IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY No. C3 of 2014

ON APPEAL FROM THE SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY, COURT OF APPEAL

BETWEEN:

Argos Pty Ltd A.C.N. 008 524 418
First Appellant

Cavo Pty Ltd ATF Demos Family Trust T/AS IGA Kaleen Supermarket A.C.N. 096 897 862
Second Appellant

Koumvari Pty Ltd ATF Vizadis Family Trust T/AS IGA Evatt Supermarket A.C.N. 081 122 492
Third Appellant

AND

Simon Corbell, Minister for the Environment and Sustainable Development
First Respondent

AMC Projects Pty Ltd A.C.N. 092 706 128
Second Respondent

Nikias Nominees Pty Ltd A.C.N. 008 519 775
Third Respondent

Australian Capital Territory Planning and Land Authority
Fourth Respondent

Australian Capital Territory Executive
Fifth Respondent

Combined Residents Action Association Incorporated
Association Number A05140
Sixth Respondent

APPELLANTS' SUBMISSIONS

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Part I: Certification

1. These submissions are suitable for publication on the internet.

Part II: Concise statement of the issue or issues the appellant contends that the appeal presents

2. This appeal concerns whether there is a 'general rule' that affectation of economic interests:

   a. will not suffice to establish that a party is a 'person aggrieved' for the purposes of s5(1) of the *Administrative Decisions (Judicial Review) Act 1989* (ACT) (the **ACT ADJR Act**); or

   b. will only be sufficient for that purpose in certain limited circumstances.

3. It also raises for consideration the place, within that analysis of concepts of 'remoteness', 'proximity' and 'directness' and whether it is necessary that there be some 'coincidence' between the interests sought to be pursued by a putative applicant and the public purposes to which an 'enactment' conferring the relevant discretionary power is directed.

Part III: Notice under s78B of the *Judiciary Act 1903* (Cth)

4. The appellant does not consider that notice is required to be given under section 78B of the *Judiciary Act 1903* (Cth).

Part IV: Authorized report of reasons for judgment of both the primary and intermediate court in the case

5. The reasons for judgement of the primary court below are reported in the authorised reports as *Argos Pty Ltd v Corbell* (2012) 7 ACTLR 15. The reasons of the Court of Appeal of the Australian Capital Territory (**CA**) are not reported in the authorised reports, but are reported as *Argos Pty Ltd v Corbell* (2013) 198 LGERA 187.

Part V: Relevant facts

6. The appellants are Argos Pty Limited (**Argos**), Cavo Pty Limited (**Cavo**) and Koumvari Pty Limited (**Koumvari**). Argos holds a lease of Crown land at the Kaleen Local Centre. A Supermarket is located in that centre and is operated by Cavo, as a sub-lessee. The supermarket is now known as "Supa Express" but was previously trading as an IGA Supermarket. Koumvari is a trustee for the Vizadis Family Trust. The Trust holds a sub-lease of the Crown Lease for the site of the IGA Supermarket at the Evatt Local Centre and conducts the IGA Supermarket at that address.[1]

7. The proceedings below concerned a development application made by the second respondent on behalf of the third respondent (together the **Developers**) under Chapter 7 of the *Planning and Development Act 2007* (ACT) (**Planning Act**). That development application sought approval for a commercial development at the Giralang Local Centre (**Giralang**). It proposed the consolidation of certain blocks of land, and a variation of a Crown lease to permit a commercial development including a supermarket and specialty shops on the subject land.[2] On 17 August 2011 the first respondent (the **Minister**)

[1] See reasons of the CA at [2]-[3].
[2] CA [4].

determined to approve that development application under s162 of the Planning Act.[3]

8. Together with the sixth respondent (the **Association**), the appellants brought proceedings under s 5(1) of the ACT ADJR Act in respect of the Minister's decision. At the hearing at first instance, the respondents raised a preliminary issue, which the trial judge characterised as concerning the 'standing of the [appellants] to bring the present proceedings'.[4] That was seemingly shorthand for the issue of whether each of the appellants was a 'person aggrieved' within the meaning of s 5(1).[5]

9. Relevant to that issue, the appellants and the Developers adduced evidence that the approval of the Giralang development would cause loss of trade at the Kaleen and Evatt Local Centres. For the appellants, that evidence included evidence from Mr Haridemos (a director of Cavo), Mr Vizadis (a director and shareholder of Koumvari) and Mr Petsas (a director of Argos), which was summarised in the reasons of the CA at [39]-[41]. In short, that evidence was to the effect that each of the supermarkets may suffer a loss of trade and be forced to close down and that, in those circumstances, Argos would face difficulty in locating a new tenant for the Kaleen Local Centre. Those witnesses were not cross-examined on that evidence.

10. In addition, the appellants and the Developers adduced expert evidence relevant to those issues. The following aspects of that evidence are of particular importance for the purposes of this appeal:

    (a) Mr Duane, an economist, was retained by the Developers for the purposes of preparing a report assessing the economic effect of the development that was the subject of the development application (the **Economic Impact Assessment**, which was received into evidence by the primary judge). That Assessment was prepared to address one of the criteria that applied to the development under the regulatory scheme.[6] In both the Economic Impact Assessment and in his evidence before the primary judge, Mr Duane expressed the view that, for the year 2012 (the first full trading year of the new centre), the Giralang Development would cause a 7.5% reduction in annual turnover for the Evatt Local Centre and an 8.5% reduction in annual turnover for the Kaleen Local Centre.[7]

    (b) Mr Hack, also an economist, was called by the Developers at first instance to give evidence as to the economic effect of the development. He opined that Mr Duane had underestimated the expenditure that would be attracted by the development. He further expressed the view that each of Mr Duane's figures quantifying the effect of the development upon turnover at the affected shopping centres was likely to be about 15% higher for 2012 – suggesting a reduction in annual turnover of 9.78% for the Kaleen Local Centre and 8.6% for the Evatt Local Centre.[8] During cross-examination, Mr

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[3] CA [4], [13].
[4] SC [6] and see also SC [86] (the acronym "SC" is used to refer to the reasons of the primary judge).
[5] See the conclusions of the trial judge at SC [53]-[55].
[6] See the extract from the *Local Centres Development Code* at CA [21] (Criterion C33 – part of the *Territory Plan 2008* (ACT)) and note ss 119(1)(a) and 139(2)(d) of the Planning Act. The Planning Act did not require that the information or documents addressed to that criterion take that form (see SC [79]-[83]).
[7] CA Bundle vol 3 p 652, para [4.12] and p 655, table 2 and CA Bundle vol 5 p1224-1229.
[8] CA Bundle vol 3 p621, para [17.1]. See also the transcript of Mr Hack's cross-examination at T 203.20-204.1 (CA Bundle, vol 2 260-261).

Hack accepted that a 10% reduction in annual turnover could 'potentially put [a local centre] under' thus 'resulting in closures', depending upon where the local centre stood in relation to 'industry benchmarks'.[9]

(c) Mr Adams, a senior Town Planner called by the appellants, stated that if one applied Mr Duane's reasoning, but altered the assumptions regarding growth rates for certain centres (which Mr Adams regarded as 'anomalous'), the impact on the annual turnover for those centres would be greater. That modified form of Mr Duane's analysis suggested that the reduction in annual turnover for Evatt Local Centre would increase to 10%.[10]

(d) Ms Robertshaw, a senior Town Planner called by the appellants, undertook an analysis that suggested that, depending upon how one calculates the 'gross floor area', there could be a re-direction of expenditure from the Kaleen and Evatt IGAs that 'could be detrimental to their ability to continue to trade effectively'.[11]

(e) Mr Leyshon, a retail analyst and town planner called by the appellants, opined that the supermarket to be developed at Giralang was likely to have a 'gross floor area' greater than that estimated by Mr Duane for the purposes of his analysis and, assuming that to be so, Mr Duane was likely to have underestimated the economic impacts of the development in the Economic Impact Assessment.[12]

11. Without dealing with the evidence in any detail, the trial judge accepted that:

(a) the proposed development 'will have an adverse economic effect' upon the Cavo and Koumvari (as the operators of the supermarkets); and

(b) that it was possible that the economic interests of Argos may come to be 'indirectly' affected by the proposed development (at [49]).

12. Of course, acceptance of the possible 'indirect' effect upon Argos involves implicit acceptance of the proposition that the ultimate effect upon the trade of Cavo may be sufficiently significant to force the closure of the supermarket (requiring Argos to seek to locate a new tenant) or in some other way adversely impact upon the economic interests of Argos (for example, in any future renegotiation of the lease). However, his Honour did not go so far as to accept, as an affirmative factual proposition, that the evidence established that Cavo or Koumvari 'would be unable to trade' by reason of the development - holding that the evidence was 'not persuasive' in that regard (at [49]).[13] His Honour went on to hold that the appellants lacked 'standing' to maintain those proceedings and their application for relief was refused on that basis: at SC [86]. That result was affirmed on appeal by the Court of Appeal: CA [50] and [59]. The Association does not seek to disturb that decision and is not a party to this appeal (having filed a notice of discontinuance on 17 February 2014).

Part VI: Argument

13. In summary the appellants say:

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[9] See T204; CA Bundle 261; lines 9-19.
[10] CA Bundle, vol 3 pp521-523 [64]-[75].
[11] CA Bundle, Vol 3 p558, para [7.5.2].
[12] CA Bundle, Vol 3 pp 475 (para [2.3.9]), 478 (para 2.5.7) and 481 (paras [3.9]-[3.10]).
[13] The ultimate likely economic impact, his Honour said at [51], would depend upon the competitive responses of the appellants.

(a) The issue of whether the appellants were 'persons aggrieved' for the purposes of s5(1) of the ACT ADJR Act fell to be determined in a relatively straight-forward fashion. In essence, what was required was **first** identification of the relevant 'decision of an administrative character'; **secondly**, consideration of the legal and practical operation of that decision; and **thirdly**, an assessment of whether any affectation of the appellants' interests 'by' that decision fell within the statutory description 'adversely affected' or otherwise gave rise to something aptly characterised as a 'grievance'.

10 (b) Instead, the CA was distracted by one or more a-textual concepts or rules, including 'remoteness', 'directness', 'proximity' and a 'general rule' that 'mere detriment to the economic interests of a business will not give rise to standing'.

(c) The manner in which those concepts were actually applied by the CA is not pellucidly clear. But what is clear is that the effect was to obscure the question actually posed by the statute and to lead the CA to fail, in any meaningful fashion, to deal with the evidence of affectation. That evidence was sufficient to satisfy the statutory test.

Legislative context and history

20 14. The ACT ADJR Act was an ordinance made under the *Seat of Government (Administration) Act 1910* (Cth), and commenced upon the date of commencement of s 22 of the *Australian Capital Territory (Self Government) Act 1988* (Cth) (**Self-Government Act**).[14] As is apparent from the text and the explanatory statement that accompanied the original ordinance, the ACT ADJR Act was modelled upon the *Administrative Decisions (Judicial Review) Act 1975* (Cth) (**Commonwealth ADJR Act**). Of particular relevance for the current matter, that commonality included what were referred to below as the provisions dealing with 'standing'. At the time of the application those provisions were as follows:[15]

30 (a) section 5(1) of the ACT ADJR Act (like s 5(1) of the Commonwealth ADJR Act) employed the term 'person aggrieved by' the relevant decision in defining the requisite interest required to make an application for the relief for which that Act provided;[16]

(b) section 3B(1)(a) of the ACT ADJR Act (essentially replicating the terms of s 3(4) of the Commonwealth ADJR Act) provided that a 'person aggrieved by' such a decision included a person whose 'interests' are 'adversely affected by' the decision.

15. The term 'interests', as employed in s 3B(1)(a), was one of complete generality,

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[14] 11 May 1989. By force of s10(3) of the *ACT (Self Government) Consequential Provisions Act 1988* (Cth), the ACT ADJR Act was, from that date, taken to be an 'enactment' within the meaning of s3 of the Self Government Act and able to be amended or repealed accordingly.

[15] They have since been amended by the *Administrative Decisions (Judicial Review) Amendment Act 2013* (ACT): see the current form of ss 4A and 5 of the ACT ADJR Act. Those amendments commenced on 26 September 2013. The CA seemingly proceeded on the basis that the appeal was to be determined on the terms of the Act as they applied at the date of the application made to the Supreme Court: see, in that regard, s 84 of the *Legislation Act 2001* (ACT). Provisions analogous to those in force prior to the amendments remain applicable to review of certain decisions made under the Planning Act and also to those made under the *Heritage Act 2004* (ACT): see ss 4A(2) and 4A(5) of the current version of the Act.

[16] In turn, section 17(1) of the ACT ADJR Act provides for various remedies in the event such an application is successful.

and there was nothing in the text of the statute suggesting that particular 'species' of interest were excluded or to be preferred over other interests or to otherwise narrow the test. Rather, as was explained in the explanatory memorandum that accompanied the Commonwealth ADJR Bill, the statutory object was:

> ..to make clear that the term [person aggrieved] is to include any person whose interests are adversely affected by the decision, a failure to decide, or the action in question (emphasis added).[17]

16. The relevant 'decision' was required to be a 'decision to which this Act applies' (see the chapeau to s5(1)). That term was defined in the Dictionary to mean a decision 'of an administrative character' made under an 'enactment', other than a decision mentioned in schedule 1. The term 'enactment' was, in turn, defined to include an Act or a subordinate law,[18] thereby drawing within the review mechanism provided for by the Act an extremely broad range of statutory decision making processes.

Rejection of a restrictive interpretation

17. From the outset, the courts have favoured a wide construction of those provisions. In one of the early seminal decisions, Ellicott J reiterated an observation that he had expressed as Attorney-General when introducing the Commonwealth ADJR Bill. That is, that the statutory review mechanism provided by the Commonwealth ADJR Act was intended, in part, to be a substitute for the more complex prerogative writ procedures: see *Tooheys Limited v Minister for Business and Consumer Affairs* (***Tooheys***).[19] It followed, his Honour said, that the words 'person aggrieved' were not to be given a narrow construction. That aspect of his Honour's reasoning has been frequently endorsed or cited with apparent approval.[20]

18. His Honour immediately went on to observe (at 437-438):

> This does not mean that any member of the public can seek an order of review. I am satisfied however that it at least covers a person who can show a grievance which will be suffered as a result of the decision complained of beyond that which he or she has as an ordinary member of the public. In many cases that grievance will be shown because the decision directly affects his or her existing or future legal rights. In some cases however the effect may be less direct. It may affect him or her in the conduct of a business or may, as I think is the case here, affect his or her rights against third parties.

19. There are four important aspects to that passage that require emphasis. First, in his Honour's view, the requisite 'grievance' need not relate to injury to existing or future legal interests. That (undoubtedly correct) conclusion is consistent with other authorities dealing with an identical or similar collocation of words or

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[17] See p5, clause 14 of the explanatory memorandum. In that regard, the provisions were seemingly intended to pick up aspects of the Kerr Review, which used the terms 'person aggrieved' and person 'adversely affected' by a decision as alternative formulations of the requisite interest: see Commonwealth Administrative Review Committee, *Report August 1971*, Parliament of the Commonwealth of Australia, Parliamentary Paper no 144, para 254.

[18] It also included the *Canberra Water Supply (Googong Dam) Act 1974* (Cth). See similarly ss 3(1) and 5(1) of the Commonwealth ADJR Act and schedule 1 to that Act.

[19] (1981) 54 FLR 421 at 437. And see Commonwealth of Australia, 1977, *Parliamentary debates: House of Representatives: official Hansard*, p 1394.

[20] *Ogle v Strickland* (1987) 13 FCR 306 (***Ogle***) at 314-315; *North Coast Environment Council Inc v Minister for Resources* (1994) 55 FCR 492 (***North Coast***) at 506 per Sackville J; *Right to Life v Department of Human Services* (1995) 56 FCR 50 (***Right to Life***) at 65 per Lockhart J; *Rayjon Properties Pty Ltd v Director-General, Department of Housing, Local Government and Planning* [1995] 2 Qd R 559 (***Rayjon***) at 560 per Thomas J.

concepts. For example, in the course of rejecting the submission that the term 'person aggrieved' as it appeared in a statute governing appeals was limited to legal right-holders, the Privy Council in *Gambia v N'Jie*[21] said that the words are of 'wide import' and should not be subjected to a 'restrictive interpretation', extending to anyone who has a 'genuine grievance' (as opposed to being a 'mere busybody').[22]

20. As Gummow J noted in *Australian Institute of Marine and Power Engineers v Secretary, Department of Transport*[23] (***Marine Engineers)*** a similar position emerges from the jurisprudence concerning the concept of 'grievance' in relation to standing to obtain writs of certiorari – it being 'by no means apparent that "grievance" necessarily involved injury to property or present legal interests or "special damage" in any technical sense'. Noting that the same is true of equitable remedies,[24] his Honour opined that it would be a 'strange result' if the Commonwealth ADJR Act posited, by use of the concept of grievance, some narrower criterion.[25]

21. The second point that emerges from the passage in *Tooheys* relates to the relevance of the somewhat elusive concept of 'directness' and similar formulae or criteria not to be found in the statute (such as 'proximity' and 'remoteness'). It will be necessary to say something further about those matters below. For now it suffices to note that Ellicott J did not accept that it was necessary to show that the decision operates in some 'direct' or 'immediate' sense upon the rights or interests of an aggrieved person. Thus, his Honour held that it was sufficient on the facts in *Tooheys* that the decision stood to confer upon the importer a right to a refund of the impost. For that would, in turn, enliven a potential claim by Tooheys against the importer for the amount that it had already paid to the importer in respect of that dutiable amount.

22. Those matters bring to mind a truism captured in the metaphor developed by Brennan J in *Re McHattan and Collector of Customs* (***McHattan***).[26] That is, that it is in the nature of modern regulatory decision making, and a society in which social and economic activity is increasingly organized through large aggregates of people,[27] that the 'ripples of affection [of any particular administrative decision] may widely extend'.[28] It was to that context that the ADJR Acts were addressed. Of course, as this Court observed in *Allan v Transurban City Link Limited*[29] (***Allan***) it does not follow that 'any ripple of affection would be sufficient to support an interest'. But the threshold to be met is to be determined by reference to the criteria specified in the statute, not a-textual notions of 'directness' or 'remoteness' (see further below).

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[21] [1961] AC 617 at 634 per Lord Denning.
[22] To similar effect, the Full Federal Court in *US Tobacco Co v Minister for Consumer Affairs* (1988) 20 FCR 520 said that the 'broadest of technical terms' had been selected for the purposes of the Commonwealth ADJR Act and that 'The necessary interest need not be a legal, proprietary, financial or other tangible interest' (at 527).
[23] (1986) 13 FCR 124 at 131.
[24] A position that is even more clearly established after *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Limited* (1998) 194 CLR 247 (***Bateman's Bay***).
[25] That approach has continued. As Gummow, Callinan and Heydon JJ said in *Griffith v Tang* (2005) 221 CLR 99: *'[T]he cases under the [ADJR Act] may be said, putting the matter very broadly, to have rejected a 'rights based approach' whilst 'understandably [refusing] to go into specifics'* (at 117 [44]), citing Aronson, Dyer and Groves *Judicial Review of Administrative Action*, 3rd ed, (2004) p684.
[26] (1977)18 ALR 154.
[27] See, generally, A Chayes 'The Role of the Judge in Public Law Litigation' 89(7) *Harv Law Rev* 1281 at 1294.
[28] *McHattan* at 157.
[29] (2001) 208 CLR 167 at 174 [15].

23. Thirdly, and related to the last point, the terms 'aggrieved by' and 'adversely affected by' are sufficiently broad to encompass grievances and adverse effects upon interests that involve an element of futurity, and that may therefore be subject to uncertainties or contingencies. Thus, to return to the facts in *Tooheys*, it was not to the point that the applicant might (if it was ultimately found that the goods were dutiable at a lesser rate) bring a claim against the importer and yet fail in that claim.[30] It was sufficient, his Honour said, that the plaintiff would have a 'serious and not a frivolous claim' and that it could only pursue that claim if the decision was overturned.[31]

24. Similarly, in later cases, it has been held that the statutory test will be satisfied if 'the decision...will in some way expose [the relevant interest] to peril' or if that interest will be 'sufficiently threatened' by the relevant decision.[32] In *H A Bachrach Pty Ltd v Minister for Housing*[33] (***Bacharach***) Kiefel J applied that line of authority to the similarly worded provisions of the *Judicial Review Act 1991* (QLD)[34] in the context of a decision to amend a 'strategic plan' (a planning instrument) to allow for the possible development of a regional shopping centre that would compete with the applicant's shopping centre. Her Honour there observed:

> Counsel for the Minister however argued that [any loss of custom, loss of tenants or diminishment in the value of the applicant's shopping centre] is only contingent, since the decision only brings the strategic plan into operation and does not itself effect the approval of the development. I do not however consider that the sections require that an applicant show an immediate adverse effect, or that a decision be the final link in a chain of causative events. If the decision has potential for such damage, a person's interests are exposed to peril, and are adversely affected within the meaning of the section. To construe the section as narrowly as the Minister would contend for would be to read the words as limited to interests which are thereby injured.

25. Fourthly, Ellicott J said that it was otherwise 'unnecessary and undesirable to discuss the full import of the phrase [a person who is aggrieved]'. The reason that is so was further explained by Gummow J in *Marine Engineers*, citing *Tooheys* as authority for the proposition that the meaning of 'person aggrieved' was not 'encased in any technical rules and that much depends upon the nature of the particular decision and the extent to which the interest of the applicant rises above that of an ordinary member of the public'. The force of those observations was, Gummow J said, apparent when one had regard to the fact that (as noted above) the ADJR Acts draw within their scope a diverse and 'unclosed class' of decision making processes, thereby operating on a diverse and equally unclosed range of interests. Those matters indicated that 'too rigid a criterion of locus standi will threaten to stultify the utility of the procedures the [Commonwealth ADJR Act] offers'.[35]

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[30] See also, in a different statutory context, *Assa Abloy v Australian Lock Co* (2005) 147 FCR 126 (***Abloy***) at 131 [19] per Heerey and Allsop JJ (cf Finkelstein J at 133-134 [32]).
[31] At 438.
[32] See *Queensland Newsagents Federation Limited v Trade Practices Commission* (1993) 46 FCR 38 at 42 per Spender J and *Robinswood Pty Ltd v Federal Commissioner of Taxation* (1998) 55 ALD 717.
[33] (1994) 85 LGERA 134 at 137.
[34] See ss 7(1)(a) and 20 of that enactment.
[35] At 132-133. To similar effect, in the context of the *Designs Act 1906* (Cth), Heerey and Allsop JJ doubted that it was 'either necessary or desirable to develop particular criteria that might limit the broad words of the statute': *Abloy* at 131 [19].

26. However, over time, observations made in particular cases have tended to harden into 'rigid' criteria of precisely that nature. In particular, three prescriptive rules or principles have emerged which threaten to have a stultifying effect upon the reach of the ACT and Commonwealth ADJR Acts. They are:

    (a) The notion that the outer limits of the statutory test are to be determined by reference to concepts of 'remoteness', 'proximity' or 'directness';

    (b) A rule that the interests of the putative applicant must coincide with the particular public interest sought to be achieved by the enactment conferring power to make the 'decision of an administrative character'; and

    (c) A 'general rule' that mere detriment to the economic interests of a business will not give rise to standing.

27. Although not pellucidly clear, the reasoning of the CA appears to have been animated by those principles or rules, particularly the first and the third. It is convenient now to consider each in turn.

Remoteness, proximity and directness

28. Departing from the decision in *Tooheys*, a number of authorities have sought to transplant from other contexts the a-textual concepts of 'proximity', 'remoteness' and 'indirectness' as limitations on the statutory text. Ultimately, all are unhelpful, indeed positively misleading. They should be abandoned.

29. Those notions, which feature in the reasoning of the CA at [31]-[35], appear to have originated in two sources. First, the concept of 'proximity' was used by Stephen J in *Onus v Alcoa*,[36] explaining the application of the special interest test to the facts in that case and distinguishing *Australian Conservation Foundation v Commonwealth* (the ***ACF Case***)[37]:

> ...the distinction between this case and the *ACF Case* is not to be found in any ready rule of thumb, capable of mechanical application; the criterion of "special interest" supplies no such rule. As the law now stands it seems rather to involve in each case a curial assessment of the importance of the concern which a plaintiff has with particular subject matter and of the closeness of that plaintiff's relationship to that subject matter (emphasis added).

30. His Honour went on to say that the interests of the plaintiffs in *Onus* were to be distinguished 'in particular in terms of proximity' from that of the plaintiffs in the *ACF Case*. A similar distinction was proposed by Brennan J in *McHattan*, considering the term 'person...whose interests are affected by the decision' in s27(1) of the *Administrative Appeals Tribunal Act 1975* (Cth). After referring to the 'ripples of affection' in the passage extracted above, his Honour said:

> The problem which is inherent in the language of the statute is the determination of the point beyond which of the point beyond which the affection of interests by a decision should be regarded as too remote for the purposes of s27(1).[38]

31. Those concepts have been taken up and applied in the context of the Commonwealth and ACT ADJR Acts in a series of decisions by first instance

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[36] (1981) 149 CLR 27 at 42.
[37] (1980) 146 CLR 493.
[38] At 157. It is apparent that his Honour's use of the concept of remoteness was influenced by the decision of the Texas Court of Civil Appeals to which he referred (at 157-158): see *Empire Gas & Fuel Co v Railroad Commission of Texas* (1936) 90 SO West Rep (2d) series 1240.

and intermediate appellate Courts. For example, in *Marine Engineers*, Gummow J observed that there flowed from the decision of the Secretary in issue in that case a 'danger and peril to the interests of the applicant that is clear and imminent rather than remote, indirect or fanciful', which indicated that the applicant had an interest in the matter of 'an intensity and degree well above that of an ordinary member of the public'.[39] That passage was adopted by a Full Federal Court comprised of Bowen CJ, Beaumont and Gummow as the statement of the relevant test in *Broadbridge v Stammers*.[40] To similar effect, in *Ogle*,[41] Fisher J (by reference to the reasons of Stephen J in *Onus*) emphasised that the interests of the priests in the subject matter of the film and the question of whether it was blasphemous were in 'closer proximity' to that subject matter than other members of the community. In *Right to Life v Department of Human Services*[42] Lockhart J (seemingly drawing on Gummow J's statement in *Marine Engineers*) said it was necessary that the applicant's interest not be 'remote, indirect or fanciful'. And in *US Tobacco Company v Minister for Consumer Affairs*,[43] *Australian Foreman Stevedores Association v Crone*[44] (***Crone***) and *Big Country Developments Limited v Australian Community Pharmacy Authority*[45] (***Big Country***) Brennan J's discussion of remoteness in *McHattan* was referred to with apparent approval.

32. Those statements may be seen as an attempt to define, with more precision, where the line is to be drawn between those members of the public who can seek an order of review and those who cannot. But doing so is undesirable for the reason identified above: that is, that such criteria or formulae will tend to limit the broad and ambulatory terms of the statute. As will be developed below, that is precisely what has happened in relation to economic interests.

33. Moreover, the result is actually to deepen, rather than resolve, any indeterminacy or imprecision in the application of the statute. The statutory text is buried beneath layers of metaphor, commencing with the notion of standing, which (as this Court has said) apparently originated with the posture required of advocates.[46] The cumulative effect of those various tropes is that one comes to be metaphorically 'standing' (or alternatively sitting semi-submerged); in a 'pool' of potentially affected interests; at a 'distance' from a decisional epicentre that is either 'proximate' or 'remote' depending on one's place in the pool or the 'directness' of affectation; and facing either 'ripples' or 'waves' of affection, depending upon that 'distance'.

34. None of that is of much, if any, assistance in approaching the statutory text. What is meant, for example, by the statement that the priests in *Ogle* were sufficiently 'proximate' to the particular decision? It is seemingly no more than a statement of conclusion about the fact that their interests or grievances were found, on the facts, to satisfy the statutory test. As with the use of similar concepts in the law of negligence and the identification of a duty of care,

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[39] At 133-134.
[40] (1987) 16 FCR 296 at 298
[41] At 308.
[42] (1995) 56 FCR 50 at 65F.
[43] (1988) 20 FCR 520 at 529-530.
[44] (1988) 20 FCR 377 at 383 per Pincus J.
[45] (1995) 60 FCR 85 at 91, 92 per Lindgren J.
[46] *Truth About Motorways Pty Limited v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 624-625 [88] per Gummow J and see also *Allan* at 174 [15] and *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at [68].

'proximity' may in that sense be considered a short-handed method of describing the nature of what is in issue.[47] But, as is also the case in that context, it is of little utility as an explanation of a process of reasoning leading to such a conclusion. The same is true of the correlative notion of 'remoteness', a protean term that may extend to various forms of seclusion or separation: geographical, 'decisional', 'causal' (in the broad sense) or perhaps temporal. Each of those notions, when sought to be used as a legal norm in this context, give rise to 'uncertainties and perils of a category of indeterminate reference, used with shifting meanings to mask no more than policy preferences'.[48]

35. And the suggested bifurcation between 'directly' and 'indirectly' affected interests fares no better. That issue has been touched upon above in the context of Ellicott J's reasons in *Tooheys*.

36. The difficulties posed by attempted use of such a criterion may be further illustrated by reference to the history of the litigation in *Bateman's Bay*.[49] At first instance, McClelland CJ in Eq held that the 'sufficient special interest' test from *ACF* had a differential operation in cases where the 'purely commercial interests' of a plaintiff were involved. According to his Honour, in such a case, the issue of standing was (in part) determined by reference to whether the effect upon the relevant interests was or was not 'direct'. That seemingly involved an analysis directed to locating something 'analogous to infringement [by the decision] of a private right' (giving as an example *Phillips v NSW Fish Authority*,[50] where 'as a matter of commercial reality' the plaintiffs were required to pay fees exacted without authority in order to carry on their business as fish merchants).[51]

37. In criticising that approach Gaudron, Gummow and Kirby JJ warned of the 'dangers involved in the adoption of any precise formula as to what suffices for a special interest in the subject matter of an action'. McHugh J's reasons were to similar effect.[52] The correct inquiry required no more than consideration of whether the plaintiff had a sufficient material interest in the subject matter of the litigation. That test was satisfied by the finding that it was probable that the activities of the Land Council would cause 'severe detriment to the business' (per Gaudron, Gummow and Kirby JJ) or would have 'affected [the plaintiff] financially' (per McHugh J).

38. As submitted above, equally pressing 'dangers' arise from the adoption of rigid criteria or formulae in the context of the Commonwealth and ACT ADJR Acts. And, to adapt what was said by Gummow J in *Marine Engineers*, it would be a 'strange result' if the ACT and Commonwealth ADJR Acts posited a narrower criterion than the general law. But it was clear, at least from the time of the decision in *Tooheys*, that so called 'indirect' effects upon interests are in fact capable of satisfying the statutory test in the Commonwealth and ACT ADJR

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[47] See eg *Sullivan v Moody* (2001) 207 CLR 562 at 578-579 [48] per Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ.
[48] See, again in the context of negligence, *Hill v Van Erp* (1997) 188 CLR 159 at 238 per Gummow J. Note also the analysis of the notion of 'proportionality' in *Plaintiff S156-2013 v Minister for Immigration and Border Protection* [2014] HCA 22 at [29].
[49] (1998) 194 CLR 247. The decision at first instance is reported at (1996) 92 LGERA 212.
[50] (1969) 91 WN (NSW) 905.
[51] (1996) 92 LGERA 212 at 219.
[52] At 283 [102]. See also Hayne J agreeing with the other members of the Court at 284 [107]. Similar difficulties have been identified in the United Kingdom authorities, dealing with the supervisory jurisdiction under the common law: see *Walton v Scottish Ministers* [2013] PTSR 51 at 74-75 [89]-[92] per Lord Reed.

Acts (see also the passage from Kiefel J's reasons in *Bacharach* extracted above). And, once that is accepted, the concept of 'directness' would seem to have little, if any, part to play in determining who is and who is not a 'person aggrieved by' a particular decision. It is not, for example, readily apparent how one applies some form of graduated scale of 'directness' to determine that question, particularly given that the criterion itself seems to envisage an essentially binary outcome.

39. And the potential for confusion becomes more pronounced when one considers that a decision such as that in issue in the current matter will affect all conceivably relevant interests in a way that is 'indirect', save for those of the Developers, who obtain relief from a statutory prohibition (s199(1) of the Planning Act). Take for example the obvious case of adjacent property owners: the decision only has any potential effect upon their interests through the medium of the actions of the Developers. Any adverse affectation (construction waste, noise, traffic) will depend upon those 'intervening' actions – the thing must be built to have any effect. The question of whether the interests of those persons, or the interests of the appellants, are more 'directly' affected is as meaningful as asking which shade of red is the reddest. Both possible answers are equally valid and will reflect no more than subjective preference and taste.

40. At most, and as with 'remoteness' or 'proximity', 'directness' reduces to a shorthand re-statement of the ultimate inquiry posed by the statute. But that, in turn, suggests that one should abandon those distracting figurative terms and focus instead upon the statutory text.

Differentiated approach by reference to the mischief addressed by the enactment conferring power to make the decision

41. A further matter that has introduced unwarranted complexity in this area is the notion that it is necessary to consider whether the interests of the putative applicant are 'coincidental with the particular public interest' sought to be achieved by the enactment authorising the relevant decision.[53] As will be explained below, that analysis has been relied upon in a number of the authorities to which the CA referred to exclude reliance upon commercial interests or grievances arising from those interests for the purposes of the statutory test. Again, that analysis is unhelpful and should no longer be applied.

42. That approach has been said to be supported, in particular, by the decision of the Full Federal Court in *Alphapharm Pty Limited v Smithkline Beecham (Australia) Pty Limited* (***Alphapharm***).[54] But it cannot stand with the explanation of what was decided in that case given by five members of this Court in *Bateman's Bay*. At issue in *Alphapharm* (and in *Allan*), were statutes that provided for the making of certain decisions and then provided for certain administrative review procedures in respect of those decisions. In each case, the particular statute established an internal regime that provided for its own measure of review on the application of persons meeting the criteria in that statute.[55] The question of whether the particular third party applicants had 'standing' under those regimes was in each case resolved as an orthodox

[53] See particularly *Big Country* at 93-94 per Lindgren J. See also *Right to Life* at 68-69 per Lockhart J and at 84-85 per Gummow J and the more tentatively expressed views of Sackville J in *North* at 514-515.
[54] (1994) 49 FCR 250.
[55] *Bateman's Bay* at 266 [48] per Gaudron, Gummow and Kirby JJ; *Allan* at 174 [16] per Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ.

question of construction, adjusting the meanings of the terms within the same statute. That was made clear in *Bateman's Bay*, where Gaudron, Gummow and Kirby JJ cited *Alphapharm* as an example of a statute that on its 'true construction' established a regulatory regime that gives an 'exhaustive' (and therefore 'limited') measure of review at the instance of competitors or other third parties.[56] To similar effect, McHugh J explained and distinguished *Alphapharm* as a case where the 'statutory criteria...[rendered] the commercial interests of an individual an inadequate basis for standing'.[57] The result in *Allan* similarly rested upon an orthodox process of construction, having regard to the particular provisions of the regulatory regime and the statutory objects of that regime.[58]

43. Different considerations apply to the construction of the Commonwealth and ACT ADJR Acts. They were intended to create a 'single [and] simple' test[59] for 'standing', applicable to what is, as submitted above, a diverse and unclosed class of decision-making processes in any 'enactment'.

44. It is, of course, necessary as a first step in approaching that test to identify the particular administrative 'decision' giving rise to the putative grievance, and the 'enactment' under which that decision was made.[60] But that is because that analysis is required to ascertain the legal and practical operation of that 'decision'. That will, in turn, provide the context required to determine whether, on the evidence, the plaintiff's interests can be said to be exposed to peril in the sense identified by Kiefel J in *Bacharach*, and so 'adversely affected by' the decision.

45. None of that suggests that the objects of each enactment will provide some basis for reading words of limitation into a <u>different statute</u> that has, by design and for the purpose of avoiding stultification in its application, used words that are of 'wide import'.[61] Such a broad ranging proposition departs 'too far' from the statutory text and to enter the realm of 'speculation' about the unexpressed intention of the legislature.[62]

46. It is true that the operation of the ADJR Acts are, at least in some sense, intertwined with that of the various statutes authorising relevant decisions. That might, in turn, be said to support the proposition that the two statutes should be read together in their application to any particular decision, so as to support some form of implied limitation.[63] But, such reasoning would overlook the fact that, in each case, the two statutes will serve distinctly different objects and have distinct areas of operation:[64] at a level of generality, one defines the limits upon statutory power; the other provides for the enforcement of those limits.

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[56] At 266 [48].
[57] At 283 [102]. Hayne J agreed with both sets of reasons (at 284 [107]).
[58] See at [29]-[38].
[59] M Allars "Standing: the Role and Evolution of the Test" (1991) 20 (1) Federal Law Review 83 at 88 and Commonwealth of Australia, 1977, *Parliamentary debates: House of Representatives: official Hansard*, p 1394.
[60] See eg *Right to Life* per Gummow J at 84B and 86D.
[61] As Dyer has observed, it will generally be 'doubtful' that the relevant legislature 'turned its mind to the question of standing to seek judicial review in relation to the rights and duties created by the first Act' (B Dyer 'Costs Standing and Access to Judicial Review' (1998) *AIAL Forum No 23*, p 17).
[62] *Taylor v Owners – Strata Plan No 11564* (2014) 88 ALJR 473 at 483 [40] per French CJ, Crennan and Bell JJ and at 488 [65] per Gageler and Keane JJ (in dissent in the result).
[63] See eg *Sweeney v Fitzhardinge* (1906) 4 CLR 716. See also *Commissioner of Stamp Duties v Permanent Trustee Co Ltd* (1987) 9 NSWLR 719 at 723-724 per Kirby J
[64] See *Certain Lloyds Underwriters v Cross* (2012) 248 CLR 378 at 393-394 [36]-[37] per French CJ and Hayne J and 414-415 [96]-[102] per Kiefel J.

47. One can illustrate that point further by considering the various grounds of review for which the ADJR Acts provide. The fact that a particular exercise of power 'adversely affects' interests that are in some sense alien to the statutory objects of the 'enactment' may, for example, indicate that the decision is vitiated by an improper purpose – beyond the scope of the purposes for which the power was conferred.[65] It may equally indicate that there has been some error of law; that the decision maker lacked jurisdiction; or that the decision was not authorised under the relevant enactment. It may do so because it may suggest that the decision maker failed to observe the limits on the power, properly construed by reference to the statutory objects. And, it may further appear that an exercise of power of that nature involves a failure to take into account a mandatory relevant consideration or the taking into account of a forbidden consideration (again, such constraints being discerned by reference the object, scope and subject matter of the enabling statute[66]). It is precisely to those possibilities that the grounds of review in s5(1)(c), (d) and (f) and s5(2)(a), (b) and (c) (read with s5(1)(e)) of each of the ACT and Commonwealth ADJR Acts are directed. Does it nevertheless follow that a person whose interests are adversely affected by such an exercise of power is to be taken to be excluded from the concept of a 'person aggrieved' by reason of disconformity between those interests and the objects of the authorising enactment? Surely not.

48. It is also of some importance that the ACT ADJR Act provides a means of excluding decisions from being the subject of an application for review.[67] In other words, where Parliament has sought to cut down the rights for review provided for by the ACT ADJR Act, it has done so using clear words in that statute itself, rather than relying upon implications drawn from the objects of each 'enactment'.

49. In any event, no such implied limitation can be discerned from the relevant provisions in the current matter, which stand in sharp contrast to the provisions considered in *Alphapharm*. Unlike the provisions considered in that matter, the ACT Planning Act required public notification of the development proposal in issue here.[68] As appears from the text and structure of the Act, that was an element of a broader public consultation process (thus potentially involving third parties, including those with commercial interests), applicable to all development applications included in the relevant category of development application (the 'merit track'). Moreover, the terms of that scheme required that commercial interests to be taken into account.[69] And, illustrating that the timeliness imperative that was influential in *Alphapharm*[70] is of far less significance in the current scheme, the decision as to whether to approve the development is to be made at the conclusion of that public consultation process.[71]

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[65] See eg *Thompson v The Council of the Municipality of Randwick Corporation* (1950) 81 CLR 87 at 106.
[66] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40 per Mason J.
[67] See the definition of 'decision to which this Act applies' and schedule 1, which has been amended on numerous occasions.
[68] See ss 121(1) and Division 7.3.4 of the Planning Act.
[69] See again the extract from the *Local Centres Development Code* at CA [21] and ss 119(1)(a) and 120(f) of the Planning Act and the definition of the term 'environment' in the Dictionary.
[70] *Alphapharm* at 280B-D.
[71] See, in that regard, ss120(c), 122, 156(1) and (2) and 157 of the Planning Act and clause 28 of the *Planning and Development Regulation 2008* (ACT).

The 'general rule' regarding economic interests

50. The third problematic strain in the jurisprudence in this area is conveniently captured in the reasons of the CA, which said the following statement was a 'well established' 'general principle'[72]:

> As a general rule, mere detriment to the economic interests of a business will not give rise to standing.[73]

The 'general rule' is at odds with authority

51. That statement is directly at odds with a substantial body of authority. For example, in the passage extracted above from *Tooheys*, Ellicott J accepted that a decision that affects a person in the 'conduct of a business' is a form of 'indirect' affectation that can constitute a relevant grievance. In *Crone*, Pincus J said that there was 'no doubt' that a 'sufficient economic effect' caused by a relevant decision is a satisfactory basis for an application under the Commonwealth ADJR Act.[74] And in *Alphapharm*, expressly rejecting the existence of the 'general rule' or principle proposed by the CA, Gummow J observed:

> ...in my view, there is no "general principle" that a decision under an enactment which favours one corporation cannot relevantly affect the interests of a competitor.[75]

52. The position is equally clear at general law. Indeed, in the *ACF Case* Mason J endorsed a 'general' approach that appears to be the exact opposite of the 'general rule' adopted by the CA:

> ...in general have *locus standi* when he can show actual or apprehended injury or damage to his property or proprietary rights, to his business or economic interests...and perhaps to his social or political interests.[76]

Qualified 'general rule': attenuated approach to economic interests for sufficiently 'direct' or 'non-remote' interests

53. Despite those clear statements (to which the CA made some reference) the 'general rule' seemingly persists in the form of an attenuated approach to commercial or economic interests: admitting such interests only if they satisfy certain criteria. For example, the CA went on to elaborate upon the 'general rule', observing at [31] (seemingly as a qualification) that economic interests:

> ...<u>may</u> provide a basis for standing under the [ACT ADJR Act] <u>provided that</u> the interests of the applicants are <u>so directly affected</u> as to justify the right to challenge the impugned decision (emphasis added).

54. The CA apparently considered that that proposition explained why the putative plaintiff was denied 'standing' in *Crone*, *Big Country* and *Jewell Food Stores Pty*

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[72] See at [31]
[73] Citing, as authority for that proposition, *Rayjon* at 561-562; *Yu Feng Pty Ltd v Chief Executive, Queensland Department of Local Government and Planning* (1998) 99 LGERA 122 at 128; *Canberra Tradesmen's Union Club Incorporated v Commissioner for Land and Planning* [1999] FCA 262; (1999) 86 FCR 266 at [39]; *Jewel Food Stores Pty Ltd v Minister for the Environment, Land and Planning* (1994) 122 FLR 269.
[74] At 379.
[75] At 272D.
[76] At 547. See also the authorities collected by Gaudron, Gummow and Kirby JJ in *Bateman's Bay at* 266 [48].

Limited v Minister for Environment and Planning[77] (***Jewell***): see at [32]. Although not entirely clear, their Honours seemingly equated insufficient 'directness' of affectation with what they understood to have been found in each of those decisions, being that the affected interest was 'too remote'. The perplexities associated with the use of those concepts have been identified above. But, perhaps more revealingly, that analysis was not in fact applied in any of the authorities to which the CA referred.

55. Commencing with *Crone*, the CA suggested (at [32]) that in that decision Pincus J:

> ...considered the claim that the rival employer would gain trade at the expense of the applicant union and its members and their prospects would be lessened. His Honour found that this was too remote to give them standing.

56. Properly understood, his Honour did no such thing. It is true, as has been submitted above, that his Honour's reasons formed part of a line of authority that endorsed the use of the notions of 'remoteness' and 'directness'. But the interest to which the CA referred was not found wanting by Pincus J through the application of such a concept. The relevant aspect of the Union's argument was rather rejected because, although there was no evidence as to the amount of either non-union or union shipping capacity available:

> ...the extra capacity involved in the importation of the [vessels the subject of the impugned importation decision] is, relatively speaking, quite small.[78]

57. In other words, any affectation of the interests of the union and its members flowing from the gain in trade by the rival employer was relatively trivial and was therefore insufficient to reach the threshold of an 'adverse' affectation or give rise to a 'grievance'.

58. Similarly, *Big Country*, to which the CA next referred, did not in fact turn upon 'remoteness' or lack of 'directness', although Lindgren J did discuss those concepts. His Honour rather concluded that the statutory test was not satisfied because:

> The private commercial interest of Big Country is not coincidental with the particular public interest [which emerged from the extrinsic materials to the relevant provisions].[79]

59. Dealing with that matter first, the difficulties with that analysis were identified above: the relevant question is one of construction and whether review rights in respect of such interests are 'limited'. Such a construction is not warranted by the mere fact that a commercial interest does not 'coincide' with the objective purposes of the Act.

60. And that misconception perhaps explains a number of the cases upon which the 'general rule' concerning economic interests is founded.[80] For, it will frequently be the case that the mischief to which statutes are directed and their correlative objects concern the broader public interest, rather than particular

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[77] (1994) 85 LGERA 62. That decision concerned the formula '[a]ny person who may be affected by the approval of a [development application]' which appeared in the planning legislation in force at that time: section 237(1) of the *Land (Planning and Environment) Act 1991* (ACT).
[78] At 383-384.
[79] At 93, see also 94.
[80] See eg *Rayjon* (one of the authorities to which the CA cited in support of the general rule at CA [29](d)) at 562, lines 15-25.

private commercial or economic interests. Perhaps equally frequently, as in *Bateman's Bay*, the legislation may refer to some private interests, but not others. In that case, the latter class of interest might be said to be 'outside the legislature's contemplation' in the sense that the terms of the legislation do not specifically advert to that class. But as was said in *Bateman's Bay*, it would be 'wrong' to start from the position that only those whom the legislation protects or applies to in an 'immediate' sense have standing at general law.[81] And it is equally wrong to start from the position that the wide term 'person aggrieved' is to be cut down in those circumstances.

61. Retuning then to Lindgren J's discussion of 'remoteness' and 'indirectness' in *Big Country*, those observations were made in the course of seeking to dispel the notion that Parliament intended to accord standing to 'every person who has a financial or commercial interest which is adversely affected by a decision'. In that regard, his Honour referred to the wide range of people whose financial interests were potentially affected by the ultimate decision regarding the location of the pharmacy. His Honour's examples included the interests of the competing shopping centre owner and its tenants. His Honour also observed that the staff of the pharmacy and its customers might incur some financial effects (for better or worse) in terms of travel costs. It is not entirely clear whether his Honour regarded all of those interests as too 'remote' or 'indirect', although it is apparent that that was his view as regards some of those examples.[82]

62. Whatever be the case in that regard, his Honour did not explain how those concepts provide any assistance in answering the question actually posed by the statute in those hypothetical examples. His Honour rather seems to have to deployed that figurative language to illustrate the point that not every affected interest is sufficient to confer 'standing'.

63. The same is true of *Jewell*. Higgins J accepted that the decision in issue in that case (to approve a development application) could cause an economic impact upon the applicants. His Honour also accepted that it was 'possible that the impact might be adverse'. But, because the evidence did not address the applicants' possible competitive responses, his Honour was not satisfied that that the increased competition would 'necessarily have an adverse effect on the applicants'.[83] His Honour's analysis was not founded on 'remoteness' or 'directness'.

64. However, at first instance in the current matter (at [51]), Burns J sought to explain the result in *Jewell* by reference to the notion of 'indirectness', which may in turn explain the observations of the CA at [32]. Although not entirely clear, it appears that Burns J considered that the uncertainty as to the ultimate effect upon the businesses in *Jewell* indicated that those interests were not sufficiently 'directly affected'. That appears to have been critical to his Honour's approach to the facts in the current matter. As noted above, his Honour accepted that the proposed development 'will have an adverse economic effect' upon Cavo and Koumvari, and that the interests of Argos may come to be affected by the development. But it appeared that his Honour was of the view that the criterion of 'directness' would only be satisfied if the possibility of

[81] At 267, [50].
[82] At 92-93.
[83] At 70-72.

intervening events and contingencies (market forces and competitive responses) could be excluded so as to be certain that that adverse effect would eventuate (see at [51]).

65. The difficulties of predicting the manner in which a market will respond to changes in the supply or the demand side are notorious. Even more acute difficulties arise in proving that a particular adverse economic effect will necessarily come to pass as a result of such changes. And so the approach in *Jewell*, which has been followed in various other decisions to which the CA referred, may be seen to be a further manifestation of the 'general rule' regarding economic interests identified above. Indeed, Burns J's decision illustrates why that is so: for there will only truly be certainty in such matters if one can conclude that the affected party will be put out of business by being 'unable to trade', which his Honour seemingly accepted would be sufficient to satisfy the statutory test (see at [49] and [53]). That equates to the troubling proposition that while there is life, there is hope (but no 'standing').

66. That should not be accepted. Rather, as was made clear by Kiefel J in *Bacharach*, it is sufficient that the plaintiff demonstrates that the decision has the potential to cause damage, including loss of custom. The fact that a person's economic interests are exposed to peril in that fashion, means that they are 'adversely affected' within the meaning of s3B(1)(a). As her Honour observed, to conclude otherwise would be to read the words of the statute as requiring that they be 'interests which are thereby injured'.

67. Returning then to the observations of the CA at [32]: the three authorities there identified did not in fact turn upon remoteness or directness, and provide no meaningful elucidation as to how those concepts might assist in identifying the 'exceptions' to the general rule. To the extent the result in *Jewell* is to be explained by reference to such matters, it serves only to illustrate the potential pitfalls and seemingly rests upon the notion that the alleged affectation of economic interests are subject to more demanding evidentiary requirements than other interests, for reasons that are not readily explained. The analysis in fact applied in *Big Country* and in *Jewell* may be seen to involve other manifestations of the 'general rule'. But they are equally flawed for the reasons just given.

Requirement for an additional, more material, interest

68. At [45]-[46], the CA identified a further variant of the general rule, which emerges from the reasons of Higgins CJ in *Westfield v Commissioner for Land Planning* (***Westfield***).[84] It posits a dichotomy between the affectation of a 'mere economic interest' (insufficient for the purposes of the statute) and an affectation of such an interest combined with some form of adverse effect upon a 'more material' or less abstract interest (which may satisfy the statutory test). The examples given by Higgins CJ in *Westfield* of the latter category were 'geographic proximity', 'effect on traffic flows' and effect on the 'amenity' of the putative plaintiff's shopping centre.[85] The CA similarly referred to an affectation of 'the amenities (such as car parking, landscaping or traffic flow)' as being potentially sufficient (at [46]).

69. That approach is wrong for two reasons. First, contrary to the clear statements

[84] (2004) 136 LGERA 145.
[85] *Westfield* at 147, [8] and 148, [18]

in the authorities identified above, it proceeds on the premise that affectation of economic interests, however severe, cannot provide a satisfactory basis for an application under the Commonwealth ADJR Act unless accompanied by an affectation of some other form of interest. And, as such, the assertion that economic interests may be sufficient to satisfy the statutory test becomes illusory. Such interests are in fact properly regarded as superfluous to the affectation of the accompanying 'material interest'.

70. Secondly *all* of the matters identified by Higgins CJ and the CA are *only* likely to be of any moment to the putative shopping centre owner by reason of an effect upon that person's business. Viewed as a matter of substance,[86] the connection with the subject matter of the litigation will necessarily be founded upon that person's economic interests in each of those examples. That suggests that that approach is both over and under inclusive. For example, the interests of an overseas owner of a parcel of land located near a proposed development may be only marginally affected by any effect upon traffic flows caused by its approval.

Not the 'sort' of interest a Court should recognise

71. It is also necessary to note that some of the authorities to which the CA referred rely upon something in the nature of a public policy test to winnow out certain economic interests. For example, in *Rayjon* it was said that '[a]n interest in hindering a competitor or obtaining a tactical benefit...is not...the sort of interest that the law should encourage or protect'.[87] But, as McMurdo J pointed out in *Co-Mac Pty Limited v Queensland Gaming Commission*,[88] if it is established that a particular decision is legally erroneous, then any advantage received by the beneficiary of that decision (over its commercial rivals) may be one that may be regarded as 'unfair competition'.

72. Moreover, an approach of that nature risks entering the legislative arena – for the Court cannot substitute its own preferred policy outcomes without usurping the role of the legislature.[89] The difficulties in doing so are revealed by Lindgren J's attempts to distinguish the facts of *Big Country* from those of *Loveridge v Pharmacy Restructuring Authority*.[90] His Honour characterised the facts of the latter case as involving applicants who already carried on, and were entitled to carry on, a form of 'monopolistic' trade. Although not expressing a concluded view, his Honour seemingly saw little difficulty there. In contrast, the facts of *Big Country* were said to involve an attempt to 'take a prize that at present seems destined for its competitor' or to 'obtain a windfall benefit of a kind which is a by-product of the advent of re-structuring'. That, his Honour said, was not the 'kind' of interest the law should protect. Why one necessarily prefers the interests of entrenched monopolists against opportunistic entrepreneurs is by no means clear. Such fine distinctions, if they are to be made, are best left to the legislative branch. Indeed, there is a potential constitutional dimension to that point.[91]

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[86] Or 'practical reality' – see *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Limited* (1998) 194 CLR 247 (***Bateman's Bay***) at 267.
[87] See *Rayjon* at 561-562 per Thomas J, upon which the Court of Appeal seemingly relied - see at CA [29](d).
[88] [2009] QSC 33 at [20].
[89] See, by way of analogy, *Attorney-General for the Northern Territory v Emmerson* (2014) 88 ALJR 522 at [85].
[90] (1995) 39 ALD 103.
[91] See *Taylor* at 483 [40] and *Zhang v Cai* (2009) 239 CLR 446 at [28].

Actual approach of the CA

73. It is difficult to discern which of the various strains of the reasoning identified above the CA in fact applied.

74. Their Honours did not expressly conclude that the interests of the applicants were 'too remote' or not sufficiently 'direct', although that may be implicit in their agreement with the decision of the primary judge (at [50]) and their discussion of those concepts at [31]-[35]. On the other hand, their Honours' conclusions at each of paras [38], [45] and [46] suggest that they may have adopted the approach derived from *Westfield* (affectation of economic interests are only sufficient if accompanied by affectation of some more material interest). Alternatively, those aspects of its reasoning may be underpinned by the notion that 'mere economic interests' are not the 'kind' of interests the law should protect or that establishing 'possible adverse financial impact' is not sufficient (see particularly [38]).

75. Each of those various approaches is flawed for the reasons identified above. And, regardless of which is to be seen as the true basis for the decision of the CA, that reasoning obscured the correct inquiry, to which it is now convenient to turn.

The Correct inquiry and the disposition of the matter

76. One starts with the statutory context in which the decision was taken.

77. The relevant decision was a decision to approve a development application under s162 of the Planning Act. Amongst other things, that decision permitted the construction of a supermarket and speciality stores.

78. That decision had an obvious and 'immediate' legal effect upon the interests of the second and third respondents, in that it permitted development that would otherwise be prohibited. But, as Keifel J accepted in *Bacharach* and as is plain from the terms of the regulatory scheme itself,[92] the practical operation of such a decision may be to affect the economic interests of those in the position of the appellants. Indeed, that potential impact was identified by the Developers' own expert in the Economic Impact Statement, which was prepared to address criteria to which the Planning Act and the relevant instruments required attention.

79. And, as submitted above, it is untenable to suggest that the Planning Act provides some basis for reading into the ACT ADJR Act words of limitation that would prevent pursuit of those interests.

80. The next question was whether the evidence established that the affectation of those interests 'by' the decision was sufficient to meet the statutory test: that is, that they were 'adversely' affected or affected in a way that could otherwise be said to give rise to a real 'grievance'. As the trial judge accepted, that evidence established that if the decision were acted upon by the second and third respondents, the change to the competitive environment would have an adverse economic effect upon Cavo and Koumvari. It would cause them damage in the nature of loss of custom, and (depending upon the severity of

[92] See the extract from the *Local Centres Development Code* at CA [21] and note s119(1)(a) of the Planning Act. See, in addition, s120(f) of the Planning Act and the definition of the term 'environment' in the Dictionary, which includes (in sub-para (h)) "economic characteristics" that affect, or are affected by other elements of the environment.

that damage) potential financial harm to Argos. The likelihood that that the supermarket businesses of Cavo and Koumvari would be rendered unviable was contested. But, even Mr Hack (the second and third respondents' expert) did not rule out the possibility that a reduction in annual turnover of 10% could cause a local centre to go 'under' with resulting closures of the businesses. Mr Hack's evidence suggested that the loss in turnover at Evatt and Kaleen was approaching that figure and the evidence of the appellants' witnesses suggested that it may be even higher.

81. That was more than sufficient to conclude that the decision had the potential to cause real harm akin to that in issue in *Bacharach*: loss of custom, loss of tenants or diminishment in the value of the premises. Indeed, as Lindgren J suggested in *Big Country* in distinguishing *Loveridge*, the likely effect upon the goodwill of the supermarket businesses may be regarded as an affectation of a proprietary interest.[93] The fact that the decision exposed the appellants' economic or proprietary interests to damage or peril of that nature meant that those interests were 'adversely affected' within the meaning of s 3B(1)(a). The primary judge erred insofar as he held that it was necessary to show that those matters would in fact come to pass.

82. And so, shorn of all metaphorical and semantic complexity, the matter is to be resolved by a relatively straight-forward application of the statutory text to the evidence.

Part VII: applicable constitutional provisions, statutes and regulations

83. See annexure A.

Part VIII: orders sought by the appellants

84. The appellants seek the orders set out in the notice of appeal.

Part IX: Time for oral argument

85. The appellants estimate that 1 hour will be required for presentation of their oral argument.

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[93] See *Federal Commissioner of Taxation v Murry* (1998) 193 CLR 605 at 615 [23] per Gaudron, McHugh, Gummow and Hayne JJ.

ANNEXURE A TO APPELLANT'S SUBMISSIONS

C3 of 2014

***Administrative Decisions (Judicial Review) Act 1989* (ACT)**

as at 13 September 2011

Section 3B - Meaning of *person aggrieved*

(1) For this Act, a reference to a ***person aggrieved*** by a decision includes a reference to—

(a) a person whose interests are adversely affected by the decision; and

(b) for a decision by way of the making of a report or recommendation—a person whose interests would be adversely affected if a decision were, or were not, made in accordance with the report or recommendation.

(2) For this Act, a reference to a ***person aggrieved*** by conduct that has been, is being, or is proposed to be engaged in for the purpose of making a decision, includes a reference to a person whose interests are, or would be, adversely affected by the conduct.

(3) For this Act, a reference to a ***person aggrieved*** by a failure to make a decision includes a reference to a person whose interests are, or would be, adversely affected by the failure.

Section 5 - Applications for review of decisions

(1) A person aggrieved by a decision to which this Act applies may apply to the Supreme Court for an order of review in relation to the decision on any 1 or more of the following grounds:

(a) that a breach of the rules of natural justice happened in relation to the making of the decision;

(b) that procedures that were required by law to be observed in relation to the making of the decision were not observed;

(c) that the person who purported to make the decision did not have jurisdiction to make the decision;

(d) that the decision was not authorised by the enactment under which it was purported to be made;

(e) that the making of the decision was an improper exercise of the power given by the enactment under which it was purported to be made;

(f) that the decision involved an error of law, whether or not the error appears on the record of the decision;

(g) that the decision was induced or affected by fraud;

(h) that there was no evidence or other material to justify the making of the decision;

(i) that the decision was otherwise contrary to law.

(2) The reference in subsection (1) (e) to an ***improper exercise*** of a power includes a reference to—

(a) taking an irrelevant consideration into account in the exercise of a power; and

(b) failing to take a relevant consideration into account in the exercise of a power; and

(c) an exercise of a power for a purpose other than a purpose for which the power is given; and

(d) an exercise of a discretionary power in bad faith; and

(e) an exercise of a personal discretionary power at the direction or behest of another person; and

(f) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case; and

(g) an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power; and

(h) an exercise of a power in such a way that the result of the exercise of the power is uncertain; and

(i) any other exercise of a power in a way that is abuse of the power.

(3) The ground mentioned in subsection (1) (h) is not taken to be made out unless—

(a) the person who made the decision was required by law to reach that decision only if a particular matter was established, and there was no evidence or other material (including facts of which the person was entitled to take notice) from which the person could reasonably be satisfied that the matter was established; or

(b) the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist.

am. No. A2012-13 (commenced 12 April 2012).

Part 1.13 Section 5(1), new note

insert

Note The *Human Rights Act 2004*, s 40B (1) (b) makes it unlawful for a public authority to fail to give proper consideration to a relevant human right when making a decision.

am. No. A2013-37 (commenced 26 September 2013).

4 Dictionary - Section 2, note 1

omit

For example, the signpost definition '***person aggrieved***—see section 3B.' means that the term 'person aggrieved' is defined that section.

substitute

For example, the signpost definition '***conduct engaged in*** for the purpose of making a decision—see section 3C.' means that the term 'conduct engaged in' is defined in that section.

5 Meaning of *person aggrieved – Section 3B*

omit

6 New section 4A

insert

Section 4A - Who may make an application under this Act

(1) An eligible person may make an application under this Act, subject to subsections (2) and (3).

(2) If the application relates to a category A decision, or conduct engaged in for the purpose of making the decision, the person may make the application only if—

(a) the person's interests are, or would be, adversely affected by the decision, failure to make the decision, or conduct engaged in for the purpose of making the decision; or

(b) if the decision is of a kind that is proposed in a report or recommendation—the person's interests are, or would be, adversely affected if the decision were, or were not, made in accordance with the report or recommendation.

(3) If the application relates to a category B decision, or conduct engaged in for the purpose of making the decision, the person may make the application unless—

(a) an enactment does not allow the person to make the application; or

(b) each of the following apply:

i. the interests of the eligible person are not adversely affected by the decision or conduct;

ii. the application fails to raise a significant issue of public importance.

(4) The Supreme Court may at any time, on application by a party, refuse to hear the application or dismiss the application if satisfied that the applicant is not an eligible person.

(5) In this section:

category A decision means a decision of an administrative character made, proposed to be made, or required to be made (whether in the exercise of a discretion or not) under—

(a) the *Heritage Act 2004*; or

(b) the *Planning and Development Act 2007*, other than a decision under that Act mentioned in schedule 1.

category B decision means a decision to which this Act applies, other than a category A decision.

7 Applications for review of decisions – Section 5(1)

omit everything before paragraph (a), substitute

(1) An eligible person may apply to the Supreme Court for an order of review in relation to a decision to which this Act applies on 1 or more of the following grounds:

14 Dictionary, new definition of *eligible person*

Insert

eligible person, for an application under this Act, means—

(a) an individual; or

(b) a corporation, if the subject matter of the application relates to a matter that happens after the corporation was incorporated or came into existence; or

(c) an unincorporated organisation or association if the subject matter of the application relates to a matter that—

i. forms part of the objects or purposes of the organisation or association; and

ii. happens after the organisation or association came into existence.

15 Dictionary, definition of *person aggrieved*

omit

***Planning and Development Act 2007* (ACT)**

as at 17 August 2011

Section 119– Merit track – when development approval must not be given

(1) Development approval must not be given for a development proposal in the merit track unless the proposal is consistent with—

(a) the relevant code; and

...

Section 120 - Merit track—considerations when deciding development approval

In deciding a development application for a development proposal in the merit track, the decision-maker must consider the following:

...

(c) each representation received by the authority in relation to the application that has not been withdrawn;

...

(f) the probable impact of the proposed development, including the nature, extent and significance of probable environmental impacts.

121 Merit track—notification and right of review

(1) To remove any doubt, if a development proposal is in the merit track, the application for development approval for the proposal must be publicly notified under division 7.3.4.

122 Merit track—time for decision on application

A development application for a development proposal in the merit track must be decided under section 162 (Deciding development applications) not later than—

(a) if no representation is made in relation to the proposal— 30 working days after the day the application is made to the planning and land authority; or

(b) in any other case—45 working days after the day the application is made to the authority.

139 Form of development applications

...

(2) The application must—

...

(d) if the application is for approval of a development in the merit track—be accompanied by information or documents addressing the relevant rules and relevant criteria; and...

Division 7.3.4 Public notification of development applications and representations

152 What is *publicly notifies* for ch 7?

(1) For this chapter, the planning and land authority ***publicly notifies*** a development application if—

(a) for an application for a development proposal in the merit track that is prescribed by regulation—the authority notifies the application in the manner prescribed under subsection (2); or

(b) for any other application for a development proposal—the authority notifies the application under—

(i) section 153 and section 155; and

(ii) if the development proposal is, or includes, a lease variation—section 154 (if applicable).

Note 1 Only developments to which the merit track and impact track applies are required to be publicly notified (see s 121 and s 130). Also, the planning and land authority must re-notify some amended development applications (see s 146).

Note 2 An entity other than an applicant may apply for review of a decision to approve a development application in the merit track only if the application is required to be notified under section 153 and section 155 (see sch 1, item 4).

(2) For an application prescribed under subsection (1) (a), the planning and land authority may, by regulation, prescribe either of the following ways of notifying the application:

(a) under section 155 (Major public notification) and, if the development proposal is, or includes, a lease variation— section 154 (Public notice to registered interest holders) (if applicable);

(b) under section 153 (Public notice to adjoining premises) and, if the development proposal is, or includes, a lease variation— section 154 (if applicable).

153 Public notice to adjoining premises

(1) This section applies in relation to a development application if—

(a) the planning and land authority must notify the application under this section; and

(b) a place (the ***adjoining place***) other than unleased land adjoins the place (the ***developing place***) to which the application relates.

(2) If the adjoining place is occupied, the planning and land authority must give written notice of the making of the development application to the registered proprietor of the lease of the adjoining place at the adjoining place.

Note For how documents may be given, see the Legislation Act, pt 19.5.

(3) If the adjoining place is unoccupied, the planning and land authority must give written notice of the making of the development application to the lessee of the adjoining place at the lessee's last-known address.

(4) The planning and land authority must give a new written notice under subsection (2) or (3) if, before the public notification period ends, the authority—

(a) becomes aware that the original notice is defective because its contents are incorrect, incomplete or include misleading information; and

(b) is satisfied that the defect is likely to—

(i) unfavourably affect a person's awareness of the timing, location or nature of the development proposal in the application; or

(ii) deny or restrict the opportunity of a person to make representations about the application under section 156.

(5) However, the planning and land authority need not give public notice under subsection (2), (3) or (4) in relation to an adjoining place that is leased by the applicant or a person for whom the applicant has been appointed to act as agent.

Note This section is subject to s 411 and s 412.

(6) The validity of a development approval is not affected by a failure by the planning and land authority to comply with this section.

(7) In this section:

adjoins—a place ***adjoins*** another place if the place touches the other place, or is separated from the other place only by a road, reserve, river, watercourse or similar division.

registered proprietor—see section 234.

154 Public notice to registered interest-holders

(1) This section applies in relation to a development application if—

(a) the planning and land authority must notify the application under this section because it is, or includes, a lease variation; and

(b) a person other than the applicant has a registered interest in the land comprised in the lease to be varied.

(2) The planning and land authority must give written notice of the making of the development application to each person, other than the applicant, with a registered interest in the land comprised in the lease.

(3) The planning and land authority must give a new written notice under subsection (2) if, before the public notification period ends, the authority—

(a) becomes aware that the original notice is defective because its contents are incorrect, incomplete or include misleading information; and

(b) is satisfied that the defect is likely to—

(i) unfavourably affect a person's awareness of the nature of the lease variation; or

(ii) deny or restrict the opportunity of a person to make representations about the application under section 156.

(4) The validity of a development approval is not affected by a failure by the planning and land authority to comply with this section.

155 Major public notification

(1) If the planning and land authority must notify a development application under this section, the authority must do each of the following:

(a) display a sign on the place to which the application relates that states the development proposed to be undertaken;

(b) publish notice of the making of the application in a daily newspaper.

Note This section is subject to s 411 and s 412.

(2) The planning and land authority must display a new sign under subsection (1) (a) if, before the public notification period ends—

(a) the authority—

(i) becomes aware that the original sign is defective because its contents are incorrect, incomplete or include misleading information; and

(ii) is satisfied that the defect is likely to—

(A) unfavourably affect a person's awareness of the timing, location or nature of the development proposal in the application; or

(B) deny or restrict the opportunity of a person to make representations about the application under section 156; or

(b) the authority becomes aware that a sign was not displayed.

(3) Subsection (2) does not apply if a sign is displayed, but is subsequently moved, altered, damaged, defaced, covered or had access to it prevented.

(4) The planning and land authority must publish a new notice under subsection (1) (b) if, before the public notification period ends—

(a) the planning and land authority—

(i) becomes aware that the original notice is defective because its contents are incorrect, incomplete or include misleading information; and

(ii) is satisfied that the defect is likely to—

(A) unfavourably affect a person's awareness of the timing, location or nature of the development proposal in the application; or

(B) deny or restrict the opportunity of a person to make representations about the application under section 156; or

(b) the authority becomes aware that a notice was not published.

(5) A person commits an offence if—

(a) a sign is displayed under subsection (1) (a) or (2); and

(b) the person moves, alters, damages, defaces, covers or prevents access to the sign while it is required to be displayed.

Maximum penalty: 5 penalty units.

(6) An offence against subsection (2) is a strict liability offence.

(7) Subsection (2) does not apply to a person if the person acts with the written approval of the chief planning executive.

(8) The validity of a development approval is not affected by a failure by the planning and land authority to comply with this section.

156 Representations about development applications

(1) Anyone may make a written representation about a development application that has been publicly notified under this Act.

Note Only developments in the merit track and impact track are required to be publicly notified (see s 121 and s 130). Also, the planning and land authority must re-notify some amended development applications (see s 146).

(2) A representation about a development application must be made during the public notification period for the application.

Note ***Public notification period*** for a development application—see s 157.

(3) The planning and land authority may, by notice published in a daily newspaper, extend the public notification period.

Note The planning and land authority may extend the public notification period after it has ended (see Legislation Act, s 151C).

(4) If the planning and land authority extends the public notification period under subsection (3), the authority must give the applicant for the development approval written notice of the extension.

(5) A person who makes a representation about a development application may, in writing, withdraw the representation at any time before the application is decided.

(6) To remove any doubt, a representation about a development application—

(a) may relate to how the development proposed in the application meets, or does not meet, any finding or recommendation of the EIS for the development; and

(b) must not relate to the adequacy of the EIS for the development.

Note Representations about a draft EIS may be made under s 219.

157 Meaning of *public notification period* for development applications—Act

In this Act:

public notification period, for a development application, means—

(a) the period prescribed by regulation; or

(b) if the period prescribed is extended under section 156 (3)—the prescribed period as extended.

Planning and Development Regulation 2008

As at 17 August 2011:

28 Public notification period—Act, s 157, def *public notification period*, par (a)

The following periods are prescribed:

(a) for a development application notified in accordance with the Act, section 152 (1) (a)—10 working days after the day the application is notified;

(b) for a development application notified in accordance with the Act, section 152 (1) (b)—15 working days after the day the application is notified.

Am No A2013-23 (as at 14 June 2013)

20 Public notification period—Act, s 157, def *public notification period*, par (a) Section 28 (a) and (b)

substitute

(a) for a development application notified in accordance with the Act, section 152 (1) (a)—

(i) if the development application is for an estate development plan that has an ongoing provision included in the plan under the Act, section 94 (3) (h)—20 working days; and

(ii) in any other case—10 working days;

(b) for a development application notified in accordance with the Act, section 152 (1) (b)—

(i) if the development application is for an estate development plan that has an ongoing provision included in the plan under the Act, section 94 (3) (h)—20 working days; and

(ii) in any other case—15 working days.