 66K refer to discrimination "on the ground of" impairment. As this matter has progressed through the courts, it has been accepted that "by reason of" is not materially different from "on the ground of". Hence, once a conclusion is reached that discriminatory factors were one ground on which the Council reached its decision to refuse the application, it follows that there was a contravention of s 66K even if the discriminatory ground was not the principal ground upon which the decision was made.

It further follows that the particular issue is whether the discriminatory ground on which 5 of the 13 Councillors resolved to refuse the application could be imputed to the Council and with what consequences. In disposing of this issue, three possible tests have emerged from the proceedings below.

1. The test adopted by the Tribunal and upheld by Murray J was that the ground of decision of any Councillor whose decision was causative, in the sense that "but for" that decision approval would not have been refused, can be imputed to the Council. On this test, since there was a 13 to 12 majority against approval, the vote of every Councillor in the majority was causative. Consequently, in the words of Murray J, "it would be sufficient if the vote of one of those councillors was produced by or grounded in the consideration of the impairment of the aggrieved person".

2. The test favoured by Ipp J was that relevantly the ground of decision is the ground on which a majority of the voting Councillors made their decision.

3. The test favoured by Wallwork J was to look at the ground on which a majority of the majority Councillors made their decision. In the present case, presumably 7 Councillors would have had to vote on an improper ground for that ground to be imputed to the Council.

Scott J held that the complainants had been unable to identify the reasons for decision of the Council.

The "but for" test, which has featured in some decisions relating to causation in negligence actions, has been rejected as a definitive test of causation[68]. That is not to say that it has no part in this appeal. It has a respectable provenance in situations having some comparability to the present one. Thus in *Whitehouse v Carlton Hotel Pty Ltd*, where it was held that an allotment of shares was made for an impermissible purpose, Mason, Deane and Dawson JJ said[69]:

"As a matter of logic and principle, the preferable view would seem to be that, regardless of whether the impermissible purpose was the dominant one or but one of a number of significantly contributing causes, the allotment will be invalidated if the impermissible purpose was causative in the sense that, but for its presence, 'the power would not have been exercised'".

While not relying on the expression "but for", the House of Lords in *R v Birmingham City Council; Ex parte Equal Opportunities Commission*[70] and in *James v Eastleigh Borough Council*[71]applied a causative construction to the phrase "on the ground of" in discrimination legislation. In other words the test to be applied was objective in the sense that it was necessary to show no more than that "but for" the prohibited ground, the complainant would have been treated differently.

It is true that these decisions are not concerned with the attribution of a ground of a decision to a corporate body. However they offer guidance. The decision of the Council must have been on the ground of impairment of members of PLWA before the Act could operate on the refusal of approval. In the present case each Councillor in the majority determined the outcome by the vote he or she cast. If one or more of these Councillors voted on an impermissible ground, whether or not that was "the dominant or substantial reason"[72], that vote determined the outcome because the result would have been different "but for" the vote of that Councillor. The City of Perth could only act through its Council; the Council could only act through the vote of its members; the vote of every member of the majority was causative in the sense that the application would not have been refused but for each of those votes; and one, in fact five, Councillors reached a decision on a ground that was unlawful. The decision of the Council was likewise infected.

To whom is the impaired person to be compared?

Under s 66A a person discriminates against another on the ground of impairment in the circumstances there identified.

The respondents contended that while the notional person to whom the impaired person must be compared in terms of s 66A is free of the impairment, that person retains the characteristics imputed to or which characterise the impaired person. Put another way, the features identified in pars (b) to (d) of s 66A(1) are shared by both the impaired and the notional person and are included in the "circumstances" identified in the section as those in which the differential treatment is to be considered. On the other hand, the appellant contended that such an approach would fatally frustrate the purposes of the Act. Thus, he said, if infectiousness is a characteristic of sufferers of AIDS (which is an impairment) and people would discriminate equally against those who are infectious but do not have AIDS, it would follow that there has been no discrimination under the Act against people with AIDS. Likewise, he said, if illegal drug use or homosexuality is a perceived characteristic of those who are HIV positive, discriminating against AIDS sufferers would not be contrary to the Act so long as the discriminator would also discriminate against illicit drug users and homosexuals who do not have AIDS.

The illustration given in the course of argument before the Court is apt. On the construction for which the respondents contended, if dangerousness was a characteristic imputed to paranoid or schizoid personalities, there could be no discrimination against persons with those personalities.

The point was made by the President of the Human Rights and Equal Opportunity Commission in a passage quoted by Wilcox J in *The Commonwealth v Human Rights Commission*[73] and by Lockhart J in *Human Rights and Equal Opportunity Commission v Mt Isa Mines Ltd*[74]:

"It would fatally frustrate the purposes of the Act if the matters which it expressly identifies as constituting unacceptable bases for differential treatment ... could be seized upon as rendering the overall circumstances materially different, with the result that the treatment could never be discriminatory within the meaning of the Act."

In my view these considerations lead to the construction of the Act argued for by the appellant and upheld by the Tribunal and Murray J.

The process of construction and application of the relevant provisions of the legislation is as follows. The impairment must be identified with reference to the definition in s 4(1) of the Act. This is so expressed as to identify various "conditions" by reference to defects or disturbances in the normal structure or functioning of a person's body or brain, and to illnesses or conditions which impair thought processes, perception of reality, emotions or judgment, or which result in disturbed behaviour. The impairment of the aggrieved person is an essential element in all that follows.

The next step is to ascertain whether there has been any treatment by the discriminator of the aggrieved person "on the ground of impairment". That portion of s 66A(1) which comprises pars (a) to (d) and the immediately preceding words "on the ground of" are declaratory or explanatory of the expression in the opening passage of s 66A(1) "a person ... discriminates ... on the ground of impairment if ...". Paragraphs (b) and (c) refer to characteristics which appertain generally, or are generally imputed to, persons having the same impairment as the aggrieved person. The result is that there may be wrongful discrimination against the aggrieved person "on the ground of impairment" where the ground is not the impairment itself but one or other of these characteristics. Paragraphs (b) and (c) (and par (d) also) add to the unacceptable bases for differential conduct and in this way expand the scope of the sub-section. They do not limit the overall operation of the sub-section and thus of the Act.

Then a comparison must be made. This involves consideration of how the discriminator treats or would treat a person who does not have "such an impairment". In making the comparison the characteristics referred to in pars (b) and (c) of s 66A(1) are to be ignored. When s 66A(1) concludes with the words "such an impairment", the correspondence is with "the ground of impairment" in the opening words of the sub-section. Any other approach would render the Act ineffective.

Conclusion

It follows from these reasons that both grounds of appeal succeed and both grounds of the notice of contention fail.

In that event a question arises whether s 680 of the *Local Government Act* 1960 (WA) applies to the acts of the Councillors. I agree with Kirby J that an error of law occurred in the Tribunal which necessitates that this aspect be dealt with by the Tribunal.

I also agree with the orders proposed by Kirby J.

GUMMOW J. The facts giving rise to this litigation and the course of the litigation in the Supreme Court of Western Australia are detailed in the reasons for judgment of Kirby J. I need not repeat them. However, it should be noted that the Equal Opportunity Tribunal ("the Tribunal") found that the application for the use of the premises at Walcott Street, North Perth, as a "daytime drop-in centre" for persons who were HIV positive was rejected on 19 March 1990 upon a motion lost by 13:12 votes in the council of the City of Perth ("the Council"). The application had been made by People Living with AIDS (WA) Inc ("PLWA"). This was an association incorporated under the *Associations Incorporation Act* 1987 (WA). An appeal to the Minister was successful and the application was approved on 6 April 1990. However, the complaints giving rise to this litigation concern the treatment of the matter by the Council.

The Tribunal found that, of the majority of 13, the votes of Councillors Scurria, Vlahos, Salpietro, David Nairn and Donald Nairn were "grounded on the AIDS factor" and that, whilst he did not vote, Councillor Nattrass "advertently" encouraged councillors to vote against the motion "because of the AIDS factor". These six councillors are the second to seventh respondents to the present appeal. The Tribunal held that the votes of Councillors Scurria, Vlahos, Salpietro, David Nairn and Donald Nairn were "causative in terms of the decision of the Council (and hence the City of Perth ['the City'] whose executive decision-making body the Council was), in that but for them that decision would not have been made".

The Tribunal is established under Pt VIII (ss 96-137) of the *Equal Opportunity Act* 1984 (WA) ("the Act"). The appellant obtained from it orders under s 127(b)(i) that the respondents pay to him damages by way of compensation for loss or damage suffered by reason of their conduct.

The appeal to the Supreme Court of Western Australia by the City and those councillors who are now the second to seventh respondents was dismissed by Murray J[75]. Section 134 of the Act provided that the appeal was limited to questions of law. An appeal to the Full Court was allowed (Ipp, Wallwork and Scott JJ)[76].

The Act

I should begin by some reference to provisions of the Act. One of the objects of the Act, specified in s 3(a) is:

"to eliminate, so far as is possible, discrimination against persons on the ground of sex, marital status or pregnancy, race, religious or political conviction or impairment in the areas of work, accommodation, education, the provision of goods, facilities and services and the activities of clubs".

Section 18 of the *Interpretation Act* 1984 (WA) ("the Interpretation Act") requires preference to be given in the interpretation of a provision of a written law to a construction that would promote the purpose or object underlying that law over a construction that would not promote that purpose or object.

This case is concerned with discrimination on the ground of impairment. Provision with respect to this is made in Pt IVA (ss 66A-66U). Part IVA and consequential amendments were inserted by the*Equal Opportunity Amendment Act* 1988 (WA). Section 4(1) of the Act contains the following definition of "impairment":

"'impairment' in relation to a person, means one or more of the following conditions -

(a) any defect or disturbance in the normal structure or functioning of a person's body;

(b) any defect or disturbance in the normal structure or functioning of a person's brain; or

(c) any illness or condition which impairs a person's thought processes, perception of reality, emotions or judgment or which results in disturbed behaviour,

whether arising from a condition subsisting at birth or from an illness or injury and includes an impairment which presently exists or existed in the past but has now ceased to exist."

Section 66A identifies that conduct which amounts to discrimination on the ground of impairment. Before turning to the detailed provisions of s 66A, it may be observed that "discrimination", as a matter of ordinary English, has quite distinct shades of meaning. Some of these lack the critical if not pejorative connotation the term has in human rights legislation. Thus, "discrimination" may identify the ability to observe accurately and make fine distinctions with acuity, good judgment or taste, as well as the making of unjust or prejudicial distinctions.

In Australia, discrimination is also a constitutional concept. The terms "discriminate" or "discrimination" appear in various provisions of the Constitution, notably ss 51(ii), 102 and 117. Section 117 states:

"A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State."

Section 51(ii) authorises the making of laws with respect to taxation "but so as not to discriminate between States or parts of States". In *Street v Queensland Bar Association*, when dealing with s 117, Gaudron J said[77]:

"Although in its primary sense 'discrimination' refers to the process of differentiating between persons or things possessing different properties, in legal usage it signifies the process by which different treatment is accorded to persons or things by reference to considerations which are irrelevant to the object to be attained. The primary sense of the word is 'discrimination between'; the legal sense is 'discrimination against'."

Further, in *Castlemaine Tooheys Ltd v South Australia*, a case concerned with the application of s 92 of the Constitution after *Cole v Whitfield*[78], Gaudron and McHugh JJ said[79]:

"A law is discriminatory if it operates by reference to a distinction which some overriding law decrees to be irrelevant or by reference to a distinction which is in fact irrelevant[**80**] to the object to be attained; a law is discriminatory if, although it operates by reference to a relevant distinction, the different treatment thereby assigned is not appropriate and adapted to the difference or differences which support that distinction. A law is also discriminatory if, although there is a relevant difference, it proceeds as though there is no such difference, or, in other words, if it treats equally things that are unequal - unless, perhaps, there is no practical basis for differentiation."

This passage deals with species of discrimination which elsewhere have been identified as "direct" and "indirect" discrimination[81]. The succinct terms by which the fundamental precepts are explained in this passage have been eschewed by legislatures when framing human rights legislation, such as the Act. Language has been employed which is both complex and obscure and productive of further disputation.

Section 66A of the Act is itself a striking example. Sub-sections (1), (2) and (3) state:

"(1) For the purposes of this Act, a person (in this subsection referred to as the 'discriminator') discriminates against another person (in this subsection referred to as the 'aggrieved person') on the ground of impairment if, on the ground of -

(a) the impairment of the aggrieved person;

(b) a characteristic that appertains generally to persons having the same impairment as the aggrieved person;

(c) a characteristic that is generally imputed to persons having the same impairment as the aggrieved person; or

(d) a requirement that the aggrieved person be accompanied by or in possession of any palliative device in respect of that person's impairment,

the discriminator treats the aggrieved person less favourably than in the same circumstances, or in circumstances that are not materially different, the discriminator treats or would treat a person who does not have such an impairment.

(2) For the purposes of subsection (1), circumstances in which a person treats or would treat another person who has an impairment are not materially different by reason of the fact that different accommodations or services may be required by the person who has an impairment.

(3) For the purposes of this Act, a person (in this subsection referred to as the 'discriminator') discriminates against another person (in this subsection referred to as the 'aggrieved person') on the ground of impairment if the discriminator requires the aggrieved person to comply with a requirement or condition -

(a) with which a substantially higher proportion of persons who do not have the same impairment as the aggrieved person comply or are able to comply;

(b) which is not reasonable having regard to the circumstances of the case; and

(c) with which the aggrieved person does not or is not able to comply."

Section 66A(1) is concerned with direct and s 66A(3) with indirect discrimination. This case is said to arise under s 66A(1).

Section 66K(1) is the other provision central to this case. It states:

"(1) It is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person's impairment -

(a) by refusing to provide the other person with those goods or services or to make those facilities available to the other person;

(b) in the terms or conditions on which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person; or

(c) in the manner in which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person."

There is no definition in the Act of "person" which would further identify either those whose conduct is made unlawful by s 66K(1) or those who suffer discrimination. The general definition in s 5 of theInterpretation Act indicates that "person" includes a public body which is incorporated.

The Act does not in terms deal with the meaning of the phrase "on the ground of" in s 66K. However, s 5 of the Act states:

"A reference in Part II, III, IV or IVA to the doing of an act by reason of a particular matter includes a reference to the doing of an act by reason of 2 or more matters that include the particular matter, whether or not the particular matter is the dominant or substantial reason for the doing of the act."

The argument in this Court and below proceeded on the footing that there was no material difference between the phrase "by reason of" in s 5 and "on the ground of" in s 66K[82].

The issues

A number of the issues in this appeal turn upon the construction of the Act, in particular the interrelation between ss 66A(1) and 66K and the meaning of the phrase in s 66K(1) "unlawful for a person who ... provides ... services ... to discriminate against another person on the ground of the other person's impairment".

There is ample authority that remedial legislation, such as that found here, is to be accorded "a fair, large and liberal" interpretation rather than one which is "literal or technical". These were the phrases used by Thorp J in *Coburn v Human Rights Commission*[83]. They are of importance in this case, particularly in construing the term "services" as it appears in the statutory phrases "a person who ... provides goods or services" and "by refusing to provide the other person with those goods or services" in s 66K of the Act. Nevertheless, as will appear, the legislation must be read as a whole and such a term must be construed in the context in which it appears. The circumstance that "services" is used in what might be called human rights legislation does not necessarily indicate that it bears, to its full scope, the potential meaning which the legislature might have given it.

I turn to the issues in this appeal. First, there is what has been identified as the "standing" issue. The respondents contend that the appellant was not an "aggrieved person" within the meaning of s 66A and thus not a complainant permitted by s 83 of the Act to trigger its procedures by lodging a complaint in writing with the Commissioner for Equal Opportunity ("the Commissioner"). The complaint in question had been referred to the Tribunal by the Commissioner under s 93(1)(a). The Commissioner is required so to act where of the opinion that a complaint cannot be resolved by conciliation.

The contention that the appellant was not an "aggrieved person" within the meaning of s 66A was identified in submissions as an allegation as to lack of standing. "Standing" is an important concept in public law and the use in s 66A of the phrase "aggrieved person" evokes a proceeding for judicial review of an administrative decision. However, that is not this case. Rather, the Act imposes new obligations and confers new rights in private law to obtain statutory remedies if certain conditions are met by the applicant. One such requirement is that the applicant be an "aggrieved person" within the meaning of s 66A. Accordingly, the

substance of the respondents' contention is that the appellant did not meet a requirement for the availability of the remedies which were granted to him by the Tribunal.

Secondly, there is an issue as to whether the processes of decision-making by the City were such as to render it a person which had discriminated against another person on the ground of that person's impairment. This issue was at the forefront of the special leave application.

Thirdly, there is an issue whether there was discrimination on the ground of impairment in the provision of "services", within the meaning of s 66K(1).

Fourthly, the respondents support the holding by Ipp J upon what has been called "the comparison question". This is that the City does not discriminate against those with an impairment if the reason for differential treatment is a characteristic not unique to such persons and the City treats uniformly all persons with that characteristic. On that view, the appropriate comparison is between the impaired person and a notional person who, while not so impaired, exhibits the characteristics similar to those of the impaired person.

Finally, the second to seventh respondents rely upon s 680 of the *Local Government Act* 1960 (WA) ("the LG Act")[84] as an answer to the imposition of personal liability upon them[85].

Several of these issues arise upon a Notice of Contention filed by the respondents. As Kirby J points out, the Tribunal did not make the necessary factual findings for this Court to deal with the last issue. With respect to the comparison issue, I agree that it should be resolved in the manner proposed and for the reasons given by Toohey J. I deal with the remaining issues by commencing with those of "services" and "standing".

Services

The term "service" and its variants are of wide and varied meaning. One speaks of the duties or work of a public servant, being a person serving the state or the community in a particular capacity. Service may also be rendered to an individual by conduct tending to the welfare or advantage of that person.

Section 4(1) provides an inclusive, not exclusive, definition of services. It states that in the Act, unless the contrary intention appears:

"'services' includes -

(a) services relating to banking, insurance and the provision of grants, loans, credit or finance;

(b) services relating to entertainment, recreation or refreshment;

(c) services relating to transport or travel;

(d) services of the kind provided by members of any profession or trade;

and

(e) services of the kind provided by a government, a government or public authority or a local government body".

In the present case the Council, in a sense, was serving the community in the discharge of its functions under the town planning legislation whilst, at the same time, conferring a personal benefit or advantage upon successful applicants for planning permission. Were successful applicants also provided with services and those who were denied permission refused the provision of services? Were all applicants, successful and unsuccessful, provided with services by the exercise by the Council of its legal obligations to consider and dispose of applications for town planning approval? The appellant's primary submission was that the denial of approval was a refusal to provide services and thus was unlawful discrimination.

In *Gould v Yukon Order of Pioneers*[86], the Supreme Court of Canada construed legislation which prohibited discrimination "when offering or providing services, goods, or facilities to the public"[87]. L'Heureux-Dubé J, in the course of dealing with the question of statutory construction said[88]:

"Dictionary entries, while far from conclusive, may be of some assistance in this regard: the various commonly understood meanings for the words chosen by the legislature can be a starting point for the interpretative analysis. For example, the *Concise Oxford Dictionary* (8th ed 1990) defines a 'service' to include assistance or a benefit given to someone, or the act of helping or doing work for another or for a community. *Le Nouveau Petit Robert* (1993) provides a slightly different definition for '*service*', which encompasses economic activities, other than the supply of tangible property, as well as functions having a 'common or public' utility. These definitions suggest that the expression 'providing services' has a broad meaning which encompasses activities in which a benefit other than a good is conferred on, or effort expended on behalf of another person or a community."

Earlier, in *Attorney General of Canada v Cumming*[89], the Federal Court of Canada adverted to the question whether in assessing taxes the Department of National Revenue was engaged in the provision of services within the meaning of s 5 of the *Canadian Human Rights Act*[90]. Thurlow ACJ said that he was not prepared to accept the broad proposition that in assessing taxes under the*Income Tax Act*[91] the Department was not engaged in the provision of services within the meaning of s 5. His Lordship said[92]:

"The statute is cast in wide terms and both its subject-matter and its stated purpose suggest that it is not to be interpreted narrowly or restrictively. Nor do I think that discrimination on any of the bases prohibited by the Act cannot conceivably occur in the provision of such services to the public."

Similar questions have arisen in England. Section 20(1) of the *Race Relations Act* 1976 (UK) provided that in certain circumstances it was unlawful for any person concerned with the provision (for payment or not) of services to the public or a section of the public to discriminate against a person seeking to obtain those services. In *Savjani v Inland Revenue Commissioners*[93], the English Court of Appeal decided that the Inland Revenue was providing "services" to the public within s 20(1) when performing the duties laid on them by the taxation legislation to make a deduction from tax liability for a dependent child and to repay any consequential overpayment of tax, and in disseminating and giving advice to taxpayers to enable them to claim that tax relief. Templeman LJ said[94]:

"As [counsel] on behalf of the revenue submitted, the board and the inspector are performing duties - those duties laid upon them by the Act which I have mentioned - but, in my judgment, it does not necessarily follow that the board and the inspector are not voluntarily, or in order to carry out their duty, also performing services for the taxpayer. The duty is to collect the right amount of revenue; but, in my judgment, there is a service to the taxpayer provided by the board and the inspector by the provision, dissemination and implementation of regulations which will enable the taxpayer to know that he is entitled to a deduction or a repayment, which will entitle him to know how he is to satisfy the inspector or the board if he is so entitled, and which will enable him to obtain the actual deduction or repayment which Parliament said he is to have. For present purposes, in my judgment, the inspector and the board provide the inestimable services of enabling a taxpayer to obtain that relief which Parliament intended he should be able to obtain as a matter of right subject only to proof."

In *R v Entry Clearance Officer; Ex parte Amin*[95], *Savjani* was treated as turning on the finding that the Inland Revenue performed two distinct functions, first a duty of collecting revenue and secondly a service of providing taxpayers with information. In *Amin* itself, the House of Lords considered the operation of s 29(1) of the *Sex Discrimination Act* 1975 (UK) which was expressed in similar terms to s 20(1) of the *Race Relations Act* 1976 (UK). The House of Lords decided that a British entry clearance officer stationed in Bombay, when administering a special voucher scheme which enabled successful applicants to settle in the United Kingdom, was not providing a service for would-be immigrants. Rather, the officer was performing his statutory duty of controlling would-be immigrants and the refusal of a special voucher was not unlawful discrimination within the 1975 statute.

In the present case, the Tribunal decided the issue as follows:

"Taking the 'broad view', there can be no doubt that in administering a town planning scheme within its municipal area, regulating the use of land to the best possible advantage, securing provision for traffic and the other factors mentioned in s 2 [of the *Town Planning and Development Act* 1928 (WA) ('the Town Planning Act')] and clause 5 of the City Planning Scheme ['the Scheme'], and generally implementing or enforcing measures directed to the

amenity of the area, the municipality of the City of Perth *is providing a service to residents*. In this context, the exercise of a discretion to give planning approval to allow the use of premises for a particular purpose in a specific locality *is part of that service and is itself a 'service'* within the meaning of s 4(1) of the Act. The statutory definition is inclusive, not exclusive, and where it is reasonably capable of having a sufficiently wide meaning to encompass a situation which would prima facie advance the objects and purposes of the Act, that interpretation is to be preferred (see eg *NM Superannuation Pty Ltd v Young*[96])." (emphasis added)

The appellant contends, as was put successfully to the Tribunal, that, in performing its functions as responsible authority for the purposes of the Town Planning Act, including the Scheme, the City was providing services of the kind provided by a public authority or a local government body within the meaning of par (e) of the definition of "services".

The question arises whether the circumstance that, in dealing with applications for approval, the Council, as responsible authority, exercises its statutory functions and duties under the town planning law has the consequence that the Council is not also engaged in the provision of services to applicants within the meaning of the anti-discrimination legislation. An issue of

characterisation is involved. Each statute operates in aid of particular ends considered important by the legislature. There is no reason in logic or good sense to deny the proposition that the Council may be engaged in the provision of services, not only to the community as a whole, but also to individual applicants who invoke the exercise of the powers of the Council under the town planning law. There is no dichotomy here between the discharge of statutory functions and the provision of services to those seeking the discharge of these functions[97].

The point may be illustrated by reference to the decision of the English Court of Appeal in *Farah v Commissioner of Police of the Metropolis*[98]. Otton LJ said[99]:

"[P]olice officers perform duties in order to prevent and detect crime and to bring offenders to justice. They are also vested with powers to enable them to perform those duties. While performing duties and exercising powers they also provide services in providing protection to the victims of crimes of violence."

The plaintiff had sought such protection. Her claim was that because of her race she did not obtain the protection others would have been afforded and that she had suffered unlawful discrimination within the meaning of s 20 of the *Race Relations Act* 1976 (UK), by reason of the deliberate omission to provide services to her. The Court of Appeal held that such a claim was maintainable against the police.

If the present case be considered in that way, the Council, as executive organ of the City, was providing services whether it granted or refused a particular application for consent. The issue presented by the appellant then is whether, by reason of the treatment by the Council of the application in March 1990, the City contravened s 66K(1).

In the present case, the Council did not refuse to provide services. It did not, for example, refuse to accept or to deal with the application by PLWA in respect of the premises at Walcott Street, North Perth. Section 66K(1)(a) could have no application. It deals with refusal to provide services. Accordingly, the appellant's primary submission should be rejected.

However, in its application to the facts of this litigation s 66K(1)(c) looks to "the manner" in which the Council discharged its statutory obligations under the town planning law. That section made it unlawful for the Council to discriminate against an impaired person in the manner in which it provided that person with services. In a broad sense, the manner in which the Council went about its task with respect to the Walcott Street premises involved discrimination within the sense of the Act.

Standing

But that is not the end of the matter. The Act is concerned with the provision of services to the person who complains of discrimination and seeks the remedies for which it provides. That complainant must also be a person who suffers an impairment in the statutory sense. The appellant must bring the case within s 66K(1) and show discrimination by conduct in relation to the provision to him, as an impaired person, of those services. Here the appellant's case breaks down. The appellant suffered impairment but did not seek the provision of services by the Council. Services were sought by PLWA, but it did not suffer impairment.

The respondents accept that only those who were HIV positive were entitled to be members of PLWA, but submit that as a corporation PLWA was incapable of having an "impairment" as defined in s 4(1) of the Act. These submissions should be accepted. The terms of the definition of impairment, set out earlier in these reasons, indicate that it is directed to individuals rather than entities with an artificial legal personality.

Counsel for the appellant sought support for the contrary conclusion from certain passages in *Koowarta v Bjelke-Petersen*[100]. However, that case turned upon particular provisions of the *Racial Discrimination Act* 1975 (Cth).

The point is that, even giving full effect to the principles of construction referred to earlier in these reasons, as it stood at the relevant time the legislation was so drawn as not to accommodate the factual and legal framework which gave rise to the appellant's complaint.

Section 66A was amended by s 17 of the *Equal Opportunity Amendment Act* 1992 (WA). This inserted s 66A(1a). It provides that the discriminator discriminates against the aggrieved person on the ground of impairment if, on the ground of the impairment of any relative *or associate of the aggrieved person*, the discriminator treats the aggrieved person less favourably than in the same circumstances, or, in circumstances not materially different, the discriminator treats or would treat a person not having such an impairment. Had the Act been in this form at the relevant time, the inclusion of the reference to associates of the aggrieved person may have produced the result that PLWA (but not the appellant) was an "aggrieved person" by reason of the treatment of persons such as the appellant who were its associates. The proposition would be that, in refusing the development application, the City discriminated against PLWA on the ground of the impairment of its associates, being the members of that body. But in its earlier form s 66A did not have such an operation.

The requirement that the complainant be a person who suffers an impairment in the statutory sense is not merely one of form. I have referred to the orders made under s 127 by the Tribunal in the present case. Section 127 empowers the Tribunal to grant relief which is analogous to an award of damages and to a prohibitory or mandatory injunction.

These conclusions are sufficient to dispose of the appeal. However, special leave was granted primarily to deal with the question of general importance concerning the decision-making processes of the Council and other collegiate bodies to which the Act applies. Accordingly, I should indicate my conclusions upon that question.

Decision-making by the Council

Section 9 of the LG Act constituted the City as a body corporate and specified the Council as the executive body of the City. The Council consisted of the mayor and the councillors. Provision for the transaction of business at meetings of the Council was made by s 173 of the LG Act. Questions were to be determined by a majority of the valid votes of members present at the meeting (s 173(8)(b)). The appellant submits that this collegiate body of mayor and councillors, as executive organ of the City, so acted as to refuse the development application by PLWA "on the ground of" impairment within the meaning of Pt IVA of the Act.

The particular question here is whether the City discriminated in the sense specified in s 66K of the Act. It is not whether, under the general law or under the provisions of the LG Act itself, the decision was other than in proper form or lacked binding effect. It is true that s

66K(1) opens with the phrase "[i]t is unlawful". However, the effect of contravention of the Act is spelled out in s 154. This provides:

"(1) A contravention of this Act shall attract no sanction or consequence, whether criminal or civil, except to the extent expressly provided by this Act.

(2) Nothing in subsection (1) prevents an action for defamation."

The Council, as executive organ of the City, was a responsible authority for the purposes of the Town Planning Act. Section 7(3) thereof gave to the Scheme the full force and effect it would have had if enacted by the statute itself. Section 6(1) of the Town Planning Act stated that town planning schemes might be made with the general object of improving and developing the land in question to the best possible advantage and of securing suitable provision for such matters as traffic, transportation, disposition of shops, residence, factory and other areas, proper sanitary conditions, parks, gardens and reserves. Clause 34 of the Scheme had required the approval of the City, by its executive organ, the Council, to the application for the use of the premises in question. The City was a public body and a "person" to which, in the exercise of these powers, s 66K of the Act was directed. The effect of the Act was to require the exercise by the Council of its collegiate decision-making authority without any purpose rendered by s 66K of the Act foreign to that power.

Where, as in this case, the Council, as the executive organ of the City, exercised its powers as responsible authority to refuse the application in circumstances where, but for the ground relevantly animating five of the 13 majority councillors, the decision would not have been made, s 66K applies. In this regard, the Tribunal, in deciding as it did, did not fall into any error of law.

The appellant refers to the dictum of Lord Lowry in *Jones v Swansea City Council*[101] that the tort of misfeasance in public office might be established by a plaintiff who alleged and proved that a majority of councillors present and voting for a resolution did so with the object of damaging the plaintiff. The appellant also referred to decisions in which a challenge was made to the exercise of the powers of company directors.

An allotment of shares by directors will be invalidated if the impermissible purpose is causative in the sense that, but for its presence, the power would not have been exercised. This is so even if the impermissible purpose was not the substantial object or moving cause. Authority for that proposition is provided by *Whitehouse v Carlton Hotel Pty Ltd*[102], where Mason, Deane and Dawson JJ referred to remarks by Dixon J in *Mills v Mills*[103].

In *Mills v Mills*, Dixon J said[104]:

"Directors of a company are fiduciary agents, and a power conferred upon them cannot be exercised in order to obtain some private advantage or for any purpose foreign to the power. It is only one application of the general doctrine expressed by Lord *Northington* in *Aleyn v Belchier*[105]: 'No point is better established than that, a person having a power, must execute it bona fide for the end designed, otherwise it is corrupt and void.'"

However, in neither of these cases was the issue whether an allotment would be invalid where the impermissible purpose moved some but not all of the directors or some but not all of those directors comprising a majority of a divided board. Nor is any guidance, and therefore

any useful analogy, supplied by the factual situation upon which rested the approval of *Mills v Mills*[106] by Lord Wilberforce in *Howard Smith Ltd v Ampol Petroleum Ltd*[107].

In any event, if any analogy is to be sought from the field of equity, it is better found in the law regulating the exercise of trustee powers. Dixon J observed that the application of general fiduciary principles to the acts of directors in the course of managing the business affairs of a company "cannot be as nice as it is in the case of a trustee exercising a special power of appointment"[108].

In the absence of some other direction by statute, by a competent court, or by the terms of the will or settlement, where there is a plurality of trustees of a private trust all must join in the execution of the trust[109]. If a power of appointment be vested in trustees or jointly in other appointors, an appointment in the exercise of the power may be fraudulent although only one of the appointors is infected with the fraud[110].

The councillors who voted on 19 March 1990 against the motion to grant the application for use of the premises at Walcott Street, North Perth, were not engaged in the commercial pursuits of company directors seeking to achieve profits for the benefit of shareholders. Nor, on the other hand, were the councillors law-makers invested with the ample authority of a parliament. Rather, pursuant to the LG Act they held public office for the good of the inhabitants whom s 9(1) of that statute identified as constituting the City[111].

The proposition, espoused in English decisions such as *Bromley London Borough Council v Greater London Council*[112], that in the exercise of certain statutory powers and authorities local government bodies owe fiduciary duties to the ratepayers to date has not been accepted in Australia. In this case, it is unnecessary to determine whether any such proposition should be accepted here.

However, in the discharge of their public offices, the councillors were required to exercise any powers and authorities pertaining thereto for the end designed and not for any purpose rendered foreign thereto, whether by the general law or by any statutory provision. In my view, s 66K of the Act was such a provision.

As to the general law, since at least the decision of the Privy Council in *Bowes v City of Toronto*[113], it has been accepted that, where the local government body is incorporated, councillors are to be treated as trustees for that corporation in the sense that they must account for secret profits made by virtue of their office and without the assent of the corporation. Knight Bruce LJ said[114]:

"We are of opinion, however, that neither the governing character nor the deliberative character of the Corporation Council makes any difference, and that the Council was in effect and substance a body of trustees for the inhabitants of Toronto; trustees having a considerable extent of discretion and power, but having also duties to perform, and forbidden to act corruptly. With regard to members of a Legislature, properly so called, who vote in support of their private interests; if that ever happens, there may possibly be insurmountable difficulties in the way of the practical application of some acknowledged principles by Courts of civil justice, which Courts, however, are nevertheless bound to apply those principles where they can be applied. The Common Council of Toronto cannot in any proper sense of the term be deemed a legislative body; nor can it be so treated. The members are merely delegates in and of a Provincial town for its local administration. For every purpose at present

material, they must be held to be merely private persons having to perform duties, for the proper execution of which they are responsible to powers above them."

The personal liability of councillors in cases such as the above to account for improper gains springs from the application to persons holding public positions of trust of doctrines developed in equity with respect to private rights and obligations. Public law also has a role to play.

Section 174 of the LG Act contained detailed provisions imposing prohibitions upon councillors taking part in consideration of or voting on matters in which they were interested. As a matter of general law, and even without particular provision such as that made by s 174, a decision made by such a body as the Council, one or more members of which are disqualified for bias, is liable to be set aside on administrative review[115].

An exception may be provided by statute or by the operation of a principle of necessity[116]. One example of the operation of the principle of necessity may be considered. It has been said that a decision of a collegiate body may be successfully attacked for bias even where but one member was biased and that member was not one of the majority. This is on the footing that in bias cases the court does not enter into difficult evidentiary questions as to the extent to which that person may have influenced the majority[117]. However, where the body in question is the sole repository of a statutory power, an exception to such a stringent rule may be necessary to enable it to function[118].

No such issue calling for the application of a principle of necessity arose on the facts of this case. It is unnecessary to determine how and to what extent the principle would apply to the operation of the Act upon the decision-making processes of the Council. However, it is significant that a contravention of the Act attracts no sanction or consequence except as expressly provided by that statute. The text of s 154 of the Act which so provides is set out earlier in these reasons. It follows that activity by the Council which contravenes the anti-discrimination statute nevertheless retains its efficacy for the purposes of local government and town planning law.

The concern of administrative law with the doctrine of bias in public decision-making seeks to advance objectives identified by Lord Woolf and Professor Jowell as follows[119]:

"The first seeks accuracy in public decision-making and the second seeks the absence of prejudice or partiality on the part of the decision-maker. An accurate decision is more likely to be achieved by a decision-maker who is in fact impartial or disinterested in the outcome of the decision and who puts aside any personal prejudices. The third requirement is for public confidence in the decision-making process. Even though the decision-maker may in fact be scrupulously impartial, the appearance of bias can itself call into question the legitimacy of the decision-making process."

Comparable objectives are sought to be advanced by the statute giving rise to this litigation. I have referred to the statement of objects in s 3 of the Act and to the precepts by which the legislation is to be construed. In respect of the particular species of discrimination with which it is concerned, the Act seeks (but subject to s 154) to extirpate them from decision-making processes. This is so even where they do not provide the dominant or substantial reason for the conduct in question (s 5).

What of the case where the "person" whose activity falls for scrutiny upon a complaint of contravention of s 66K of the Act is a public body[120] whose decisions are entrusted by its constituent law or authority to a collegiate group acting by a majority? Here the decision-making process will be tainted for the purposes of the Act by reason of discrimination, in similar manner as a decision of that body would be tainted by the presence of bias, in accordance with the principles of administrative law. Under those principles it is no answer that only a minority of those decision-makers comprising the majority of the whole body was biased.

Conclusion

The appeal should be dismissed with costs.

KIRBY J. The important facts are simple. A local government body refused to permit a change of zoning to allow a shop to be developed as a "drop-in" centre for people infected with the human immuno-deficiency virus ("HIV") or manifesting its final stage, acquired immuno-deficiency syndrome ("AIDS"). The refusal resulted from a narrow vote in the Council of that body. The Tribunal with the exclusive jurisdiction to determine facts found that 5 of the majority on the Council cast their votes not upon planning or like grounds but because of views which they then held about HIV/AIDS impairment or the characteristics which they ascribed to persons so impaired. Some of the characteristics relied upon were found by the Tribunal to have involved ignorance, prejudice and stereotyping. The votes of the five made all the difference. Without their votes, the body would have approved the application.

Legislation prohibiting discrimination on the grounds of impairment was expressly extended to local government bodies. Proceedings for redress were brought by individuals who had stood to benefit from, and wished to use, the "drop-in" centre. The decision of the Tribunal, affirmed on the first appeal, found that the local government body had engaged in unlawful discrimination on the ground of impairment. In the circumstances, such a decision seems scarcely surprising. The orders, obliging the body and the offending councillors to pay, between them, to the three original complainants, an aggregate amount of $8000, were modest ones. Presumably the purpose of such orders was educative or symbolic rather than punative.

However, the proceedings illustrate once again the difficulty of obtaining the successful application of anti-discrimination legislation to simple facts. It is a difficulty about which commentators frequently complain[121]. Take these proceedings as an example. The trial at first instance occupied nine hearing days over thirteen months. There were two appeals to the Supreme Court, the second rising to the Full Court. Now, before this Court, the case is disposed of in favour of the alleged discriminators upon a ground rejected at every level of the hearings below. Such a result may be inescapable when one descends from generalised expectations or sentiments to the technical language in which the anti-discrimination legislation is expressed. Courts grappling with the novel concepts and objectives of such legislation quite frequently complain about the difficulties which they are called upon to resolve[122]. They warn against "misdirected" litigation which seeks to impose upon such legislation "a traffic it was not designed to bear"[123].

Those who are alleged to have acted in an unlawful and discriminatory manner are entitled to defend themselves and to raise every available legal argument, as the respondents have done

here. That is what the rule of law permits. But unless courts are willing to give such legislation the beneficial construction often talked about, it seems likely that the legislation will continue to misfire. That risk may be greatest when those who invoke the legislation comprise individuals or groups in minorities most in need of protection but least likely to strike a sympathetic chord.

Approval for an HIV "day time drop-in centre" is refused

The City of Perth (the first respondent - "the City") is a municipality[124] comprising a body corporate[125] with the powers conferred, and obligations imposed, on it by law. The municipality is constituted by the inhabitants for the time being of the applicable district[126]. The executive body of the City is the Council[127]. In the case of a municipality which is a city, the Council consists of the mayor and councillors[128]. The Council may, on behalf, and in the name, of the municipality, exercise the powers conferred by law. It is obliged to discharge the obligations imposed by law upon the municipality or the Council[129].

Such powers and obligations include those arising under legislation made to ensure orderly town planning[130]. Pursuant to such legislation, in the case of the City, the City of Perth City Planning Scheme 1985 ("the Scheme") was promulgated[131]. Clause 34 of that Scheme forbids a person from commencing or carrying out any use of land (other than that exempted by relevant zoning[132]) "without first having applied for and obtained the town planning approval of the Council under the Scheme"[133].

In Walcott Street, North Perth, a suburb of the City, controlled by the Scheme, a site was found which a group of interested persons, including IW ("the appellant") wished to use as a "drop-in" centre for people living with HIV and AIDS and associated persons. The site adjoined a second-hand furniture shop on one side and a video and television repairer's shop on the other. It was in an area zoned by the Scheme for shopping use. To use the site for the purpose proposed the appellant, and those others involved, required the planning approval of the Council.

On 24 January 1990 an incorporated association known as People Living With AIDS (WA) Inc ("PLWA") submitted an application to the Council for such planning approval. The appellant was, at all material times, a member of PLWA. On 5 February 1990, the City Planner reported to the Town Planning Committee ("the Committee") that the proposal had the full support of the City's Planning Department. The Committee resolved to defer consideration of the application in order to procure the opinions of residents and owners of the nearby properties. Of the replies, 31 opposed the application and 14 supported it. The reasons given for the opposition included unexceptionable planning grounds (eg inappropriate zoning; insufficient parking; traffic generation; and likely future increase in use). But there were also other reasons of a different character (eg fear of the spread of AIDS and the possibility of contracting it; attraction of "undesirables" including homosexuals, intravenous drug users, ex-prisoners and child molesters; and consequential damaging effect on property values and business revenue).

The Committee, having considered these responses, resolved to recommend that the application be refused. That recommendation went to the Council. A motion to refuse was put but lost. As a result, the application was referred back to the Committee for further consideration. This course was apparently the result of the Town Clerk's action in drawing to

the Council's attention the possible legal problems which might arise if the application were refused other than for proper planning reasons. Specifically, the Town Clerk drew to the notice of the Council the then recent amendment to the *Equal Opportunity Act* 1984 (WA) ("the Act") to include impairment as a ground of unlawful discrimination. The councillors were informed that HIV/AIDS was "clearly a physical impairment within the terms of that legislation" and that the Equal Opportunity Tribunal established by the Act[134] ("the Tribunal") could "look behind" a decision and examine the motives of individual councillors[135].

PLWA, in consultation with the City Planner, subsequently modified its original proposal to overcome some of the objections relating to car spaces and access. The revised application was again supported by the City's Planning Department. The Committee resolved to refer it directly to the Council. It was considered there on 19 March 1990. A motion was put that the application be approved for a trial period of 12 months. After a lengthy debate, that motion was committed to a vote. It was defeated by 13 votes to 12.

On 21 March 1990 PLWA appealed to the Minister for Local Government against the Council's decision. Exercising his powers under the Act[136], on 6 April 1990 the Minister upheld the appeal and approved the application.

In evidence later taken before the Tribunal, it emerged that the centre had been operating for several years. It had done so "very successfully" in the opinion of one of the original opponents, Cr Donald Nairn[137]. A pharmacist who had been involved in the State's methadone programme, Cr Nairn, had expressed concern during the Council debate "about drug users dropping needles ... [and] used syringes"[138]. However, before the Tribunal, he acknowledged that there had been no such problems, that he was very pleased about the centre, that there had been no complaints and that the outcome was "wonderful". This happy result was not, however, because of the decision of the Council. It was solely because the Minister reversed that decision under the exceptional powers enjoyed by him.

One of the objectives of anti-discrimination legislation is to secure such outcomes by the avoidance of prejudiced decision-making based upon false or stereotyped assumptions about specified considerations (for example, race, sex or impairment). Such considerations might otherwise prejudice decisions which should be made on their merits, uninfluenced by forbidden grounds.

Proceedings under the Act

Notwithstanding the decision of the Minister, PLWA and its supporters (including the appellant) were upset by the way in which their application had been decided by the Council. They took the view that the narrow vote against it had been influenced by the kind of unlawful discrimination which the Act was designed to prevent and redress. On 14 August 1990, PLWA made a complaint to the Commissioner for Equal Opportunity, established under the Act[139]. That complaint was joined by the complaint of three individual members, one of whom was the appellant. The proceedings named the City and the 13 individual councillors who had voted against the application as the respondents. This complaint was referred by the Commissioner to the Tribunal[140].

Subsequently, PLWA was deleted as a complainant. Evidence before the Tribunal having concluded, the respondents sought a ruling from the Tribunal that there was no case to answer

and that the complaints should be dismissed[141]. A ruling was given refusing that application[142]. The respondents appealed to the Supreme Court of Western Australia. That Court dismissed the appeal in October 1992[143]. The hearing then resumed before the Tribunal. Further complications followed the death of one of the parties in the appellant's camp, always a risk in the case of litigants with this particular impairment. The record was amended and the submissions concluded.

On 21 July 1993, the Tribunal published its reasons for the orders which it then made. It found that the complaints of unlawful discrimination against the City were substantiated. It ordered the City to pay each of the individual complainants small sums of money, being $2,000 in the case of the appellant[144]. The Tribunal found no unlawful discrimination against the majority of the councillors named as respondents to the proceedings. But it found as against six named councillors (Cr David Nairn, Cr Donald Nairn, Cr Peter Nattrass, Cr Salvatore Salpietro, Cr Vincenzo Scurria and Cr Victor Vlahos) that the complaints were established. It found that the complainants were entitled to recover $4,000 damages against those named respondents. Its order provided for the apportionment of that sum amongst the complainants[145] and as between the individual respondents[146]. In respect of the respondents so named, save for Cr Nattrass, the Tribunal found that each had advertently "caused" or "aided" the City to do the unlawful discriminatory act, so that each was personally liable under s 160 of the Act. In the case of Cr Nattrass, who had spoken powerfully at the critical meeting against the application, but departed prior to the vote, it was found that he had advertently "aided" the City to commit the act. He was found liable under the same section.

The City and the named respondents appealed to the Supreme Court of Western Australia. Pursuant to the Act[147], such an appeal was limited to "a question of law".

The appeal was heard by Murray J. He dismissed it[148]. The respondents then appealed to the Full Court of the Supreme Court of Western Australia. Their appeal was heard by a Court comprising Ipp, Wallwork and Scott JJ[149]. That Court unanimously upheld the appeal. It set aside the orders of the Tribunal. It ordered that the complaints of each of the complainants (including the appellant) be dismissed.

By special leave, the appellant, apparently the sole survivor of this litigation, now comes before this Court seeking to restore the order of the Tribunal. The sum of damages involved is small indeed, being only $4,000 in his case. But the principles are important.

The litigated issues

Some only of the many issues which were litigated below remain alive. Others have either fallen by the wayside or, although included in the record, have not been pressed. Certain issues arise in the notice of appeal. Others arise out of an amended notice of contention by which the respondents sought to uphold the orders of the Full Court upon grounds which the Full Court rejected. The resulting issues are:

1. *The corporate liability issue*: Whether the Tribunal erred in its approach to the determination that the City had discriminated in an unlawful way by having regard to the conduct of the five named councillors in voting as they did? Or whether it was necessary to show that a majority of the Councillors (or at least a majority of the majority voting against

the proposal) were affected by an unlawful ground, in order that unlawful discrimination on their part could be attributed to the City?

2. *The comparison issue*: Whether the majority of the Full Court[150] erred in holding that the comparison required by the Act[151] obliged the Tribunal only to consider the way in which the respondents would have treated persons not impaired (ie by HIV or AIDS) but exhibiting characteristics[152] similar to those ascribed to the complainants? Or whether the statutory provisions required regard to be had to the characteristics which the councillors had ascribed to the applicants?

3. *The services issue*: Whether the refusal to approve the change of use for the premises was a refusal of a "service" and so forbidden by the Act[153]? Or whether, in law, it was not open to the Tribunal to so hold?

4. *The entitlement issue*: Whether, given that the only body which had actually applied to the Council for the provision of the refused "services" was PLWA (and not the appellant) there was any relevant refusal of a service to the appellant so as to render him a "person aggrieved" and the respondents liable for unlawful discrimination against him (as distinct from PLWA)?

5. *The councillors' issue*: Whether, having regard to the terms of an exempting provision of the *Local Government Act* ("LGA")[154] the individual councillors could not be personally liable in the absence of proved "wilful or intentional misconduct or ... negligence" and whether this statutory exemption applied to relieve the individual respondents of the liability found against them by the Tribunal?

Common ground

To help isolate the issues in the appeal and to put the questions for decision in context, it is useful to note certain matters which were not in issue:

1. The appeal from the decision of the Tribunal being limited to questions of law[155], it is impermissible to determine or re-determine questions of fact or to substitute a view of the facts for that reached by the Tribunal. A possible reason for withholding the facility of a general appeal from bodies such as the Tribunal to a court is a Parliamentary conclusion that a specialist body, constituted as the Tribunal is, will be more likely to be knowledgeable about and sympathetic to the objectives of legislation such as the Act than courts have proved to be. The giving of meaning to common words of everyday use (for example "service") does not ordinarily raise a question of law[156]. Appeals so confined are severely constrained by established legal doctrine[157].

2. The purpose of anti-discrimination legislation, such as the Act, is to ensure that, within the areas prescribed by Parliament, equals are treated equally and human rights are not violated by reference to inappropriate or irrelevant distinctions[158]. Especially where important human rights are concerned, protective and remedial legislation should not be construed narrowly lest courts become the undoers and destroyers of the benefits and remedies provided by such legislation[159]. Courts will not unduly stretch the language of such legislation[160]. But they will be very slow to find that the effect of something which is discriminatory falls outside the ambit of the legislation, given its purpose[161]. This is especially so where a complainant, who can establish unequal treatment, falls within the category of persons for whom anti-discrimination legislation has apparently been enacted[162]. It is legitimate in

giving effect to such legislation, to keep in mind its broad purposes and, to the full extent that the text permits, to ensure that the Act achieves its objectives and is not held to have misfired[163]. To the extent that, in legislation such as the Act, courts adopt narrow or pernickety approaches, they will force parliaments into expressing their purposes in language of even more detail and complexity. This will increase the burden and costs of litigation. It will obscure the broad objectives of such statutes and frustrate their achievement.

3. By statute in Western Australia, where an ambiguity is found, an Act is to be accorded a construction which will promote the underlying purpose or objective of the Act[164]. The fundamental purpose and objective of the Act in question here is not punitive. It is designed to educate the community about the irrelevance and potential injustice of stereotyped distinctions. The procedures required of the Tribunal[165] and the range of remedies open to it[166] indicate the non-penal character of the legislation, its educative function and compensatory and ameliorative objectives.

4. Against this background, it is unsurprising that the weight of authority supports the proposition that it is unnecessary for a complainant to show that the alleged discriminator intended to discriminate or set out with that motivation and purpose[167]. Some doubts have been expressed concerning this opinion[168]. Certainly, where the alleged discriminator is shown to have been actuated by a deliberate discriminatory purpose, that fact, if proved, will make the breach of the statute easier to establish. But much discrimination occurs unconsciously, thoughtlessly or ignorantly. It would subvert the achievement of the purposes of the Act if it were necessary for a complainant to establish that the alleged discriminator intended, or had the motive, to discriminate[169]. All that need be shown is that the alleged discriminator has acted "on the ground of"[170], relevantly, impairment. That involves an objective characterisation of the discriminator's "ground" for its conduct, for which subjective intention may be relevant but is not decisive.

5. The liability of the City gave rise to some debate. No contest was raised that the City, being a municipality within the LGA[171], was a body corporate and a "person" within the proscription established by the Act[172]. However, the respondents drew attention to the assumptions that had been made throughout that the acts of the Council were the acts of the City. They pointed to the fact that the Scheme assigned the approval in question to the Council as the statutory donee of power. As no point was raised about this suggested distinction in the Tribunal, where it might have been met or cured by amendment, it was common ground that it could not be raised in the appeal. In any case, the City, being an inanimate corporation, is required to act by its Council and officers who have statutory powers for that purpose. The differentiation raised can be ignored with only a passing tribute to the ingenuity that produced it.

6. It was common ground that the personal complainants (including the appellant) were at all material times HIV positive and members of PLWA. Similarly, that the medical status of being HIV positive or having AIDS constituted an "impairment" within the meaning of the Act[173]. Likewise, the Council was the authority responsible, under the relevant legislation[174], to enforce the applicable town planning scheme and to give the approval sought in this case from the City. The Tribunal acknowledged that it had no legal competence to review any decision of the Council (and thus the City) on town planning matters. The limit of its competency under the Act was the determination of complaints of unlawful discrimination[175].

7. Various questions arose at earlier stages which have not troubled this Court. For example, it was disputed that a further appeal lay within the Supreme Court to the Full Court. This point was decided in favour of the respondents[176]; it will be assumed correctly. Similarly, although in this Court the respondents, by their notice of contention, contested the liability of Cr Nattrass (who, it will be remembered, did not vote on the application at the critical meeting), this contention was abandoned at the hearing. One argument of potential importance which was raised before the Tribunal did not survive, as such, into the appellate process. This was the question whether, upon its true construction, the Act was intended to apply at all to the quasi-legislative functions of a body such as the Council, elected to be the executive body of the City[177]. For the purpose of the appeal, it has been assumed that the Act does so apply. In a case where so much else was contested, I am prepared to proceed on this footing in the comfortable belief that had there been anything at all in the point, the respondents would surely have persisted with it.

The relevant legislation

In the definition section of the Act, two definitions should be observed. They appear in s 4(1). The definition of "services" is set out in the reasons of Brennan CJ and McHugh J. The same sub-section contains a definition of "impairment". It reads:

"In this Act, unless the contrary intention appears -

'impairment' in relation to a person, means one or more of the following conditions-

(a) any defect or disturbance in the normal structure or functioning of a person's body;

(b) any defect or disturbance in the normal structure or functioning of a person's brain; or

(c) any illness or condition which impairs a person's thought processes, perception of reality, emotions or judgment or which results in disturbed behaviour,

whether arising from a condition subsisting at birth or from an illness or injury and includes an impairment which presently exists or existed in the

past but has now ceased to exist ... "

The Part of the Act dealing with "Discrimination on the Ground of Impairment" was inserted when Part IVA was added to the Act in 1988. That Part contained ss 66A and 66K. The relevant parts of those sections are set out in the reasons of other members of the Court. I will not repeat them.

The power to provide, by regulation, exceptions for infectious diseases should be noted[178]. However, at the relevant time no such regulations had been made.

The corporate liability issue

The first issue arises out of the corporate character of the City. It involves the determination of what constitutes the reasons or grounds of the action of the City, bearing in mind that the refusal of services which is made unlawful by the Act[179] is a refusal "on the ground of the other person's impairment". Given that, for the purposes of the proceedings, it is accepted that

the City could act only through the Council and that this body comprised 26 individuals, each with his or her own grounds for action, the question is posed: How is the "ground" of the refusal of the Council to provide the alleged "services" to be determined? For the purpose of deciding this issue, the other arguments of the respondents are assumed to be decided in favour of the appellant.

The Tribunal considered that this question was to be answered by reference to the votes of the five councillors who, it found, had cast their vote against the PLWA application on grounds which discriminated on the basis of impairment. The Tribunal decided that the votes of these councillors were "causative in terms of the decision of the Council (and hence the City of Perth, whose executive decision-making body the Council was), in that but for them that decision would not have been made"[180]. This "but for" test was accepted at the first level of appeal[181]. The Judge rejected the submission that it was necessary to show that a majority of the Council were affected by an unlawful ground in order to ascribe that ground to the Council (and to the City). He concluded that, having regard to the size of the majority which determined the Council's (and thus the City's) refusal, it would have been sufficient if the vote of one councillor had been "grounded in the consideration of the impairment of the aggrieved person"[182]. The finding that five councillors voted against the application because of "the AIDS factor" was sufficient to establish the "ground" of the Council's (and the City's) refusal.

In the Full Court, Ipp J[183] and Wallwork J[184] disagreed. Ipp J concluded that "only a state of mind possessed, collectively, by a majority of councillors voting can be attributed to the Council, and hence the City"[185]. Wallwork J took a slightly different view[186]:

"As it was not established that the application was refused by a majority of the 13 persons who made the relevant decision on the ground of impairment all of the appeals must be allowed."

Scott J took a different view again. In his opinion[187]:

"the true ground for decision by the collegiate body (the City of Perth and the Perth City Council) cannot properly be ascertained ...

[The complainants] have been unable to identify the reasons for decision by the [City]."

Four views therefore compete for acceptance. First, that it is enough to show that "but for" the votes of the five councillors, affected by the unlawful consideration, the application would have been granted and discrimination avoided. Secondly, that the "ground" of the Council's refusal lies in the state of mind of the majority of the councillors. Thirdly, that it lies in the mind of the majority of the majority refusing the application (ie 7 of the 13 persons who voted against it and not 5). Fourthly, that it is unascertainable or, at least, unascertained.

Bearing in mind the purposes of the Act, the answer to this puzzle is to be found in the terms of s 5. At the relevant time[188], s 5 of the Act provided:

"A reference in Part II, III, IV or IVA to the doing of an act by reason of a particular matter includes a reference to the doing of an act by reason of 2 or more matters that include the particular matter, whether or not the particular matter is the dominant or substantial reason for the doing of the act."

Part IVA is the Part dealing with "Discrimination on the Ground of Impairment". A minor problem arises because the key provisions in that Part describing discrimination (s 66A) and rendering it unlawful in the provision of, or refusal to provide, services (s 66K) are both expressed in terms of discrimination "on the ground of" impairment, not "by reason" thereof. The respondents made much of this difference, suggesting that it caused s 5 to miscarry in the case of impairment. In support of this argument, reference was made to the subsequent amendment of the section. However, the argument is without substance. There is no work for s 5 to do in Part IVA of the Act unless it is to attach its terms to the ground of impairment, relevantly in ss 66A and 66K. It should not be assumed that Parliament took the trouble of amending s 5 to apply its terms to Part IVA with no relevant purpose. That purpose is plain enough. It involves a recognition of the fact that, typically, human motivation is complex. Discriminatory conduct can rarely be ascribed to a single "reason" or "ground". Although elsewhere in the Act the word "reason" is used, the reference to that word in the context of Part IVA is clearly designed to achieve the same object. The *Macquarie Dictionary* gives as its primary definition of "reason" a "ground or cause, as for a belief, action, fact, event, etc". It would defeat the operation of s 5 in its application to Part IVA if any other approach were taken.

Once this conclusion is reached, it is clear that, by s 5, Parliament provided that, so long as an unlawful ground (relevantly impairment) is one of the reasons for the conduct of the alleged discriminator (even if not the dominant or substantial reason) that is enough. The object of the Act is to exclude the unlawful and discriminatory reasons from the relevant conduct. This is because such reasons can infect that conduct with prejudice and irrelevant or irrational considerations which the Act is designed to prevent. Because persons, faced with allegations of discrimination, genuinely or otherwise, assert multiple and complex reasons - and because affirmative proof of an unlawful reason is often difficult - the Act has simplified the task for the decision-maker. It is enough that it be shown that the doing of the act was "by reason" or "on the ground" of the particular matter in the sense that the unlawful consideration was included in the alleged discriminator's reasons or grounds. It must be a real "reason" or "ground". It is not enough to show that it was a trivial or insubstantial one. But once it is shown that the unlawful consideration truly played a causative part in the decision of the alleged discriminator, that is sufficient to attract a remedy under the Act.

This approach is consistent with that adopted, in respect of similar language, by the House of Lords. In *James v Eastleigh Borough Council*[189] their Lordships were considering the phrase "on the grounds of sex". Applying a test earlier stated in a unanimous opinion of the House of Lords[190] it was concluded that the test for the establishment of the relevant discrimination was "not subjective, but objective"[191]. It was whether the complainant would have received the same treatment "but for" the prohibited ground. Whatever may have been the intention or motive of the alleged discriminator (a matter which might be relevant so far as remedies were concerned[192]), such subjective considerations were "not a necessary condition of liability" because it was "perfectly possible to envisage cases where the defendant had no such motive, and yet did in fact discriminate on the ground [complained of]"[193]. The application of this "but for" test was reaffirmed in *James*[194]. It has also been approved in this Court[195]. In my view it is the correct test. In the present case it must be applied keeping s 5 of the Act in mind. It is not necessary for the claimant to show that the unlawful reason (or ground) was the dominant or substantial reason (or ground) for the doing of the act. It is enough that it had a real causative effect in the sense that but for its presence the act complained of would not have occurred.

An added complication arises in the present case because of the fact that the alleged discriminator was not a natural person but a local government authority. How might the "reason" or "ground" of that body be ascertained for the purposes of the Act? As has been stated, it was not disputed that a corporation, such as the City, might be a "person" capable of discrimination within ss 66A and 66K of theAct. Nor was it ultimately disputed that the "reason" or "ground" of the relevant conduct of the City was to be ascertained by examining the conduct of the members of the Council. The suggestion that a body corporate such as the City fell outside the language of the Act or that its reasons or grounds for action were incapable of being ascertained must be rejected[196]. The express inclusion in the definition of "services" of "services of the kind provided by ... a local government body" makes it plain that Parliament contemplated that such a body might perform an act of unlawful discrimination. The only way that a "local government body", as distinct from its employees and agents as individuals, could do so, would be by acting through its lawfully constituted governing body, the Council, or through its officers. Because councils comprise elected individuals acting upon multiple grounds and for complex reasons, Parliament should not have ascribed to it either the erection of impossible barriers for the ascertainment of the "grounds" or "reasons" or the completely unrealistic insistence that the corporate body (or a majority of its members) should have one single ground or reason. I agree with the comment of Ipp J, when dealing with the meaning of "services", when he said[197]:

"Town planning approvals and licences have historically been means whereby persons and institutions holding power have frequently discriminated against minority groups. It would be strange indeed if the legislation was not intended to apply to grants of this kind."

Equally strange would be the adoption of an approach to the ascertainment of the "reason" or "ground" of a local government body which failed to take into account the way in which such bodies ordinarily operate. Most strange of all would be an insistence on establishing the presence of an impermissible "ground" or "reason" in the individual motivation of a majority of the councillors (or even a majority of the majority), when legal authority has repeatedly insisted that subjective motivation is not the test and when, by s 5, Parliament has provided that proof, amongst the many potential "reasons", of the presence of the unlawful consideration is enough to attract the application of the Act.

Whilst it is doubtless helpful to seek analogies for statutory interpretation in other areas of the law, there are dangers in doing so. A great deal of attention was paid below to the analogy thought to arise from the ascertainment of whether directors of a company had voted to issue shares, in part, for an impermissible purpose. In such a case, this Court has held that an allotment would be invalid if the impermissible purpose "was causative in the sense that, but for its presence, 'the power would not have been exercised'"[198]. The tests stated in that context are concerned with the principles governing the validity of the act or decision in question once it is found that the persons acted as they did for two or more reasons. Such cases do not help in determining, for the purposes of the present Act, whether the reasons of particular councillors may be attributed to the City, a separate legal person.

That attribution is to be discovered in a way which advances the purposes of the Act. Those purposes could only be achieved, in the case of the City, acting through the vote of the members of its Council, by ensuring that no unlawful "ground" caused the doing by the City of the act complained of[199]. Where, as in this case, the discrimination alleged was not only one of the reasons for the act of the Council (and hence the City) but was also critical to the determination which decided whether the act would be done or not, the discriminatory

conduct on the part of the members of the Council may be attributed to the Council itself. This is not because of a doctrine of company law or administrative law. It is because no other interpretation would achieve the objectives of the Act that the relevant conduct (in this case of the local government body) should be free from unlawful discrimination and that proof that the unlawful ground for the conduct was "the dominant or substantial reason" is not required[200].

I would therefore reject the arguments that it was necessary to show that the majority of councillors or, alternatively, a majority of the majority acted on the unlawful ground. The Full Court erred in its approach on this point. It was led into error by its use of inapplicable analogies instead of concentrating on securing the objects of this particular Act as expressed in its language.

The comparison issue

The respondents also succeeded in the Full Court on the construction of s 66A of the Act favoured by two of the Judges[201]. Section 66A requires a comparison to be made between the way in which the discriminator treated the aggrieved person and the way in which the discriminator "treats or would treat" another person. In issue are the characteristics which are to be attributed to the other person for the purposes of the comparison.

Stated generally, the section requires a comparison to be made between the treatment of an impaired person (on the one hand) and the treatment of an unimpaired person in like circumstances (on the other). Before the Full Court the respondents succeeded in their submission that the Tribunal had erred in law in construing s 66A(1). It was held that the Tribunal had done so by basing its decision on imputed characteristics attributed to the impaired person, whereas what was required was a comparison based solely on impairment itself. The two Judges who dealt with this point considered that the language and structure of the sub-section, together with authority dealing with analogous provisions[202], required a different comparator to that used by the Tribunal and affirmed by the primary Judge. According to their view, the respondents did not discriminate against people with an impairment if the reason for the differential treatment was a characteristic not unique to people with such an impairment and the respondents would have treated all persons with such a characteristic uniformly. All that was forbidden by the Act was discrimination by reference to the impairment.

There is no doubt that this view of the sub-section draws a measure of support from the terms in which the provision is expressed. The closing words of the sub-section direct attention to the way in which the alleged discriminator "treats or would treat a person who does not have such an impairment". This is the "impairment" which the aggrieved person claims is the ground of the discrimination. No reference is made in the description of the comparator to a characteristic appertaining generally to[203], or generally imputed to[204], persons having the same impairment. It would have been simple for Parliament to have defined the comparator in terms both of the impairment and the characteristics generally appertaining or imputed to impaired persons. But it did not do so. The word "impairment" is defined in s 4(1) of the Act to mean physiological conditions. The definition does not incorporate the kinds of characteristics mentioned in s 66A(1) of the Act. Furthermore, by drawing a distinction between the impairment itself[205] and those "characteristics", it can be argued that Parliament was conscious of the differentiation and deliberately provided for it.

This view of the section was not favoured in the Tribunal[206] or by the primary Judge.[207] The construction to be given to it is not unarguably clear. However, a number of considerations support the contrary construction which the appellant urged:

1. To achieve the apparent objects of the section, like must be compared with like. In the words of the President of the Human Rights and Equal Opportunity Commission, Sir Ronald Wilson[208] :

"It would fatally frustrate the purposes of the Act if the matters which it expressly identifies as constituting unacceptable bases for differential treatment ... could be seized upon as rendering the overall circumstances materially different, with the result that the treatment could never be discriminatory within the meaning of the Act."

Although these words were expressed in the context of discrimination on the ground of marital status, they apply to other forbidden grounds, including impairment. The section acknowledges what ordinary experience teaches. The source of discrimination is as often a characteristic attributed, or imputed, to persons as the ground of discrimination itself. Except perhaps in cases where the link between the characteristic and the impairment is unique to a particular group of people with the impairment, the approach favoured by the Full Court would tend to defeat the achievement of the purpose of the Act. This conclusion obliges a court to consider whether an alternative construction is reasonably available.

2. When s 66A(1) is examined, its structure suggests that the comparison is between a person with the impairment (in the sense of the physical condition and the characteristics or requirements that go with it) and a person with a like combination of physical conditions, characteristics and requirements. The phrase "ground of impairment" appears in the opening words of the sub-section. It is not difficult to see the succeeding paragraphs ((a) to (d)) as constituting a definition or description of the "impairment" being referred to. When, in the closing words of the sub-section the comparator is described as a person "who does not have *such* an impairment", the word "such" invokes the "ground of impairment" referred to in the opening words. That "ground of impairment" therefore incorporates not only the physical impairment mentioned in par (a) but also the "characteristic" referred to in pars (b) and (c) and the "requirement" mentioned in par (d). Read in this way, the word "such" may be viewed as a shorthand formula to import each of the paragraphs into the notion of "impairment" and thus to enlarge the denotation of that word in its primary sense, which would otherwise constitute only one of the paragraphs (par (a)).

3. It is true that the word "impairment" is defined in s 4(1) and appears in juxtaposition to the "characteristics" and a "requirement" stated in the paragraphs of s 66A(1), the definition stated in s 4(1) is expressed to be "unless the contrary intention appears". The definition has work to do in par (a). But the context suggests that it cannot control the word where it appears in the opening sentence of the sub-section or at its close.

4. A second basis (apart from the language and structure of s 66A(1)) which persuaded the Full Court that the City could have been justified in acting on the basis of a "characteristic", had it not been associated solely with a particular impairment, was the view taken of the facility in s 66U of the Act permitting an exemption in the case of identifiable infectious diseases which constitute a risk to public health[209]. However, far from supporting the construction preferred by the Full Court, the existence of s 66U indicates that, absent the exemption contemplated by the section, discrimination based on public health criteria which

apply to a person with an impairment is rendered unlawful. Otherwise, the facility of exemption would be unnecessary. The alleged discriminator could readily justify the discrimination as based not on the "physical" impairment but on a characteristic of the impairment which justified the discrimination. The present case is a good illustration of why the imputed characteristic must be taken into account in conceiving the comparator. As the Tribunal found, the respondents allowed their actions to be influenced by prejudicial stereotyping of the very kind to which s 66A(1) is directed. The section should not be read in a way which could destroy its effectiveness.

5. A third basis upon which the Full Court supported its decision was by reference to the reasoning of the New South Wales Court of Appeal in *Boehringer Ingelheim Pty Ltd v Reddrop*[210]. That decision has been subjected to academic commentary and criticism[211]. But in the Court of Appeal, it has now been made clear that *Reddrop* did not turn upon the general characteristics of a person based on an unlawful ground (eg that married women are prone to disclose confidences to their husbands) but upon a particular characteristic which was unique to the complainant in that case (viz that her husband was employed by a competitor of the alleged discriminator)[212].

I accept that minds might differ upon the proper approach to the construction of s 66A(1) of the Act. However, my own view is that no error of law was shown in the approach either of the Tribunal or of the primary Judge. To hold otherwise is to accept that the Act on the one hand acknowledges the way in which people discriminate undesirably on the ground of stereotyped characteristics whilst withholding a remedy where much discrimination is shown. Because that cannot have been the intention of Parliament, it is not the construction of s 66A(1) which I would favour.

The two bases upon which the Full Court overturned the decision of the Tribunal and of the primary Judge therefore reveal error. This conclusion would ordinarily require that the decision of the Tribunal be restored. However, the respondents sought to uphold their success in the Full Court upon three grounds raised in their notice of contention.

The services issue

By the Act it is unlawful for a person who "provides goods or services, or makes facilities available" to discriminate against another on the ground of the other's impairment "by refusing to provide the other person with those goods or services or to make those facilities available to the other person"[213]. The question is whether anything the appellants did amounted to a refusal of "services" or "facilities".

The *Macquarie Dictionary* defines "service" as meaning "an act of helpful activity"; "the supplying ... of any ... activities, etc., required or demanded"; "the providing ... of some accommodation required by the public, as messengers, telegraphs, telephones, or conveyance"; "the organised system of apparatus, appliances, employees, etc., for supplying some accommodation required by the public"; "the supplying ... of water, gas, or the like to the public"; and "the performance of any duties or work for another". The *Oxford English Dictionary* is to like effect: "work done to meet some general need"; "the action of serving, helping or benefiting"; "conduct tending to the welfare or advantage of another". The concept of "services" is therefore an extremely wide one. It is by no means confined to the provision of tangible things. Its meaning is to be derived from the context. In a complaint of discrimination in relation to the provision or refusal of "services", this Court has already

emphasised the importance of identifying the relevant "services" in sufficiently concrete terms to enable the decision-maker to determine whether or not there has been the unlawful refusal to provide the "services" as alleged[214]. Yet characterising the "service" in question can itself involve the acceptance of a definition which will effectively determine the complaint of discrimination according to whether a wide or narrow focus is adopted[215]. The word should be given its meaning in the context, and for the purposes, of the legislation in question.

The Tribunal referred to a number of earlier Australian decisions on the meaning of "services" in anti-discrimination legislation[216]. In the context of governmental activities, it drew a distinction between doing of things helpful to, or needed by, the public (which would be a "service") and the gathering of information to assist in the formulation of government policy[217] (which would not). After a review of English cases[218], the Tribunal concluded that "administering a town planning scheme" and "implementing or enforcing measures directed to the amenity of the area" involved the provision of "services" by the City to its residents. Specifically, the exercise of a discretion to give planning approval to allow the use of premises for a particular purpose was part of the City's planning services and within theAct[219].

The primary Judge agreed. He saw nothing in the facts or in the statutory text to warrant a narrow view of "services of the kind provided by government, including local government"[220]. He regarded it as "clear that the provision of an approval of a town planning application ... would be to provide a service"[221].

The same view was taken by the Full Court. Ipp J examined closely the powers of the City to approve a change in use[222]. He made the remark already cited about the way in which the powers to give or withhold town planning approvals and licenses had historically been abused by their exercise on discriminatory grounds. He rejected the respondents' arguments. Scott J had "little difficulty" in reaching the same conclusion[223]. The provision of a permit by the City, necessary for the change of use requested, constituted the provision of "services" in the sense used in the Act. Wallwork J, did not deal with the point.

Before this Court, the respondents contested all of these conclusions. Because, under the Act, appeals from the Tribunal lie only on a question of law[224], the respondents had to say that the view of the word "services" adopted below was not simply unduly broad. It was not open. This was not a matter upon which minds might reasonably differ, even perversely in the view of another[225]. It was a matter upon which the "only reasonable view"[226]was that "services", in the context, had a meaning different from that ascribed to it at every level of decision-making before the case reached this Court.

In support of their arguments, the respondents advanced a number of propositions:

1. The making of a decision by a donee of statutory power would not ordinarily be thought of as the provision of a "service". Exercising that power to grant or refuse approval to develop a site involved no more than the discharge of a statutory discretion by reference to lawful considerations appropriate to the conferral of the power. A decision to grant approval would render the proposed conduct lawful where otherwise it would not be. Such a decision was not aptly described as an "act of helpful activity". If refused (as lawfully it might be) it would be an extremely unhelpful activity. If, contrary to the primary submission, the exercise of the power was to be classified as the provision of a "service", the only "service" required by law

was the making of a decision. There was no requirement that the decision itself should be helpful to the applicant. On the contrary, in particular cases, the law or the circumstances might permit, or even require, the opposite.

2. This narrower view of "services" gained some support from the context in which the reference to "services of the kind provided by ... a local government body" appeared in the definition in s 4(1) of theAct. The kinds of "services" there referred to involved activities typically helpful to the recipients - banking, insurance, entertainment, transport and professional or trade services. Local government bodies also provide such services, eg libraries, recreational and parking facilities, gas, water, transport and the like. From the context these were the kind of "services" of a "local government body" to which theAct was intended to apply; not the quasi-legislative, evaluative decision-making required by law of the council of the local government body, performing its functions as such.

3. The context within which s 66K appears in the Act throws some light on the meaning of "services" in that section. Thus, where Parliament intended that an evaluative decision, of the kind performed by the Council of a local government body, should fall within the prohibition, it provided in clear terms, as in s 66G. The respondents submitted that the exceptions afforded by the Act to the application ofPart IVA[227] were not apt to apply to a Council decision to grant or refuse development approval. Nor was the making of such a decision easily encompassed by the notion of *providing* the service. It was argued that the word "provides" reinforced the inferences to be drawn as to the nature of the "services" in the context of the definition.

4. Whilst generalities about the evils of discrimination on unlawful grounds by local government bodies might be accepted, provisions of the Act rendering conduct unlawful should not be treated as open-ended. The statutory language should not be stretched to render unlawful that which was not clearly made so by the Act.

I acknowledge the force of these arguments. I do not pretend that, in this or in other respects, the meaning of the Act is unarguably clear. However, alike with the Tribunal, the primary Judge and the Full Court below, I am of the view that the better construction of the word "services", read in its context, is that it includes the provision by a local government body, such as the Council, of a planning decision to alter the permissible use of premises, without which such use would be unlawful. My reasons are as follows:

1. The attempt to confine the "services" provided by a local government body to services such as library, recreational, or parking services, or the provision of gas, water, etc is unduly to narrow the "kind" of services which "a local government body" typically affords. Such narrowing is not required either by the juxtaposition of "services" with "goods" and "facilities" or by the use of the verb "provides". TheAct is designed to have a wide application. Repeatedly it has been emphasised that, to permit the achievement of its objectives, the Act should be given a broad and purposive construction[228]. A narrow construction of the word "services" would frustrate the intended operation of the Act which is not penal but educative, compensatory and ameliorative in character.

2. The specific inclusion within the definition of "services" of those "provided by ... a local government body" indicates a purpose to extend the application of the Act to a broad range of activities of such bodies. It would be unreasonable to expect Parliament to specify, with particularity, the whole gamut of "services" which such bodies afford. Hence the choice of

the broad expression "services of the kind provided". The only common link between the "services" specified in the definition is that they are all activities helpful to the persons using them. In the case of par (d) of the definition, it will often be the case that the advice provided by "members of any profession or trade" will, in the particular case, be adverse to the wishes and interests of the user of those services. This does not make them any less the provision of "services". Thus the mere fact that a decision of a local government body might sometimes be adverse to the user of its services is not determinative of the character of the activities as "services". All that the Act requires is that the "services" should not be refused "on the ground of the other person's impairment"[229].

3. The fact that governmental "services" are expressly included amongst those to which Parliament has extended the application of the Act sufficiently indicates the legislative purpose of providing protection against unlawful discrimination in the provision of services of that nature. It suggests recognition of the particular dangers of discrimination which might, in any case, invalidate the relevant governmental decisions because of the inclusion of a ground or reason irrelevant to the lawful exercise of the power. Case reports and common experience suggest that local government activities can be a means of discrimination precisely because of the way in which councillors (as in this case) reflect the stereotyping prejudices of the community by whom they are elected. It must be inferred from the express extension of the Act to "services of the kind provided by ... a local government body" that Parliament set its face against such discrimination. There are strong reasons of principle why a higher, and not a lesser, standard should be expected of such bodies in the performance of functions that may be characterised as the provision of governmental "services".

4. From the point of view of the user of the town planning services provided by the City (the local government body in question here) the "services" in question are the provision of the permits or licences to develop premises for a use different from that for which they have been zoned. It does no offence to the overall scheme of the Act to apply it to such a case. On the contrary, the opposite construction of the word "services" withdraws the beneficial application of the Act from an important area of a local government body's activities in which it is not at all surprising that the Act should apply. In short, given the express extension of the Act to activities of a local government body, it would be more surprising that the Act should not apply to the determination of a planning application than that it should.

5. Many cases, in Australia and in overseas jurisdictions, have expanded the notion of "services" to include a variety of governmental services. Some of these have been held to include the making of decisions under or pursuant to legislation[230]. A trilogy of English cases was referred to[231]. Unfortunately, the judicial opinions expressed in them reflect the differences which have now emerged in this Court. My own preference is for the approach of Lord Denning MR and Templeman LJ in *Savjani v Inland Revenue Commissioners*[232] and of Lord Scarman (Lord Brandon of Oakbrook concurring) in *R v Entry Clearance Officer; Ex parte Amin*[233]. Their Lordships were affected, as I am, by the clearly expressed intention of Parliament to apply the Act to the supply of services by government. In *Ex parte Amin,* Lord Scarman rejected the narrower construction of the words "provision of ... services" because of the context in which the phrase appears in the English Act and because of the purposes of that Act. A similarly broad meaning has been favoured for the words "service" or "services" in different contexts in Canadian[234], United States[235] and Indian[236] court decisions. This Court has a choice. Like the Tribunal, and the courts below, it should prefer the broad definition of "services". It can more safely do so because some services of the City are clearly within the statutory definition. The provision of permission to

change a planning use is capable of being a "service". It can undoubtedly be helpful and valuable to the recipients. A refusal to provide it, on a ground of unlawful discrimination, is plainly the kind of conduct which the Act was designed to discourage and redress. Just as governmental services have changed, by expansion and, in recent times, contraction[237], so it is undesirable to impose a narrow meaning on the word "services" used in this context. Unless the City's permission were granted, the consequent services and facilities of the City, the subject of town planning, would not be provided to the applicant. Such a result would flow from the refusal to make the service of planning permission available. If the refusal were "on the ground of" the applicant's impairment, that would be contrary to the Act.

6. In the case of doubt, a court limited to correcting errors of law should withhold relief grounded in nothing more than a narrower view of the concept of "services" than that which found favour before the Tribunal to which factual decisions are exclusively committed. If a refusal to approve the change of use was capable of constituting the refusal of a "service" no error of law would be shown[238]. It would be no more than a different view about the denotation of a word upon which, in particular contexts, opinions have already differed. In the present context a unanimous view has hitherto been expressed favourable to the appellant. Given the inherent scope for differences about the ambit of the Act and the limitation which it imposes upon appeals, a measure of restraint is proper before a contrary impression is converted into an appellate order correcting an error of law. The appellant did not at any time suggest that the Council of the City was his "servant" in making its decision. But he insisted that it should not be the servant of the prejudices of its members. The word "service" is wide enough to sustain the appellant's submission. On this point the Tribunal and the courts below were, all of them, correct. This Court should not adopt a narrower meaning.

I would reject the respondents' first contention.

The entitlement issue

The respondents' second contention was that, if the rejection by the City of the application made to it by PLWA was a refusal to provide services, it was only a refusal to provide services to PLWA, which was not impaired. Accordingly, there was no entitlement in the appellant to assert discrimination against himself on the ground of his impairment for there was no refusal to provide any "services" to him. The appellant was therefore not an "aggrieved person" within the terms of s 66A(1) of the Act.

It was common ground that the Act had been amended in 1992 in such a way as to remove this suggested difficulty for the future[239]. However, this appeal must be determined in accordance with theAct as it stood before that amendment. A number of associated problems which arose after PLWA ceased to be a party were noted in the Full Court[240]. They have not been pressed in this appeal.

This contention as to IW's entitlement also failed at all levels of the proceedings below. In the Tribunal it was pointed out that, as an incorporated association, PLWA could not physically occupy the premises nor suffer an "impairment" within the meaning of the Act. Only its members could do so. As, by its rules, all members of PLWA, including the appellant, were necessarily infected with HIV (and so suffered the relevant impairment), the discrimination against PLWA was (and was known to be) discrimination against its members including the appellant. The Tribunal paraphrased what was said by Stephen J in *Koowarta v Bjelke-Petersen*[241]:

"[I]t is not to the point that as a matter of form, what the Council withheld was approval of an application by the incorporated body of which the Complainants were members. And nor was it necessary for the Council to have known of the individual Complainants personally; it was enough that there was an awareness of the group of persons who were to benefit from the approval and that the Complainants were in fact members of that group"[242].

The primary Judge agreed with this approach. In the context of the Act, he had no doubt that a person such as the appellant was an "aggrieved person"[243]. By refusing to provide "services" to the inanimate association (PLWA), the City was knowingly refusing to provide those services to a person such as the appellant. The problems which might arise in other cases did not arise here because of the assimilation of the Association and persons such as the appellant[244]. In the Full Court, Ipp J agreed with the primary Judge. His Honour held that to adopt the narrow construction would make it impossible for discriminatory conduct to occur where there was a refusal to provide services to a corporate body which could not be itself "impaired"[245]. As this approach would subvert the intended operation of the Act, it should be rejected. Wallwork J did not deal with the point. Scott J favoured the construction urged by the respondents[246].

The resolution of this contention is not to be reached by an automatic application of the holding of this Court in *Koowarta*[247]. That case turned upon the legislation which was there in question. That legislation contained a special definition of the "second person", the subject of the relevant discrimination, sufficient to extend the scope of the Act to "any relative or associate"[248]. There was no equivalent to that statutory extension to avail the appellant in this case.

That said, some of the comments made in *Koowarta*[249] involve applications of a more general principle. Two points relevant to the present question may be discerned. First, the fact of corporate personality should not be applied to subvert the purpose of the legislation designed, as it is, to protect individuals against discrimination. Secondly, in applying rights-protective legislation, such as the Act, courts will look to the actual effect of the alleged discriminatory conduct rather than only to its formal legal impact. Expressing these principles in *Koowarta* in the context of the *Racial Discrimination Act*, Stephen J said[250]:

"While it is not certain that when he refused approval of the transfer the Minister knew of the existence of Mr Koowarta, he clearly knew that the property was to be occupied by Aborigines. That was the very ground for his refusal. ... It is not, I think, to the point that, as a matter of form, what the Minister withheld was approval of a transfer to the Aboriginal Land Fund Commission. The Minister's reasons for refusal disclose that he regarded approval as involving use of the property by Aborigines and refusal of approval as preventing that use."

Now apply the foregoing to the present circumstances. In the case of an incorporated association such as PLWA, acting on behalf of its members, all of whom were necessarily "impaired", it requires no surgery to treat the refusal to provide services to the association as a refusal to provide them to the members. Difficulties could certainly arise where there was not such an exact identity between the members and the corporate applicant. But those difficulties do not arise in this case. It was at all times clear that the application for planning approval was made by PLWA for the benefit of its members, including the appellant. The purpose of the provision of corporate personality to an association such as PLWA was, relevantly, the avoidance of the problems which might otherwise confront an unincorporated association in its dealings with outside entities[251]. Incorporation allowed such an

association to act in the interests of its members with whom it maintained a contractual relationship[252]. Its purpose was not to deny the application of rights-protective legislation to those members.

In any case, the respondents' submission rests upon the questionable assumption that qualification as an "aggrieved person" within the terms of s 66A(1) of the Act required demonstration of a unity of identity between the person suffering the relevant impairment and the person seeking the refused service. But the language of s 66K(1) does not require this. An "aggrieved person" under s 66K(1) of theAct is one who can demonstrate that he or she has been discriminated against on a relevant ground. When elaborated by s 66K(1), an "aggrieved person" is one who can show that the occasion for such discrimination was a refusal of "services". In these circumstances I agree with Ipp J that[253]:

"[A] person can refuse services to another even if the other person does not expressly ask that the services be provided. I would have thought it all too obvious that persons, who announce publicly that they will refuse to provide services to an identified group of impaired persons, would thereby be refusing to provide those services to the individual members of the group. That would be the case even though none of the individual members requested that the services be provided."

Section 66K(1) of the Act does not make unlawful a discriminatory refusal to provide a service to the person requesting that service. It makes unlawful a refusal to provide a service to a person in a discriminatory manner. It does not qualify that prohibition in any way by requiring that the discrimination be against the actual person who requested that the service be provided. To read such a requirement into the section would significantly narrow its operation. The Act should not be glossed.

Once the words of s 66K(1) of the Act are given their ordinary meaning, the fact that it was the corporation which actually requested the service is beside the point. The refusal of the service to the corporation was, in effect, necessarily a refusal of a service to its members, including the appellant. This is all that the Act requires a complainant to demonstrate. The appellant succeeded in doing so. He was thus an "aggrieved person" within s 66A(1) of the Act.

The construction of s 66K(1) of the Act which I favour is all the more persuasive when the practical effect of the contrary interpretation is considered. That interpretation necessarily implies that, wherever there was a refusal to provide services to a corporate body, based upon discriminatory attitudes against its members, all of whom suffer the relevant "impairment", discriminatory conduct forbidden by theAct could never be found. Such a result would seriously undermine the achievement of the purposes of the Act. It is unnecessary. It should be rejected.

The conclusion that the appellant is an "aggrieved person" within s 66A(1) is also in conformity with the ample construction given to that phrase in other rights-protective legislation. Similar formulae have long been employed in a wide variety of statutory contexts in many jurisdictions and elaborated by much decisional law. Such words are most commonly used to define a class of persons who will have the necessary standing to bring proceedings in identified circumstances. The meaning ascribed to the expression was formerly confined to describing a class of persons suffering a particular legal grievance[254].

However, a contrary intention might appear from the context[255]. Thus, it was said in *Sevenoaks Urban Council v Twynam*[256]:

"The problem with which we are concerned is not, what is the meaning of the expression "aggrieved" in any one of a dozen other statutes, but what is its meaning in this part of this statute?"

Particularly in relation to the growing body of legislation providing for the challenge by "persons aggrieved" to decisions by public authorities of wide public interest or potential community impact, courts have lately demonstrated an increasing willingness to adopt a broader view of the scope of such expressions. In the Privy Council in *Attorney-General of the Gambia v N'Jie*[257], Lord Denning observed:

"The words 'person aggrieved' are of wide import and should not be subjected to a restrictive interpretation. They do not include, of course, a mere busybody who is interfering in things which do not concern him; but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests."

Australian courts have followed this approach[258]. In recognition of the development of much legislation providing ample statutory rights to challenge decisions of public authorities and governmental agencies, the trend of recent case law in this country has been to give a broad operation to such provisions rather than to construe them as words of limitation[259]. A good illustration of this trend may be found in *Coles Myer Ltd v O'Brien*[260].

The term "[a] person who is aggrieved" was chosen to express the interest necessary to enliven the *Administrative Decisions (Judicial Review) Act* 1977 (Cth)[261]. It has often been pointed out in that context that those words "should not ... be given a narrow construction"[262]. The trend towards a broader approach to such provisions has also been remarked upon by the Australian Law Reform Commission[263]. The trend has not been confined to Australia. It is also evident in Canada[264], India[265], New Zealand[266] and the United States[267].

These developments help to confirm the approach which I favour holding that the appellant is an "aggrieved person" within the provisions of the Act in question here. Those provisions appear in legislation with the stated objective "to eliminate, so far as is possible, discrimination against persons on the ground of ... impairment in the areas of ... facilities and services"[268]. That objective would not be promoted by a narrow approach to the meaning of "aggrieved person" for which the respondents contend. Such a construction should be rejected.

The councillors' issue

Finally, the individual respondents argued, that they were not personally liable in respect of the unlawful discrimination found against them. They relied on the provisions of s 680 of the LGA which is set out in the reasons of Dawson and Gaudron JJ. They submitted that no "intentional misconduct or ... negligence" on their part was found. Nor did the facts, as determined by the Tribunal, support a conclusion that such aggravating features of their conduct were present. Still less, in the absence of specific findings, did the facts found require that conclusion as the only one available.

The state of the record on this point is unsatisfactory. It was conceded for the appellant that the points of defence before the Tribunal had raised the councillors' claim of immunity based on s 680. It was also conceded that the issue had been litigated before the Tribunal and "argued in some detail"[269]. Despite careful attention to so many other issues, the Tribunal appears to have overlooked this one. There is considerable discussion in the Tribunal's reasons concerning the liability of the individual respondents who were found to have voted against the application on the ground of the impairment of the members of PLWA. All but one of those respondents were found to be personally liable upon the ground that each of them had advertently "caused" or "aided" the City to do the unlawful discriminatory act. The remaining councillor (Cr Nattrass), who had spoken but not voted, was found to have "aided" the City to commit the act of unlawful discrimination. In this respect, the Tribunal relied upon s 160 of the Act. Although the application of that section was challenged below, it has not been contested in this Court. It will be assumed that it provides a basis for rendering each of the individual respondents liable under the Act for the unlawful discrimination found against them. Each was thus, on the face of things, open to the orders made for the payment of compensation.

That leaves the question whether such liability is excluded by the special provisions of s 680 of the LGA. The notice of appeal to the Supreme Court from the Tribunal raised the application of s 680[270]. The ground was addressed by the primary Judge[271]. He pointed out that no authority had been cited in support of the submission. For two reasons he held that the section did not apply to confer the immunity claimed. The first was that the actions of the members of the Council could not, within the terms of the LGA, be "an act done by the Council in the execution and performance of the powers and duties conferred upon it"[272]. This was so because no power or duty was conferred upon the Council to authorise the performance of an unlawful act on the part of a member of the Council. Secondly, his Honour held that the exemption provided by s 680 assumed the lawful execution and performance by the Council of its powers and duties. As found, the performance in question was affected by the unlawful consideration which determined the vote of the named councillors. The section could not, therefore, operate to exempt those councillors from their personal liability.

Although the point was carried forward in the appeal to the Full Court it was not decided there. The respondents were relieved of the orders made against them upon the reasons already examined.

The decision of the primary Judge was given after, but made no reference to, the decision of this Court in *Webster v Lampard*[273]. That case concerned another exempting provision in Western Australian legislation, namely the *Police Act* 1892 (WA), s 138 (h). That section provides that "[n]o action shall lie against any ... Officer of Police ... on account of any act, matter, or thing done ... in carrying the provisions of [the Police] Act into effect ... unless there is direct proof of corruption or malice"[274]. Summary judgment was given against a plaintiff who sued a police officer who had pleaded that, at the relevant time, he was "acting in good faith and without corruption or malice". This Court unanimously upheld the appeal against that summary order. It emphasised that the general onus of establishing a connection between the conduct complained of and the protected official duty rested (in the absence of special legislative provisions) upon the defendant invoking the defence[275]. The onus of establishing that the defendant's ostensible pursuit of public duty was actuated by a wrong or indirect motive rested upon the plaintiff asserting that contention[276]. The Court emphasised that it was inappropriate to deal with the issue in an abstract way. There had to be some

factual basis for the belief. Until the relevant dispute of fact (in that case the belief of the police officer) was resolved, the matter was not one appropriate for summary judgment[277].

In the course of its consideration of *Webster*, this Court referred to several authorities in which protective provisions, designed to exclude the liability of public officials, had been examined[278]. Reference was made to *G Scammell & Nephew Limited v Hurley*[279] where the English Court of Appeal upheld an appeal by councillors against a judgment that they had conspired to induce their Council to breach its statutory duty by discontinuing the supply of electricity for power and lighting to the plaintiff. The councillors relied on the provisions in the *Public Authorities Protection Act* 1893 (UK). In the Court of Appeal, Scrutton LJ said[280]:

"[W]hen a defendant appears to be acting as a member of a public body under statutory authority and pleads the Public Authorities Protection Act, the plaintiff can defeat that claim by proving on sufficient evidence that the defendant was not really intending to act in pursuance of the statutory authority, but was using his pretended authority for some improper motive, such as spite, or a purpose entirely outside statutory justification. When defendants are found purporting to execute a statute, the burden of proof in my opinion is on the plaintiffs to prove the existence of the dishonest motives above described and the absence of any honest desire to execute the statute, and such existence and absence should only be found on strong and cogent evidence."

The clear purpose of s 680 of the LGA is to afford a high measure of protection to a member of a council of a local government body. The section should not be given a narrow construction. Such members of councils are, and are intended to be, drawn from a wide cross-section of the community. Inevitably, they reflect the variety of opinions, attitudes and prejudices which exist in the community. If a narrow construction of s 680 of the LGA were upheld, it could inhibit the participation in the activities of the councils of local government bodies of many ordinary citizens who could not afford the risk that their conduct would render them personally liable, although they were attempting and purporting to discharge the performance of their duties of office.

According to the findings of the Tribunal in this case, those councillors who came from the ward in which the subject premises were situated, voted as they did because they conceived it to be their duty to reflect the wishes of the majority of the ratepayers, as they understood them to be. It is inevitable, in the case of elected office-holders, that they would often feel pressure to act in such a way. To construe s 680 so as to give protection only to the lawful execution and performance, or non-performance, of the duties of a council member would, in my opinion, unduly narrow its intended operation. For performance or non-performance which is lawful, the councillor would ordinarily need no protection. The utility of such a provision really arises only where the performance or non-performance has been affected by an erroneous or unlawful consideration. It must be assumed that the protection of the section was intended to apply to such a case.

The individual respondents complain that the findings made by the Tribunal about their conduct were not specifically addressed to the issue tendered by their defence based on s 680. Although the Tribunal made quite detailed findings about the motivations of individual council members, it did not turn its attention to whether they, or any of them, had been "guilty of wilful or intentional misconduct or of negligence". Whilst negligence might safely be ignored in the facts of this case, the wilfulness or intentional character of any

"misconduct" on the part of the individual council members in casting their vote as they did in an unlawful way (as I have found) was never the subject of a finding by the Tribunal. Yet it is the only body with the authority to make any relevant factual findings. Only if a court could hold that s 680 had no possible application or that the evidence permitted but one conclusion, could this apparent oversight of the Tribunal, in failing to address this issue, be cured on appeal.

The decision in *Webster* emphasises the importance of applying exempting provisions such as s 680 of the LGA only after the relevant factual findings are made. As they were not made in this case, although the issue was tendered for decision, an error of law has occurred in the Tribunal. It is one which was complained of to the Supreme Court. Because the primary Judge took a view of s 680 which was unduly narrow an error of law has occurred which the Full Court failed to address. This Court should now do so because it cannot confirm the order of dismissal entered by the Full Court. Neither can it make the necessary factual finding for itself. Nor can it uphold the immunity claimed upon the basis that only one factual finding was open.

Despite the further extension of this litigation, criticised by the Tribunal as "exceptionally long and unfortunate"[281], there is no alternative, in the opinions which I hold, but to return the proceedings to the Tribunal so that it can give such relief to the individual respondents on this point of their defence as is required by law. The power of the Supreme Court to return proceedings to the Tribunal in the circumstances is clearly provided for[282]. It should be exercised in this case.

Conclusion and orders

The appellant is entitled to succeed in the appeal in the case between him and the City of Perth. In those proceedings the appeal should be allowed with costs. The orders of the Full Court of the Supreme Court of Western Australia should be set aside. In lieu thereof, it should be ordered that the appeal to that Court be dismissed with costs. The order that the City pay the appellant the damages ordered by the Tribunal will thereby be restored.

In the proceedings between the appellant and the individual (second to seventh) respondents, the appeal should also be allowed. The orders of the Full Court of the Supreme Court of Western Australia should be set aside. In lieu thereof, it should be ordered that the appeal to that Court by the said respondents should be allowed. The judgment of Murray J should be set aside. In place of his Honour's orders, it should be ordered that the proceedings be returned to the Equal Opportunity Tribunal to determine, conformably with law, the defence of

those respondents based on s 680 of the LGA.

[1] See *Waters v Public Transport Corporation* [1991] HCA 49; (1991) 173 CLR 349 at 392-393.

[2] Unreported decision of 21 July 1993. A digest of the Tribunal's decision is published in [1993] EOC |P 92-510.

[3] Section 134 limited the appeal to "a question of law".

[4] *Perth City v DL* (1994) 88 LGERA 45.

[5] *Perth City v DL* (1996) 90 LGERA 178.

[6] (1996) 90 LGERA 178 at 190.

[7] (1996) 90 LGERA 178 at 199.

[8] (1996) 90 LGERA 178 at 207.

[9] (1996) 90 LGERA 178 at 223.

[10] Section 3(a).

[11] cf *Waters v Public Transport Corporation* [1991] HCA 49; (1991) 173 CLR 349 at 402-403.

[12] *West v AGC (Advances) Ltd* (1986) 5 NSWLR 610 at 631.

[13] *Coburn v Human Rights Commission* [1994] 3 NZLR 323 at 333.

[14] [1980] 2 FC 122 at 131-132.

[15] RSC 1952 c148 as amended by SC 1970-1972 c 63.

[16] SC 1976-1977 c 33.

[17] [1981] QB 458.

[18] [1981] QB 458 at 467.

[19] [1983] 2 AC 818.

[20] [1983] 2 AC 818 at 835.

[21] [1983] 2 AC 818 at 834.

[22] [1997] 2 WLR 824; [1997] 1 All ER 289.

[23] [1997] 2 WLR 824 at 840; [1997] 1 All ER 289 at 304.

[24] [1997] 2 WLR 824 at 840; [1997] 1 All ER 289 at 304.

[25] [1981] QB 458 at 466-467.

[26] [1990] HCA 1; (1990) 169 CLR 436 at 478.

[27] [1991] HCA 49; (1991) 173 CLR 349 at 409.

[28] [1993] FCA 91; (1993) 41 FCR 182; 113 ALR 39.

[29] *Hope v Bathurst City Council* [1980] HCA 16; (1980) 144 CLR 1 at 7-8.

[30] *Waters* [1991] HCA 49; (1991) 173 CLR 349 at 404-405.

[31] Clause 36(1) of the City of Perth City Planning Scheme.

[32] Emphasis added.

[33] Section 9(2). The Local Government Act was largely repealed and replaced by the *Local Government Act* 1995 (WA) with effect from 1 July 1996, but this has no bearing on the present appeal.

[34] See s 9(5) of the Local Government Act, s 7 of the *Town Planning and Development Act* 1928 (WA) and cl 8 of the Planning Scheme.

[35] Clause 34.

[36] In the case of an equal division of votes and, in the absence of a casting vote, the question was to be determined in the negative. See ss 173(8)(a), (aa) and (b).

[37] Section 160 of the Act provides: " A person who causes, instructs, induces, aids, or permits another person to do an act that is unlawful under this Act shall for the purposes of this Act be taken also to have done the act."

[38] The Tribunal ordered that the City of Perth and the six Councillors pay damages of $8,000 in total, apportioned as between the three individual complainants then surviving and as between the respondents. The appellant was to receive a total of $4,000; $2,000 from the City of Perth and $2,000 from the Councillors. No orders were considered appropriate and, thus, no order was made on the representative complaint.

[39] *Perth City v DL* (1994) 88 LGERA 45. Note that by s 134(1) of the Act, an appeal is limited to questions of law.

[40] *Perth City v DL* (1996) 90 LGERA 178.

[41] Section 17 of the *Equal Opportunity Amendment Act* 1992 (WA) which took effect on 8 January 1993.

[42] This issue arises on the respondents' Amended Notice of Contention.

[43] This issue also arises on the respondents' Amended Notice of Contention.

[44] This issue arises on the Notice of Appeal, it having been decided adversely to the appellant by Ipp and Scott JJ in the Full Court.

[45] This issue is also raised in the Notice of Appeal, it having been decided adversely to the appellant by all members of the Full Court.

[46] Section 680 relevantly provided: " In the execution and performance by a council of the powers and duties conferred upon it by this Act, a member ... is not personally liable in

respect of the execution or non-execution of the powers or the performance or non-performance of the duties, unless it is proved that he has been guilty of wilful or intentional misconduct or of negligence".

[47] This issue arises on the respondents' Amended Notice of Contention.

[48] *Waters v Public Transport Corporation* [1991] HCA 49; (1991) 173 CLR 349 at 359 per Mason CJ and Gaudron J (with whom Deane J agreed). See also at 372 per Brennan J, 394 per Dawson and Toohey JJ and 406-407 per McHugh J.

[49] *Savjani v IRC* [1981] QB 458 at 467 per Templeman LJ.

[50] *Farah v Commissioner of Police of the Metropolis* [1997] 2 WLR 824 at 835; [1997] 1 All ER 289 at 299 per Hutchison LJ.

[51] *R v Immigration Appeal Tribunal; Ex parte Kassam* [1980] 1 WLR 1037; [1980] 2 All ER 330.

[52] [1983] 2 AC 818 at 835 per Lord Fraser of Tullybelton (with whom Lord Keith of Kinkel and Lord Brightman agreed).

[53] See cl 40(1) of the Planning Scheme, which provides: " The Council, having regard to [specified matters], may refuse to approve any application for town planning approval or may grant its approval unconditionally or subject to such conditions as it may deem fit."

[54] There was an earlier appeal to the Supreme Court against a ruling of the Tribunal that the respondents had a case to answer. The appeal was dismissed.

[55] *Interpretation Act* 1984 (WA), s 18.

[56] *Waters v Public Transport Corporation* [1991] HCA 49; (1991) 173 CLR 349 at 394 per Dawson and Toohey JJ; see also 359 per Mason CJ and Gaudron J, 372 per Brennan J and 406-407 per McHugh J.

[57] s 4(1).

[58] *Waters v Public Transport Corporation* [1991] HCA 49; (1991) 173 CLR 349 at 394 per Dawson and Toohey JJ.

[59] s 134(1).

[60] Clause 40(1) of the Planning Scheme.

[61] [1981] QB 458.

[62] [1981] QB 458 at 466.

[63] [1981] QB 458 at 467-468.

[64] [1983] 2 AC 818 at 834-835.

[65] [1997] 2 WLR 824 at 835; [1997] 1 All ER 289 at 299.

[66] [1982] HCA 27; (1982) 153 CLR 168 at 221.

[67] Section 66A was amended by s 17 of the *Equal Opportunity Amendment Act* 1992 (WA) by the insertion of sub-s (1a). The amendment has no application to the present case.

[68] *March v Stramare (E & MH) Pty Ltd* [1991] HCA 12; (1991) 171 CLR 506.

[69] [1987] HCA 11; (1987) 162 CLR 285 at 294.

[70] [1989] AC 1155.

[71] [1990] UKHL 6; [1990] 2 AC 751.

[72] s 5.

[73] [1993] FCA 547; (1993) 46 FCR 191 at 209; [1993] FCA 547; 119 ALR 133 at 151.

74 (1993) 46 FCR 301 at 327; 118 ALR 80 at 104.

[75] *Perth City v DL* (1994) 88 LGERA 45.

[76] *Perth City v DL* (1996) 90 LGERA 178.

[77] [1989] HCA 53; (1989) 168 CLR 461 at 570-571.

[78] [1988] HCA 18; (1988) 165 CLR 360.

[79] [1990] HCA 1; (1990) 169 CLR 436 at 478.

80 An example of this species of discrimination identified by Gaudron and McHugh JJ may be a law which is passed in reliance upon s 51(ii) and which prefers a locality "merely because it is locality" and because the locality is "a particular part of a particular State": *W R Moran Pty Ltd v Deputy Federal Commissioner of Taxation (NSW)* [1940] UKPCHCA 3; (1940) 63 CLR 338 at 348; but cf*Commissioner of Taxation v Clyne* [1958] HCA 10; (1958) 100 CLR 246 at 266.

[81] *Waters v Public Transport Corporation* [1991] HCA 49; (1991) 173 CLR 349 at 357, 392.

[82] Section 40 of the *Equal Opportunity Amendment Act* 1992 (WA) amended various provisions of the Act, including s 5, by deleting "by reason of" and inserting "on the ground of". See also *Waters v Public Transport Corporation* [1991] HCA 49; (1991) 173 CLR 349 at 359.

[83] [1994] 3 NZLR 323 at 333. See also *Waters v Public Transport Corporation* [1991] HCA 49; (1991) 173 CLR 349 at 359, 372, 394, 406-407; *Zarczynska v Levy* [1979] 1 WLR 125 at 129; [1979] 1 All ER 814 at 817; *Ontario Human Rights Commission v Simpsons-*

Sears Limited 1985 CanLII 18 (SCC); [1985] 2 SCR 536 at 546-547; *NZ Van Lines v Proceedings Commissioner* [1995] 1 NZLR 100 at 103-104.

[84] The LG Act was repealed and replaced by the *Local Government Act* 1995 (WA), but this litigation is unaffected by the change in legislation.

[85] Section 680 provides: "In the execution and performance by a council of the powers and duties conferred upon it by this Act, a member or an officer employed or a person engaged by the council is not personally liable in respect of the execution or non-execution of the powers or the performance or non-performance of the duties, unless it is proved that he has been guilty of wilful or intentional misconduct or of negligence, but the provisions of this section do not affect those of section six hundred and thirty-two."

[86] [1996] 1 SCR 571; (1996) 133 DLR (4th) 449.

[87] *Human Rights Act*, RSY 1986, c 11 (Supp), s 8(a).

[88] [1996] 1 SCR 571 at 639; (1996) 133 DLR (4th) 449 at 498. Her Ladyship dissented in the result but nothing turns upon this for present purposes.

[89] [1980] 2 FC 122.

[90] SC 1976-77, c 33.

[91] SC 1970-71-72, c 63.

[92] [1980] 2 FC 122 at 132.

[93] [1981] QB 458.

[94] [1981] QB 458 at 467; see also per Lord Denning MR at 465-466.

[95] [1983] 2 AC 818 at 834-835, 843.

[96] [1993] FCA 91; (1993) 41 FCR 182; 113 ALR 39.

[97] cf *Strickland v Rocla Concrete Pipes Ltd* [1971] HCA 40; (1971) 124 CLR 468 at 510, 512, 523; *P v P* [1994] HCA 20; (1994) 181 CLR 583 at 600-601.

[98] [1997] 2 WLR 824; [1997] 1 All ER 289.

[99] [1997] 2 WLR 824 at 840; [1997] 1 All ER 289 at 304.

[100] [1982] HCA 27; (1982) 153 CLR 168 at 221-222, 268.

[101] [1990] 1 WLR 1453 at 1458-1459; [1990] 3 All ER 737 at 741. Lord Oliver of Aylmerton agreed in the speech of Lord Lowry. The plaintiff had pleaded, but failed to prove, that all the councillors who voted for the resolution in question were actuated by malice towards her.

[102] [1987] HCA 11; (1987) 162 CLR 285 at 294.

[103] [1938] HCA 4; (1938) 60 CLR 150 at 186.

[104] [1938] HCA 4; (1936) 60 CLR 150 at 185.

[105] [1758] EngR 208; (1758) 1 Eden 132 at 138 [28 ER 634 at 637].

[106] [1938] HCA 4; (1938) 60 CLR 150 at 164 per Latham CJ, 185-186 per Dixon J.

[107] [1974] AC 821 at 835-836.

[108] *Mills v Mills* [1938] HCA 4; (1938) 60 CLR 150 at 185-186 per Dixon J.

[109] Underhill and Hayton, *Law Relating to Trusts and Trustees*, 15th ed (1995) at 633-637.

[110] *Farwell on Powers*, 3rd ed (1916) at 459.

[111] Section 9(1) of the LG Act stated: "The inhabitants for the time being of a municipal district constitute a municipality."

[112] [1981] UKHL 7; [1983] 1 AC 768.

[113] [1858] EngR 365; (1858) 11 Moore 463 [14 ER 770].

[114] [1858] EngR 365; (1858) 11 Moore 463 at 524 [14 ER 770 at 793].

[115] *R v London County Council; Ex parte Akkersdyk; Ex parte Fermenia* [1892] 1 QB 190; *Dickason v Edwards* [1910] HCA 7; (1910) 10 CLR 243 at 252-253, 257, 263; *Frome United Breweries Co v Bath Justices* [1926] AC 586 at 590-591, 603-606, 615, 619; *R v Mullins; Ex parte Stenhouse* [1971] Qd R 66; *Builders' Registration Board of Queensland v Rauber* (1983) 57 ALJR 376 at 385; 47 ALR 55 at 71.

[116] *Dickason v Edwards* [1910] HCA 7; (1910) 10 CLR 243 at 259.

[117] *Halsbury's Laws of England*, 4th ed Reissue, vol 1(1), Administrative Law, par 90.

[118] See *Builders' Registration Board of Queensland v Rauber* (1983) 57 ALJR 376 at 385; 47 ALR 55 at 71.

[119] de Smith, Woolf & Jowell, *Judicial Review of Administrative Action*, 5th ed (1995) at par 12-002.

[120] The term "public body" is used in the definition of "person" in s 5 of the Interpretation Act.

[121] Rowe, "Misunderstanding Anti-Discrimination Law: The New South Wales Court of Appeal in *Reddrop*" [1986] AdelLawRw 2; (1986) 10 *Adelaide Law Review* 318; "Indirection of Sex Discrimination" [1993] UTasLawRw 6; (1993) 12 *University of Tasmania Law Review* 88; Skidmore, "No Gays in the Military" (1995) 24 *Industrial Law Journal* 363,

commenting on *R v Ministry of Defence; Ex parte Smith* [1995] EWCA Civ 22; [1996] QB 517; O'Byrne and McGinnis, "Case Comment: *Vriend v Alberta Plessy* Revisited: Lesbian and Gay Rights in the Province of Alberta"(1996) 34 *Alberta Law Review* 892; Renke, "Case Comment: *Vriend v Alberta* Discrimination, Burdens of Proof, and Judicial Notice" (1996) 34 *Alberta Law Review* 925.

[122] For example *R v Entry Clearance Officer; Ex parte Amin* [1983] 3 WLR 258 at 270; [1983] 2 All ER 864 at 873 per Lord Scarman.

[123] *Waters v Public Transport Corporation* [1991] HCA 49; (1991) 173 CLR 349 at 372.

[124] *Local Government Act* 1960 (WA) ("LGA"), s 9(4)(a). The City was constituted as a body corporate from 2 January 1871 under s 2 of the *Act for Establishing Municipalities* (WA) (34 Vic No 6). That Act was repealed and replaced by various statutes before the LGA came into force on 1 July 1961. Various changes have been made to the name and boundaries of the City since 1871, for example by the *City of Perth Act* 1914 (WA), but this has no application to the issues on this appeal.

[125] LGA, s 9(2).

[126] LGA, s 9(1).

[127] LGA, s 9(5)(a).

[128] LGA, s 9(5)(b)(i).

[129] LGA, s 9(5)(e).

[130] *Town Planning and Development Act* 1928 (WA).

[131] Under s 7(3).

[132] cll 34(2) and (2A).

[133] cl 34(1).

[134] s 96.

[135] *DL v City of Perth* unreported, Equal Opportunity Tribunal of Western Australia, 21 July 1993 (the "Tribunal decision") at 14; digested at [1993] EOC 92-510.

[136] *Town Planning and Development Act* 1928 (WA), s 39.

[137] Tribunal decision at 74.

[138] Tribunal decision at 73.

[139] s 75.

[140] Pursuant to s 93(1)(a) of the Act.

[141] Pursuant to s 125(1) of the Act.

[142] *DL v Perth City Council* [1992] EOC 92-422.

[143] *City of Perth v DL* [1992] EOC 92-466 per Anderson J.

[144] The total amount ordered against the City was $4,000: $500 to GM; $2,000 to IW (the appellant); and $1,500 to JW.

[145] GM $500; IW $2,000; and JW $1,500.

[146] Cr David Nairn $400; Cr Donald Nairn $500; Cr Nattrass $400; Cr Salpietro $600; Cr Scurria $1,500; Cr Vlahos $600.

[147] s 134.

[148] *Perth City v DL* (1994) 88 LGERA 45 at 68 per Murray J.

[149] *Perth City v DL* (1996) 90 LGERA 178.

[150] *Perth City v DL* (1996) 90 LGERA 45 per Ipp and Scott JJ.

[151] s 66A.

[152] Referred to in s 66A(1)(b) and (c).

[153] s 66K(1).

[154] s 680.

[155] s 134.

[156] *Hope v Bathurst City Council* [1980] HCA 16; (1980) 144 CLR 1 at 7-8; *Waters v Public Transport Corporation* [1991] HCA 49; (1991) 173 CLR 349 at 361, 394, 404.

[157] cf *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; (1990) 170 CLR 321 at 335-338.

[158] *Street v Queensland Bar Association* [1989] HCA 53; (1989) 168 CLR 461 at 571-573.

[159] cf *Waters v Public Transport Corporation* [1991] HCA 49; (1991) 173 CLR 349 at 359; *Street v Queensland Bar Association* [1989] HCA 53; (1989) 168 CLR 461 at 571.

[160] *Waters v Public Transport Corporation* [1991] HCA 49; (1991) 173 CLR 349 at 372.

[161] *Savjani v Inland Revenue Commissioners* [1981] QB 458 at 467 per Templeman LJ.

[162] cf *Henderson v Victoria* [1984] EOC 92-027 at 75,532-75,533; *Koowarta v Bjelke-Petersen* [1982] HCA 27; (1982) 153 CLR 168 at 184.

[163] *University of British Columbia v Berg* [1993] 2 SCR 353 at 370; *Gould v Yukon Order of Pioneers* [1996] 1 SCR 571; *Coburn v Human Rights Commission* [1994] 3 NZLR 323 at 333;*New Zealand Van Lines Ltd v Proceedings Commissioner* [1995] 1 NZLR 100 at 104; cf *NM Superannuation Pty Ltd v Young* [1993] FCA 91; (1993) 113 ALR 39 at 43; *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 423-425.

[164] *Interpretation Act* 1984 (WA), s 18.

[165] See for example s 118, 121, 125 of the Act.

[166] s 127 of the Act.

[167] *James v Eastleigh Borough Council [1990] UKHL 6;* [1990] 2 AC 751 at 774 per Lord Goff of Chieveley.

[168] See for example McHugh J in *Waters v Public Transport Corporation* [1991] HCA 49; (1991) 173 CLR 349 at 401.

[169] cf *R v Birmingham City Council; Ex parte Equal Opportunities Commission* [1989] AC 1155 at 1194; *Australian Iron & Steel Pty Ltd v Banovic* [1989] HCA 56; (1989) 168 CLR 165 at 176.

[170] s 66K of the Act.

[171] LGA, s 9(4)(a).

[172] s 66K(1) of the Act.

[173] cf *Hoddy v Executive Director Department of Corrective Services* [1992] EOC 92-397.

[174] *Town Planning and Development Act* 1928 (WA), s 7 and City of Perth City Planning Scheme.

[175] Or any function conferred on it by any federal Act declared by the Minister to be complementary to the Tribunal's other functions, in accordance with s 107(4)(b) of the Act.

[176] *Perth City v DL* (1996) 90 LGERA 178 at 186, 203-204, 214.

[177] LGA, s 9(5)(a).

[178] s 66U.

[179] s 66K(1).

[180] Tribunal decision at 82.

[181] *Perth City v DL* (1994) 88 LGERA 45 at 62-63.

[182] *Perth City v DL* (1994) 88 LGERA 45 at 63.

[183] *Perth City v DL* (1996) 90 LGERA 178 at 196, 199.

[184] (1996) 90 LGERA 178 at 207.

[185] (1996) 90 LGERA 178 at 196 per Ipp J; cf *R v Somerset City Council; Ex parte Fewings* [1995] EWCA Civ 24; [1995] 1 WLR 1037 at 1051; [1995] EWCA Civ 24; [1995] 3 All ER 20 at 33.

[186] (1996) 90 LGERA 178 at 207 per Wallwork J; cf *R v Amber Valley District Council, Ex parte Jackson* [1984] 3 All ER 501 at 508; *Canada (Eve Studio) v Winnipeg* [1985] 3 WWR 40 at 42-43.

[187] (1996) 90 LGERA 178 at 223 per Scott J.

[188] s 5 was amended in 1992. See *Equal Opportunity Amendment Act* 1992 (WA), ss 7 and 40.

[189] [1990] UKHL 6; [1990] 2 AC 751.

[190] *R v Birmingham City Council; Ex parte Equal Opportunities Commission* [1989] AC 1155 at 1193-1194.

[191] *James v Eastleigh Borough Council [1990] UKHL 6;* [1990] 2 AC 751 at 765.

[192] [1989] AC 1155 at 1194.

[193] [1989] AC 1155 at 1194.

[194] [1990] UKHL 6; [1990] 2 AC 751 at 764-766.

[195] *Australian Iron & Steel Pty Ltd v Banovic* [1989] HCA 56; (1989) 168 CLR 165 at 176-177; *Waters v Public Transport Corporation* [1991] HCA 49; (1991) 173 CLR 349 at 359-360 but see 400-401.

[196] *Devonport Borough Council v Robbins* [1979] 1 NZLR 1 at 25-26.

[197] (1996) 90 LGERA 178 at 188. Note that *James v Eastleigh Borough Council [1990] UKHL 6;* [1990] 2 AC 751 concerned a complaint against a local authority.

[198] *Whitehouse v Carlton Hotel Pty Ltd* [1987] HCA 11; (1987) 162 CLR 285 at 294 citing *Mills v Mills* [1938] HCA 4; (1938) 60 CLR 150 at 186.

[199] The Act, s 5.

[200] The Act, s 5.

[201] Ipp and Scott JJ.

[202] Especially *Boehringer Ingelheim Pty Ltd v Reddrop* [1984] 2 NSWLR 13.

203 The Act, s 66A(1)(b).

[204] The Act, s 66A(1)(c).

[205] The Act, s 66A(1)(a).

[206] Tribunal decision at 42-43.

[207] *Perth City v DL* (1994) 88 LGERA 45 at 64.

[208] Cited in *Commonwealth v Human Rights and Equal Opportunity Commission* [1993] FCA 547; (1993) 46 FCR 191 at 209.

[209] (1996) 90 LGERA 178 at 192 per Ipp J, 218-219 per Scott J.

[210] [1984] 2 NSWLR 13.

[211] Rowe, "Misunderstanding Anti-Discrimination Law: The New South Wales Court of Appeal in *Reddrop*" [1986] AdelLawRw 2; (1986) 10 *Adelaide Law Review* 318.

[212] *Waterhouse v Bell* (1991) 25 NSWLR 99 at 115.

[213] The Act, s 66K(1)(a).

[214] *Waters v Public Transport Corporation* [1991] HCA 49; (1991) 173 CLR 349 at 361, 404-405.

[215] *Waters v Public Transport Corporation* [1991] HCA 49; (1991) 173 CLR 349 at 405.

[216] For example *Henderson v Victoria* [1984] EOC 92-027; *Pearce v Glebe Administration Board* [1985] EOC 92-131; *L v Registrar of Births, Deaths and Marriages* [1985] EOC 92-142;*Jolly v Director-General of Corrections* [1985] EOC 92-124; *Byham v Preston City Council* [1991] EOC 92-377; *Woods v Wollongong City Council* [1993] EOC 92-486; *Woods v Wollongong City Council [No 2]* [1993] EOC 92-511.

[217] *Proudfoot v ACT Board of Health* [1992] EOC 92-417.

[218] *R v Immigration Appeal Tribunal; Ex parte Kassam* [1980] 1 WLR 1037; [1980] 2 All ER 330; *Savjani v Inland Revenue Commissioners* [1981] QB 458.

[219] Tribunal decision at 28-29.

[220] *Perth City v DL* (1994) 88 LGERA 45 at 55.

[221] *Perth City v DL* (1994) 88 LGERA 45 at 55.

[222] (1996) 90 LGERA 178 at 186-188.

[223] (1996) 90 LGERA 178 at 216.

[224] *Perth City v DL* (1994) 88 LGERA 45 at 55.

[225] cf *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; (1990) 170 CLR 321 at 354-355; *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139 at 155-156.

[226] *Hayes v Federal Commissioner of Taxation* [1956] HCA 21; (1956) 96 CLR 47 at 51.

[227] For example, s 66Q.

[228] *Waters v Public Transport Corporation* [1991] HCA 49; (1991) 173 CLR 349 at 359.

[229] The Act, s 66K(1).

[230] *R v Entry Clearance Officer; Ex parte Amin* [1983] 3 WLR 258; [1983] 2 All ER 864. See also Bourn and Whitmore, *Anti-Discrimination Law in Britain,* 3rd ed (1996) at 273-279.

[231] *R v Immigration Appeal Tribunal; Ex parte Kassam* [1980] 1 WLR 1037; [1980] 2 All ER 330; *Savjani v Inland Revenue Commissioners* [1981] QB 458; *R v Entry Clearance Officer; Ex parte Amin* [1983] 3 WLR 258; [1983] 2 All ER 864. See also *Farah v Commissioner of Police of the Metropolis* [1997] 2 WLR 824; [1997] 1 All ER 289.

[232] [1981] QB 458 at 466, 469; applied *Farah v Commissioner of Police of the Metropolis* [1997] 2 WLR 824 at 835-836, 840; [1997] 1 All ER 289 at 300, 304.

[233] [1983] 3 WLR 258 at 276; [1983] 2 All ER 864 at 879.

[234] For example *Re Singh (Subhaschan)* (1988) 86 NR 69 at 76; *Attorney General of Canada v Cumming* [1980] 2 FC 122 at 132; *Canada (Secretary of State for External Affairs) v Menghani* (1993) 70 FTR 81 at 94; *Canada (Attorney General) v Anvari* (1993) 152 NR 241 at 245; *Insurance Corporation of British Columbia v Heerspink* [1977] 6 WWR 286 at 287.

[235] *Dayton v Ewart* 72 P 420 at 422 (1903); *Pollak v Public Utilities Commission of the District of Columbia* 191 F 2d 450 at 453 (1951); *Chesterfield Fire Protection District of St Louis County v St Louis County* 645 SW 2d 367 at 370-371 (1983).

[236] *Kondala Rao v Andh. Pra. S.R.T.* [1961] AIRSC 82 at 87.

[237] cf *Bropho v Western Australia* [1990] HCA 24; (1990) 171 CLR 1 at 19.

[238] *Hope v Bathurst City Council* [1980] HCA 16; (1980) 144 CLR 1 at 7-8.

[239] *Equal Opportunity Amendment Act* 1992 (WA) (Act No 74 of 1992) relevant provisions in force from 8 January 1993.

[240] (1996) 90 LGERA 178-78,888 per Scott J.

[241] [1982] HCA 27; (1982) 153 CLR 168 at 221-222.

[242] Tribunal decision at 20.

[243] The Act, s 66A(1).

[244] *Perth City v DL* (1994) 88 LGERA 45 at 58-59.

[245] (1996) 90 LGERA 178 at 189.

[246] (1996) 90 LGERA 178 at 221.

[247] [1982] HCA 27; (1982) 153 CLR 168.

[248] *Racial Discrimination Act* 1975 (Cth) s 12(1). See also s 9(1).

[249] Especially [1982] HCA 27; (1982) 153 CLR 168 at 222 per Stephen J (Murphy J agreeing), 268 per Brennan J.

[250] *Koowarta v Bjelke-Petersen* [1982] HCA 27; (1982) 153 CLR 168 at 221.

[251] See *Associations Incorporation Act* 1987 (WA), s 10.

[252] See for example *Navarro v Spanish American Club of Canberra (Inc)* (1987) 87 FLR 390.

[253] (1996) 90 LGERA 178 at 189.

[254] See for example *Ex parte Sidebotham* (1880) 14 Ch D 458; *Buxton v Minister of Housing and Local Government* [1961] 1 QB 278 at 285; *Day v Hunter* [1964] VicRp 109; [1964] VR 845; *Spurling v Development Underwriting (Vic) Pty Ltd* [1973] VicRp 1; [1973] VR 1 at 16-17.

[255] *Attorney-General for NSW v Brewery Employés Union of NSW* [1908] HCA 94; (1908) 6 CLR 469 at 531.

[256] [1929] 2 KB 440 at 443.

[257] [1961] AC 617 at 634.

[258] See for example *Coles Myer Ltd v O'Brien* (1992) 28 NSWLR 525 at 528-530.

[259] See for example *National Trust v Aust T & G* [1976] VicRp 60; [1976] VR 592 applied in *Australian Conservation Foundation v Environment Protection Appeal Board* [1983] VicRp 34;[1983] 1 VR 385.

[260] (1992) 28 NSWLR 525.

[261] s 5.

[262] *Tooheys Ltd v Minister for Business and Consumer Affairs* [1981] FCA 121; (1981) 54 FLR 421 at 437.

[263] Australian Law Reform Commission, *Standing in Public Interest Litigation,* ALRC No 27 (1985) at 76-77, 130-131, 138-139.

[264] For example *Thorson v Attorney-General of Canada (No 2)* (1974) 43 DLR (3d) 1 at 7.

[265] For example *S P Gupta v President of India* [1982] AIRSC 149 at 195; *Bandhua Mukti Morcha v Union of India* [1984] AIRSC 802 at 839.

[266] *Environmental Defence Society Inc v South Pacific Aluminium Ltd (No 3)* [1981] 1 NZLR 216.

[267] *United States v Students Challenging Regulatory Agency Procedures* [1973] USSC 148; 412 US 669 (1973).

[268] The Act, s 3.

[269] Transcript of proceedings, 12 November 1996 at 89.

[270] Grounds 3(b) and 4(e).

[271] *Perth City v DL* (1994) 88 LGERA 45 at 66.

[272] *Perth City v DL* (1994) 88 LGERA 45 at 66.

[273] [1993] HCA 57; (1993) 177 CLR 598.

[274] [1993] HCA 57; (1993) 177 CLR 598 at 601.

[275] [1993] HCA 57; (1993) 177 CLR 598 at 606-607.

[276] [1993] HCA 57; (1993) 177 CLR 598 at 607.

[277] [1993] HCA 57; (1993) 177 CLR 598 at 611-612.

[278] For example *Theobald v Crichmore* (1818) 1 B & Ald 227 at 229 [106 ER 83 at 84]; *Hamilton v Halesworth* [1937] HCA 69; (1937) 58 CLR 369 at 377; *Little v The Commonwealth*[1947] HCA 24; (1947) 75 CLR 94 at 108; *Trobridge v Hardy* [1955] HCA 68; (1955) 94 CLR 147 at 156-158; *Marshall v Watson* [1972] HCA 27; (1972) 124 CLR 640 at 651.

[279] [1929] 1 KB 419.

[280] [1929] 1 KB 419 at 429.

[281] Tribunal decision at 1.

[282] The Act, s 134(4)(a).