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 ACN 008 524 418
First Appellant

Cavo Pty Ltd ATF Demos Family Trust T/AS IGA Kaleen Supermarket ACN 096 897 862
Second Appellant

Koumvari Pty Ltd ATF Vizardis Family Trust T/AS IGA Evatt Supermarket ACN 081 122 492
Third Appellant

AND

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

AMC Projects Pty Ltd ACN 092 706 128
Second Respondent

Nikias Nominees Pty Ltd ACN 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

SECOND AND THIRD RESPONDENTS' SUBMISSIONS

Date of document: 11 July 2014
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1 Part I: Certification

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

Part II: Concise statement of the issue or issues the second and third respondents contend that the appeal presents

2. The second and third respondents (hereafter "respondents") contend that the appeal presents the following issues:

    1. whether the judgment delivered on 29 November 2013 ("Judgment")[1] by the Australian Capital Territory Court of Appeal ("the Court"), properly construed, holds that there is a "general rule" that affectation of economic interests:
        (a) does not suffice to establish that a person has standing as a "person aggrieved" within s 5 of the *Administrative Decisions (Judicial Review) Act* (ACT) ("*ACT ADJR Act*") as defined in s 3B of that *Act*; or
        (b) will only be sufficient "in certain limited circumstances" (Cf AS[2]b),

    2. whether on the proper construction of s 3B(1)(a) of the *ACT ADJR Act*, the concepts of remoteness, directness or proximity have a place in the test of standing (AS[3]);

    3. whether there must be some "coincidence" between the interests of an applicant and the objects of the statute conferring the relevant power (AS[3]); and

    4. whether the outcome of the application of s 3B(1)(a) is that the appellants have standing.

3. The respondents do not contend that there is any "general rule", as described by the appellants, that is part of the test of standing in s 3B(1)(a). There is no dispute as stated in AS[2(a) and (b)]. Rather the dispute is whether the Court erroneously stated and applied such a "general rule" as the ratio of its Judgment, as set out in Issue 1 above.

4. The respondents agree that Issues 2 and 3 arise, as identified by the appellants in one paragraph (AS[3]), although the respondents say that Issue 3 does not raise an issue whose resolution could spell material error in the Judgment.

5. While not identified by the appellants the true issue underlying the appeal is the application of the test of standing in s 3B(1)(a) in the particular case, to which the appellants refer (AS[9]-[12], [76]-[82]). The appellants seek a fresh factual finding in substitution for the Court's finding that their economic interests were not sufficiently adversely affected to meet the test of standing. The respondents submit that this Court should not interfere with the Court's factual finding as to sufficiency. Nonetheless the respondents address this as Issue 4.

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[1] *Argos Pty Ltd and Ors v Corbell and Ors* [2013] ACTCA 51 (Penfold and Cowdroy JJ and Nield AJ).

Part III: Notice under s 78B of the Judiciary Act 1903 (Cth)

6. The respondents do not consider that notice is required to be given under s 78B of the *Judiciary Act* 1903 (Cth).

Part IV: Statement of material facts that are contested

7. The respondents agree with the appellants' statement of the facts at AS [6]-[7]. As to AS[8], the respondents notified the appellants in correspondence well before the hearing (by letter dated 17 October 2011), and in filed written submissions (dated 19 March 2012), that their standing would be contested.

8. The respondents contest the appellants' account of the nature of the evidence of their claimed commercial interest (AS [9]-[10], [12]) and their description of the findings of Burns J on that matter (AS [11]-[12]).

Part V: Statement as to whether appellants' statement of constitutional provisions, statutes and regulations is accepted

9. The appellants' statement of statutes and regulations is accepted.

Part VI: Statement of argument in answer to appellants' argument

ISSUE 1: Construction of the Court's reasons - "General rule" argument

10. The primary judge and the Court found that the appellants' economic interests were minor and remote, such that the interests were not "adversely affected" within s 3B(1)(a) of the *ACT ADJR Act* (Judgment [38], [46]).

11. The Court correctly identified the statutory test of standing and the principles against which it must be understood, holding that affectation of economic interests may suffice to establish that a person is a "person aggrieved" within ss 5 and 3B(1)(a) (Judgment [31]), citing inter alia, *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd*[2] (Judgment [36]).

12. The Court correctly recognised (Judgment [31] - [35]) that the requirement that an economic interest is sufficient, in that it is not too remote or indirect, has been accepted as an element of the test of "person aggrieved" under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ("*federal ADJR Act*")[3] and the *ACT ADJR Act*.[4]

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[2] (1998) 194 CLR 247.

[3] *Australian Institute of Marine and Power Engineers v Secretary, Department of Transport* (1986) 13 FCR 124 at 133-4 per Gummow J; *Broadbridge v Stammers* (1987) 16 FCR 296 at 298; *Australian Foreman Stevedores' Association v Crone* (1989) 20 FCR 377 at 383 per Pincus J (applying the dictum of Brennan J in *Re McHattan and Collector of Customs* (1977) 18 ALR 154 at 157 that standing is not coextensive with the "ripples of affection" of a decision); *Big Country Developments Pty Ltd v Australian Community Pharmacy Authority* (1995) 60 FCR 85 at 92-5 per Lindgren J; *Boots Co (Australia) Pty Ltd v Smithkline Beecham Healthcare Pty*

13. In *Batemans' Bay* the commercial or economic character of the plaintiffs' interests did not exclude them from having standing, a proposition expressly accepted by Burns J,[5] whose judgment the Court upheld (Judgment [50]). The Court accepted that in cases such as *Bateman's Bay* and *Boots Company (Australia) Pty Ltd v SmithKline Beecham Healthcare Pty Ltd*[6] a commercial interest sufficed to found standing (Judgment [36]).

14. The Court correctly accepted that the standing test is flexible and must be determined by reference to the nature and subject matter of the litigation (Judgment [29](b)). For that purpose the Court examined the statutory scheme and the nature of the decision made by the first respondent ("Minister") to approve the development application for a shopping centre at Giralang ("Decision") (Judgment [8]-[21], [39] – [50]).

15. In an effort to construct an error in the Judgment, the appellants extract from it a single sentence (Judgment [29](d) first sentence and characterises it as the principle applied to form the ratio of the Judgment (AS[26(c)). The sentence describes the outcome in four cases listed in one of four paragraphs summarising the parties' submissions, (Judgment [29](a)-(d)) The appellants take that sentence out of context, misconstrucs it, and disregard the principles the Court stated under the heading "Consideration" and applied in the ratio (Judgment [31] - [38]).

16. The Court did not state and apply a "general rule" that affection of economic interests will not suffice to establish that a person is a "person aggrieved" for the purposes of s 5 of the *ACT ADJR Act* (Cf AS[2]a, [50]-[52]). The Court did not state and apply a "general rule" that affectation of economic interests are only sufficient "in certain limited circumstances", or apply an "attenuated approach" to commercial interests (Cf AS[2]b, [53]-[55]). The Judgment does not contain a statement that economic interests are not the kind of interests the law should protect (Cf AS[74]).

ISSUE 2: Construction of *ACT ADJR Act* s 3B(1)(a)

17. The appellants contend that the Court misconstrued s 3B(1)(a) by impermissibly reading into the provision a test of remoteness (AS[3], [17]-[27]).

18. The appellants' primary contention is that reference to concepts of directness, remoteness or closeness in applying the test in s 3B(1)(a) import "a-textual concepts or rules" that are unhelpful and positively misleading, resulting in misconstruction of the statutory test and that should be abandoned (AS[13](b), [22], [28], [40]). The respondents submit that a construction of s 3B(1)(a) free of a test of remoteness is:
(a) inconsistent with a construction supported by the legislative history; and

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Ltd (1996) 65 FCR 282 at 287-290 per Lehane J; *Maritime Union of Australia v Anderson* (2000) 100 FCR 58 at 80[54] per Kenny J. The same element of remoteness is affirmed in *Allan v Transurban City Link Ltd* (2001) 208 CLR 167 at 174[16] in the context of a statutory test of standing to seek internal review.

[4] *Jewel Food Stores Pty Ltd v Minister for the Environment, Land and Planning* (1994) 122 FLR 269 at 280; *Mainore Pty Ltd v Australian Capital Territory* [2012] ACTSC 177.

[5] *Argos Pty Ltd and Ors v Corbell and Ors* (2012) 7 ACTLR 15; [2012] ACTSC 102 at [51].

[6] (1996) 65 FCR 282.

(b) inconsistent with the language of s 3B(1)(a) and analogous authority as to its interpretation.

(a) Legislative history and common law backdrop

19. Decisions made under ACT ordinances and instruments, and conduct engaged in for the purpose of making such decisions, were justiciable under the *federal ADJR Act* from the commencement of that Act, provided other elements of the test of justiciability were met. An applicant also had to meet the standing test in s 3(4) of the *federal ADJR Act*, which was replicated in s 3(4) of the *Administrative Decisions (Judicial Review) Ordinance* 1989 (ACT) ("*ACT ADJR Ordinance*"). In 1989 upon self-government of the ACT, s 3(4) of the *ACT ADJR Ordinance* was converted into s 3(4) of the *ACT ADJR Act*.[7] In 2005 the form of s 3(4) was improved, by substitution of s 3B(1).[8] Save for its different form, the standing test in s 3B(1) of the *ACT ADJR Act* is identical to the test in s 3(4) of the *federal ADJR Act*.[9] This legislative history indicates that the extrinsic material relevant to the enactment of s 3(4) of the *federal ADJR Act* should be considered.

20. The explanatory memorandum for the bill for the *federal ADJR Act* does not assist in explaining the scope and function of the standing test for seeking judicial review (Cf AS[15]). However in the second reading speech for the *federal ADJR Act* the Honourable Robert Ellicott stated with regard to the expression "a person who is aggrieved by a decision":

> *This term is defined in sub-clause 3(4) to include a person whose interests are adversely affected by the decision or would be adversely affected by a proposed decision. The provision relating to the standing of a person to challenge Commonwealth administrative action may need to be reviewed when the Australian Law Reform Commission presents its report on the law of standing. The Commission currently has a reference from me on the subject.*[10]

21. As noted in the second reading speech, the *federal ADJR Act* was introduced to implement recommendations of the Commonwealth Administrative Review Committee ("Kerr Committee"). The Kerr Committee had described the existing

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[7] *Australian Capital Territory (Self-Government) Act* 1989 (Cth) s 34; Savings provisions are in the *ACT Self-Government (Consequential Provisions) Act* 1988 (Cth) s 26.

[8] *Administrative Decisions (Judicial Review) Act* 1989 (ACT) s 3(4), as amended by the *Statute Law Amendment Act* 2005 (No 2) (ACT) Sch 3. The Explanatory Statement to the *Statute Law Amendment Bill* 2005 (No 2) (ACT), 20 October 2005, states that the amendments in Sch 3 "include the correction of minor error, updating language, improving syntax and other minor changes to update or improve the form of legislation. For example, the schedule includes amendments of six Acts (the *Administrative Decisions (Judicial Review) Act 1977* ... that have been reviewed as part of an ongoing program of updating and improving the language and form of legislation." The reference to "1977" instead of "1989" appears to be a typographical error.

[9] The *Administrative Decisions (Judicial Review) Amendment Act* 2013 (ACT) (commencing operation on 26 September 2013) repealed s 3B of the *ACT ADJR Act* and inserted s 4A, containing a new standing test of "eligible person". The application in the present case under the ACT ADJR Act was subject to the unamended s 3B. Whilst the new s 4A omits the use of the expression "person aggrieved", in relation to relevant decisions made under the *Planning Act* the test in s 4A in substance does not differ from that under s 3B.

[10] Parliament of the Commonwealth of Australia, The Hon Robert Ellicott Second reading speech for the *Administrative Decisions (Judicial Review) Bill* 1977, *Hansard*, House of Representatives, 28 April 1977, p 1394 at 1395.

standing tests for mandamus, prohibition and certiorari, injunction and declaration,[11] and recommended:

> *A person aggrieved or adversely affected by a decision will have standing before the* [proposed Commonwealth Administrative] *Court. This would mean that there would be a narrowing of principles relating to standing applicable at present in respect of mandamus, prohibition and certiorari. However in an appropriate case the High Court could still be approached for these remedies by persons who would not be aggrieved persons or persons adversely affected as required in the case of an applicant to the Commonwealth Administrative Court.*[12]

22. The extrinsic material indicates that the standing test in s 3(4) of the *federal ADJR Act*, drafted against the backdrop of the common law,[13] was intended to reflect a "common denominator" version of the standing test for declarations and injunctions. The test was intended to be less liberal than the test of standing for prohibition and certiorari. Any change would have to await the government's response to law reform reports on standing.[14]

23. There is no basis for discerning any different legislative intention in s 3B(1)(a) of the *ACT' ADJR Act*. The words "person whose interests are adversely affected by the decision" must be understood against the backdrop of the common law test for seeking a declaration or injunction.[15] The test required that a plaintiff had an interest in the subject matter of the action beyond that of other members of the public, in that he or she was more particularly affected.[16] The respondents accept that this is the reformulated and possibly liberalised test of "special interest in the subject matter of

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[11] The Kerr Report referred to the technicalities attending the standing test of mandamus (para 44); noted that a stranger may in some circumstances be entitled to seek prohibition and certiorari and that this standing test was "not unduly restricted" (para 49); that uncertainties applied to the standing test for a declaration (para 52); and that standing of a private litigant to seek an injunction required that the litigant's own private rights are affected or that the litigant suffers some special damage (para 51).

[12] Commonwealth Administrative Review Committee *Report* (Commonwealth, August 1971), PP No 144 of 1971, para 254. The Prerogative Writ Procedures *Report of Committee of Review* (Commonwealth 1973) PP No 56 of 1973 ("Ellicott Committee"), referred to "person aggrieved" expressed general agreement with the recommendations of the Ellicott Committee (para 19).

[13] See *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (1999) 200 CLR 591 at 640[131] per Kirby J; *Allan v Transurban Citilink Ltd* (2001) 208 CLR 167 at 189[65] per Kirby J.

[14] See also *Australian Conservation Foundation Inc v The Commonwealth* (1980) 146 CLR 493 at 540 per Stephen J, 552 per Mason J. Law reform proposals have not been implemented: Australian Law Reform Commission *Standing in Public Interest Litigation* Report No 27 (AGPS, Canberra, 1985); Australian Law Reform Commission *Beyond the Door-keeper: Standing to Sue for Public Remedies* Report No 78 (AGPS, Canberra, 1996).

[15] This leaves aside the more restrictive test applying to mandamus, of a "legal specific right": *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 275[77] per McHugh J.

[16] *Anderson v The Commonwealth* (1932) 47 CLR 50 at 51-2 per Gavan Duffy CJ, Strake and Evatt JJ (where a person seeking to challenge the validity of an intergovernmental agreement restricting the importation of sugar did not have standing on the ground that the agreement would increase the cost of sugar to himself and other consumers); *Robinson v The Western Australian Museum* (1977) 138 CLR 283 at 292-3, 301-3, 327-9 (where a person who found a shipwreck and worked on its salvage for a considerable period of time had "a sufficient interest" beyond that of other members of the public, to seek a declaration as to the constitutional invalidity of statutes whose provisions would deprive him of the legal right to continue the salvage or to compensation. Justices Gibbs and Mason held that it was sufficient that the statutes effectively totally prohibited him from continuing his activities which were the operation of a business carried on for profit: at 301-2, 328-9).

the action" ("*ACF* test") articulated by Gibbs J in *Australian Conservation Foundation Inc v The Commonwealth*,[17] shortly after the enactment of the *federal ADJR Act*. The *ACF* test requires that an interest be established, which is more than a "mere intellectual or emotional concern".[18] Further, this is the *ACF* test as it has developed at common law, bearing in mind the "dangers of adoption of any precise formula as to what suffices for a special interest in the subject matter of the action",[19] This test has been distinguished from the position under Chapter III of the Commonwealth Constitution, where to an extent questions of standing may be subsumed within the constitutional requirement of a "matter".[20]

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24. *Function of standing test.* Section 3B(1)(a) serves a similar function to common law standing rules. Even if the historical origin of standing tests lies in metaphor or parliamentary practice,[21] the present source of the standing rule for seeking judicial review in the ACT Supreme Court is statute. The common law backdrop to s 3B(1)(a) may be traced to the development of equitable remedies to restrain excesses of power by statutory enterprises and the subsequent engagement of equitable remedies to enforce the limits of statutes that created public powers and duties but not private rights.[22] The common law requirement that a plaintiff who brings an action, not to vindicate a private right, but to prevent the violation of a public right or to enforce the
20 performance of a public duty, must have a special interest to protect, is based upon considerations of public policy.[23] The function of such standing tests is not to guard against a multiplicity of actions, but to ensure that the courts decide actual issues between parties, not academic or hypothetical questions.[24] It is part of the function of civil courts to enforce the public law of the community, but only as an incident in the course of protecting the rights of individuals that are interfered with by reason of a

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[17] (1980) 146 CLR 493 at 527 per Gibbs J, 547 per Mason J (Stephen J agreeing, Murphy J dissenting);*Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)* (1995) 183 CLR 552 at 558; *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 256[21], [23], 265[46], 267[50] per Gaudron, Gummow and Kirby JJ, 281-4[96], [100], [103] per McHugh J, 284-5[107], [110] per Hayne J; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (1999) 200 CLR 591 at 609-670[39], [41] per Gaudron J.

[18] *Australian Conservation Foundation Inc v The Commonwealth* (1980) 146 CLR 493 at 530 per Gibbs J, 539-540 per Stephen J, 551-2 per Mason J.

[19] *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 265 [46] per Gaudron, Gummow and Kirby JJ.

[20] *Croome v Tasmania* (1997) 191 CLR 119 at 132-133 per Gaudron, McHugh and Gummow JJ; *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 262[37] per Gaudron, Gummow and Kirby JJ; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (1999) 200 CLR 591 at 611-2[45] – [49] per Gaudron J, 629-632 [100] – [107]. 637[122] per Gummow J;

[21] *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (1999) 200 CLR 591 at 624-6[88] –[90] per Gummow J.

[22] *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 257-259[24]-[29] per Gaudron, Gummow and Kirby JJ; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (1999) 200 CLR 591 at 626[91], 628-9[97] – [98] per Gummow J.

[23] *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (1999) 200 CLR 591 at 599[2] per Gleeson CJ and McHugh J.

[24] *Robinson v The Western Australian Museum* (1977) 138 CLR 283 at327 per Mason J.

breach of law.[25] Where the legislature thinks it appropriate to provide differently, relaxing or abolishing standing requirements it does so.

(b) The statutory language and authority

25. Application of the words "person whose interests are adversely affected by the decision" in s 3B(1)(a) may require judgments of degree. "Directness" or "remoteness" are labels that conveniently describe such judgments. The appellants submit that such assessments are "not to be found in the statute" and place a gloss upon the statutory language (AS[21]). However vague statutory language often requires the making of judgments of degree. Even if the term "standing" is a metaphor[26] (AS[33]), the test in s 3B(1)(a) of who is a "person aggrieved" is not. The requirement to meet this test in order to bring a judicial review action, is separated from the topic of remedies, and has work to do.

26. Whilst formally advocating that one should focus upon the statutory text (AS[40]), the appellants instead attack the words "remoteness" and "proximity" (AS[34]), which are understood only to operate as labels for the kind of judgment of degree that must be made. The appellants offer no analysis of the words comprising the composite phrase in s 3B(1)(a), namely "interests", "affected by the decision" and "adversely", which are now examined.

27. "*Interest*". To establish an interest a person must show that he or she will suffer a grievance as a result of the decision beyond that of any ordinary member of the public.[27] In *Australian Institute of Marine and Power Engineers v Secretary, Department of Transport* ("*AIMPE*")[28] Gummow J said that the interest in the matter must be "of an intensity and degree well above that of an ordinary member of the public.[29] An interest is a benefit or advantage to the plaintiff over and above that to be derived by the ordinary citizen if the litigation ends in the plaintiff's favour.[30] Consistently with the *ACF* test, holding, or expressing, a mere belief that a statutory office-holder should observe statutory procedures, or be prevented from engaging in certain conduct, is, without more, not an "interest" for the purposes of the *ACF* test or s 3B(1)(a).

28. It is common ground that an interest need not be a legal right (AS [19]) and that a person may have an interest of a proprietary, financial or commercial nature (AS[52]). The case-law under the *federal ADJR Act* supporting those propositions does not support the proposition that a belief about the commercial impact of a decision will

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[25] *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 276[81] per McHugh J.

[26] *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (1999) 200 CLR 591 at 624-5[88] per Gummow J; *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 659[68] per Gummow, Hayne Crennan and Bell JJ.

[27] *Tooheys Ltd v Minister for Business and Consumer Affairs* (1981) 54 FLR 421 at 437 per Ellicott J; *United States Tobacco Company v Minister for Consumer Affairs* (1988) 20 FCR 520 at 527.

[28] (1986) 13 FCR 124.

[29] (1986) 13 FCR 124 at 133-4.

[30] *Robinson v The Western Australian Museum* (1977) 138 CLR 283 at327 per Mason J.

suffice.[31] In *Tooheys Ltd v Minister for Business and Consumer Affairs*[32] Ellicott J stated that because the test should not be given a narrow construction it covered an interest that was less than a legal right, but it was "unnecessary and undesirable to discuss the full import of the phrase".[33] That is consistent with the statement by Gummow J in *AIMPE* that the test is not narrower than the *ACF test*, but given the diverse and extensive statutory contexts of public administration in which a standing issue could arise, no rigid criterion could be extracted from the test.[34] The appellants agree with these propositions (AS [25]). It does not follow that the words contained in the test do not require a judgment of degree or that they give standing to a person claiming as an "interest" what is truly no more than a belief or concern about a possible impact of a decision.

29. Yet this is the very conclusion drawn by the appellants, who paradoxically regard the making of judgments of degree, once labelled as questions of remoteness, to involve the imposition of rigid criteria (AS[26](a)). According to the appellants, a test involving a judgment of degree should be abandoned if its application can only be a binary outcome (AS[38]). It is equally unpersuasive to build rejection of a test requiring judgment upon the proposition that some colours have a more limited spectrum than others (AS[39]).

30. On the basis of the paradoxical assumption that judgments of degree involve rigidity, the appellants submit that such judgments of degree should be abandoned (irrespective of any statutory requirement that they be made) (AS[28]). No explanation is offered as to how this might promote a non-rigid approach to the test. Once the judgments of degree are abandoned, any claim will meet the test, even if based upon an interest so far along the spectrum that it collapses into a mere fear or concern. This itself is a form of rigidity, where all claimants have standing, in disregard of the statute.

31. Contrary to the appellants' submission (AS[19]), *Tooheys* is not authority that simply holding a genuine grievance or belief will suffice, or that the only person excluded is a busybody (AS [19]). In 1961, Lord Denning, delivering the speech of the Privy Council in *Attorney-General of the Gambia v N'Jie*,[35] said that the words "person aggrieved" are of such "wide import" that they only exclude a busybody. In that case the legislation provided no definition of "person aggrieved". It is not surprising, given the definition of "person aggrieved" in s 3B(1)(a) and its legislative history, that Lord Denning's dictum has not been adopted (Cf AS[19]).[36]

32. In *Tooheys* Ellicott J recognised that standing is a question of mixed law and fact, that a grievance must be "suffered as a result of the decision complained of", that a "less direct" effect on legal rights could suffice, but that a frivolous or colourable claim

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[31] *Tooheys Ltd v Minister for Business and Consumer Affairs* (1981) 54 FLR 421 at 437-8 per Ellicott J.
[32] (1981) 54 FLR 421.
[33] (1981) 54 FLR 421 at 437; *Australian Institute of Marine and Power Engineers v Secretary, Department of Transport* (1986) 13 FCR 124 at 132 per Gummow J; *United States Tobacco Company v Minister for Consumer Affairs* (1988) 20 FCR 520 at 527.
[34] (1986) 13 FCR 124 at 132-3.
[35] [1961] AC 617 at 634.
[36] Nor has it been accepted as a proper approach to the construction of an undefined test of "person aggrieved": *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 185 per Gibbs CJ. Cf *IW v City of Perth* (1997) 191 CLR 1 at 79 per Kirby J in dissent.

about an effect on interests would fail the test.[37] Similarly in *AIMPE* Gummow J accepted that, consistently with the *ACF* test, a mere belief or concern is not sufficient.[38] While Ellicott J said that a direct and immediate effect on *legal rights* is not necessary (Cf AS[21]), in referring to what is "less direct" his Honour recognised a spectrum of possible impacts beyond those that impinge on legal rights, where the impact might affect an interest. As one proceeds to the extremity of the indirect end of that spectrum, the effect is not upon an interest, but upon a mere belief about a possible claim or a concern about a possible impact.

10 33. The appellants' complaint that consideration of directness or remoteness involves a departure from the approach of Ellicott J in *Tooheys* is erroneous (AS [28]). Such considerations are entirely consistent with *Tooheys*. The recognition that there is such a judgment of degree to be made preserves flexibility in applying the standing test in diverse decision-making contexts. Making such judgments in each case does not introduce rigidity, as the appellants claim (AS[26](a)), but rather guards against it.

34. The appellants do not expressly submit that the requirement of an "interest" may be met by having a mere concern or belief. However consistently with their claim that the test under s 3B(1)(a) does not involve any question of degree, and that any effect upon
20 interests, no matter how minor, satisfies the standing test, the prospect rapidly emerges of a claimed "interest" collapsing into a concern or belief.

35. A requirement of sufficiency of an interest assists in identifying what is an interest rather than a belief. Abandoning remoteness is an invitation to condone the collapse of interest into concern or belief, contrary to the *ACF* test.

36. "*Affected by*". It is common ground that the test in s 3B(1)(a) may be satisfied in a case where the effect upon the interest is to occur in the future or is contingent (AS[23], [24]), provided it is shown that the decision exposes the interest to peril (AS[24]).[39]
30 While the appellants accept the requirement of exposure of the interest to peril (AS[24]), they reject the fuller formulation of that requirement by Gummow J in *AIMPE*: that there must flow from the decision "a danger and peril to the interests of the applicant that is clear and imminent rather than remote, indirect or fanciful"[40] (AS[31]). That formulation, which seeks to identify the minimum point on the spectrum of effects, has been accepted in subsequent Federal Court[41] and Full Federal Court decisions.[42] A governmental decision may affect the economic interests of all members of the public or large sectors of the public. They do not all have standing at

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[37] (1981) 54 FLR 421 at 437-8.
[38] (1986) 13 FCR 124 at 132.
[39] *Queensland Newsagents Federation Ltd v Trade Practices Commission* (1993) 49 FCR 38 at 42 per Spender J; *H A Bachrach Pty Ltd v Minister for Housing* (1994) 85 LGERA 134 at 137 per Kiefel J.
[40] *Australian Institute of Marine and Power Engineers v Secretary, Department of Transport* (1986) 13 FCR 124 at 133.
[41] *Australian Foreman Stevedores' Association v Crone* (1989) 20 FCR 377 at 383 per Pincus J; *Boots Co (Australia) Pty Ltd v Smithkline Beecham Healthcare Pty Ltd* (1996) 65 FCR 282 at 287-290 per Lehane J; *Big Country Developments Pty Ltd v Australian Community Pharmacy Authority* (1995) 60 FCR 85 at 92-5 per Lindgren J; *Maritime Union of Australia v Anderson* (2000) 100 FCR 58 at 80[54] per Kenny J.
[42] *Broadbridge v Stammers* (1987) 16 FCR 296 at 298; *Right to Life v Department of Human Services* (1995) 556 FCR 50 at 65F; *United States Tobacco Company v Minister for Consumer Affairs* (1988) 20 FCR 520 at 529-530.

common law to seek judicial review of the decision. The common law test demands something more.

37. This is captured by the words "affected by" in s 3B(1)(a), which involve two components. Firstly there must be a causal connection between the decision and the effect upon the interests. Secondly, that effect must be greater than the effect upon the interests of other members of the public. To determine whether an effect is greater requires a judgment of degree, or sufficiency. However the appellants deny that a judgment needs to be made, or ought to be made, with regard to either component (AS[32]).

38. The appellants' submission is inconsistent with this Court's approach to the construction of a statutory test of standing in *Allan v Transurban City Link Ltd.*[43] The owner/resident of a house, 20 metres from proposed development of the Tullamarine highway, failed to meet a standing test for seeking reconsideration by a statutory authority[44] of its decision to issue certificates associated with the development. The certificates authorised the developer to obtain infrastructure borrowing in which the lender was exempt from income tax on interest, thereby providing an incentive for infrastructure investment. The outcome in *Allan* turned upon the construction of a test of "person affected" for standing to seek internal review within a particular statutory scheme. What is important for present purposes is that this Court unanimously cited with approval[45] a passage from *Re McHattan and Collector of Customs*[46] where Brennan J said of the test of "interests ... affected" in s 27(1) of the *Administrative Appeals Tribunal Act* 1975 (Cth) that:

> *[a] decision which affects the interests of one person directly may affect the interests of others indirectly. Across the pool of sundry interests, the ripples of affection may widely extend. The problem which is inherent in the language of the statute is the determination of the point beyond which the affection of interests by a decision should be regarded as too remote for the purposes of s 27(1).*[47]

39. The notion of remoteness of interest to which Brennan J referred in *McHattan* is consistent with the *ACF* test of proximity to which Stephen J referred in *Onus v Alcoa Ltd of Australia Ltd*,[48] considered below, and which has been frequently applied in relation to standing to seek judicial review.[49]

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[43] (2001) 208 CLR 167 per Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ, Kirby J dissenting.
[44] *Development Authority Allowance Act* 1992 (Cth) s 119.
[45] (2001) 208 CLR 167 at 174[16] per Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ, 187-8[62] per Kirby J.
[46] (1977) 18 ALR 154.
[47] (1977) 18 ALR 154 at 157. In that case a customs agent did not have an "interest .. affected" so as to found standing to seek review by the Administrative Appeals Tribunal of a demand made by the Collector of Customs for duty to be paid under protest by his client.
[48] (1981) 149 CLR 27 at 42.
[49] *United States Tobacco Co v Minister for Consumer Affairs* (1988) 83 ALR 79 at 89; *Australian Foreman Stevedores Association v Crone* (1989) 20 FCR 377 at 383; *Canberra Tradesmen's Union Club Incorporated v Commissioner for Land and Planning* (1998) 100 LGERA 276 at 286.

40. As the plurality observed in *Allan*, Brennan J did not propose that *any* ripple of affection would be sufficient to support an "interest ... affected".[50] Unprepared to admit that they invite the Court to disapprove *Allan* (AS[22]), the appellants nonetheless claim that any ripple of affectation will do, including a feared ripple. That submission should be rejected as inconsistent with the language of s 3B(1)(a).

41. The point at which ripples of affectation have no causal impact upon the commercial interests of another person, or have an insufficient effect upon those interests, was captured well by Pincus J in *Australian Foreman Stevedores Association v Crone.*[51] A union and its members did not have standing under the *federal ADJR Act* to challenge a decision to issue a permit to an employer of non union labour to import a ship, enabling it to obtain shipping contracts. Justice Pincus held that the prospect that the rival employer would gain trade at the expense of the applicant union and its members whose employment prospects would thereby be lessened, was too remote to give them standing:

> *I do not think there is any general rule that, if an administrative decision is made which may improve the competitive position of a business enterprise, then competing enterprises and their employees, as well as the employees' unions, necessarily have an interest to attack the decision. No such broad proposition was sought to be, or could be, supported; nor does the fact that the decision was obtained by a non-union employer and that the applicants are unions and their members necessarily give standing...*[52]

> *... A decision favourable to one citizen may affect many others some directly, and some more remotely. There is a point, which must be fixed as a matter of judgment in each case, beyond which the court must hold that the interests of those affected are too indirectly affected to be recognised. A case such as this where a decision had been made which is said to be favourable to one of a group of business competitors, is an example; the decision may, by assisting one, relatively disadvantage the others and also affect the prospects of those who are in one way or another dependent on the others – as employees, shareholders, or even personal dependants.*[53]

42. In *Big Country Developments Pty Ltd v Australian Community Pharmacy Authority*[54] Lindgren J made a similar judgment of degree. The owner of a shopping centre had no standing to challenge a recommendation made by the Australian Community Pharmacy Authority ("ACPA") recommending approval of its tenant's application to relocate his pharmacy to another shopping centre approximately one kilometre away. The applicant claimed that as centre owner and landlord it had a commercial interest which would be directly adversely affected by loss of an approved pharmacy in the centre and, also an interest by virtue of having made a submission to the ACPA opposing the approval, on the ground of the proper calculation of the distance of the new premises proposed by the tenant pharmacy from the centre, for the purposes of the rules governing approval. Referring to Brennan J's dictum,[55] Lindgren J said:

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[50] See also *Alphapharm v SmithKline Beecham (Australia) Pty Ltd* (1994) 49 FCR 250 at 259 per Davies J.
[51] (1989) 20 FCR 377.
[52] (1989) 20 FCR 377 at 380.
[53] (1989) 20 FCR 377 at 382.
[54] (1995) 60 FCR 85.
[55] (1995) 60 FCR 85 at 91.

The "ripples of affection", in financial or commercial terms, arising from administrative decisions extend far and wide, and it is unthinkable that Parliament intended by ss 5(1) and 3(4) of the AD(JR) Act to accord standing to every person who has a financial or commercial interest which is adversely affected by a decision, no matter how "remote" that interest may be from the decision-making activity and no matter how minor the affection. The present case provides an illustration.[56]

43. Justice Lindgren noted that other persons who could claim that their commercial interests would be affected by the approval or non approval were the owner of the other shopping centre (since refusal of approval would mean that centre could not have an approved pharmacy), the doctor whose surgery was in the applicant's centre, other tenants in both centres, and existing staff and customers (affected in terms of travel costs).[57] As a consequence:

I mention these matters only to suggest the impracticality of a notion that any financial interest adversely affected falls within s 3(4) of the AD(JR) Act. Parliament cannot have intended the AD(JR) Act to operate in this way.[58]

44. "*Adversely*". *Allan* and *McHattan* are authority that the statutory language of "interests ... affected by" of itself incorporates a test of remoteness of the effect on the interests. Remoteness is not extraneous to the statutory language but is inherent in the use of vague words whose application requires a judgment of degree. A fortiori, a statutory test of "interest *adversely* affected by" requires a judgment of degree. It is necessary to identify what falls within the ripples of affectation that have an adverse effect. A mere effect is insufficient. What is an "adverse" effect requires a judgment of degree.

45. *Common law.* The respondents do not say that the *ACF* test is engrafted onto s 3B(1)(a) but that it provided the backdrop to the drafting of s 3(4) of the *federal ADJR Act* and hence the backdrop to s 3B(1)(a). The *ACF* test at that time incorporated a requirement to make judgments of degree, and it continues to do so.

46. What is a sufficient interest under the *ACF* test varies according to the nature of the subject matter of the litigation and the statutory scheme under which the challenged decision was made.[59] It is a matter for curial assessment in each case as to whether a claimed economic interest is sufficient to amount to a special interest. Sufficiency, remoteness or proximity is an accepted component of the test in *ACF*.[60] In *Onus v Alcoa Ltd*,[61] Brennan J said that not every affection of a plaintiff's interests suffices to confer standing,[62] and "[w]hether a plaintiff has shown a sufficient interest in a particular case must be a question of degree, but not a question of discretion".[63] Justice

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[56] (1995) 60 FCR 85 at 92.
[57] (1995) 60 FCR 85 at 92-3.
[58] (1995) 60 FCR 85 at 93.
[59] *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 at 36 per Gibbs CJ.
[60] *Robinson v Western Australian Museum* (1977) 138 CLR 283 at 302, 327-8; *Australian Conservation Foundation Inc v The Commonwealth* (1980) 146 CLR 493 at 547-8.
[61] (1981) 149 CLR 27.
[62] 1981) 149 CLR 27 at 74.
[63] (1981) 149 CLR 27 at 75, cited with approval by Brennan J in *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 283[101].

Wilson held that standing is "a question of fact and degree in every case".[64] Justice Stephen held that as members of a small community of aboriginal people the plaintiffs had a "closer proximity"[65] to the subject matter of the action than, for example, a body of conservationists would have done:

> *As the law now stands [the criterion of "special interest"] 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.*[66]

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47. Determining whether an interest is sufficient to be special, involves a question of fact and degree. An interest may exist but it may be too remote to meet the test, in that it is indirect or minor. As this Court held in *Bateman's Bay*,[67] the fact that a plaintiff conducts commercial activities in competition with those it seeks to restrain is not necessarily insufficient to provide it with a sufficient interest in the subject matter of the action within the *ACF* test. In *Bateman's Bay* each of the plaintiffs, a funeral fund business and a life insurance business, had a "sufficient material interest"[68] in the subject matter of the action because their interests were "as a matter of practical reality,... immediate, significant and peculiar to them".[69]

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48. The appellants accept that remoteness has been part of the *ACF* test (AS[29]-[30]), that the common law approach was simply adopted in the context of the *federal ADJR Act* test (AS[31]), but submit that it should now be abandoned (AS[40]). The appellants do not consider whether the language of s 3B(1)(a) itself, rather than a supposed aping of the common law, has required that such judgments of degree be made. The appellants misunderstand the warning given by Gaudron, Gummow and Kirby JJ in *Bateman's Bay* that no "precise formula" can be adopted as to what suffices to meet the *ACF* test[70] (AS[37]). This was a warning that what is sufficient to meet the *ACF* test will require a judgment of degree. It was not an invitation to
30 abandon the making of such judgments altogether. The plurality made a judgment that the plaintiffs had an interest and that it was immediate, significant and peculiar to them.[71]

49. The appellants mount criticism of a series of cases decided by the Federal Court and the ACT Supreme Court seeking to establish that they were not actually cases in which an issue as to remoteness was determined (AS [54] –[63]). This discussion is not supported by the reasons given by each court. *Crone*, *Big Country* and *Jewel Food Store Pty Ltd v Minister for the Environment, Land and Planning*[72] are pre-eminent examples of applicants who failed to achieve standing because their claimed interests

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[64] (1981) 149 CLR 27 at 63, observing that while the custodians under Aboriginal law of the relics on the land where it was proposed to erect a smelter had standing, an Aboriginal person from Arnhem land would not have had standing.
[65] (1981) 149 CLR 27 at 42.
[66] (1981) 149 CLR 27 at 42.
[67] (1998) 194 CLR 247 at 266[48].
[68] (1998) 194 CLR 247 at 266[48], 267[50] per Gaudron, Gummow and Kirby JJ.
[69] (1998) 194 CLR 247 at 267[52] per Gaudron, Gummow and Kirby JJ.
[70] (1998) 194 CLR 247 at 265[46].
[71] (1998) 194 CLR 247 at 265[46].
[72] (1994) 122 FLR 269 at 280.

were too remote. In none of those cases did the court describe remoteness as a "general rule", or suggest that a stricter test applies to commercial interests than other interests (Cf AS[65], [67]).

50. Where a court finds that a commercial interest is insufficient on its own and considers additional claimed interests, it does not follow that the court is applying a general rule that commercial interests are incapable of meeting the standing test (Cf AS[69]). Nor does reference to the motives of an applicant amount to a public policy test that implicitly operates as a general rule excluding commercial interests (Cf AS[71]-[72])

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51. Ultimately the appellants' complaints about the reasoning in other cases are contrived and cannot be attributed to the Court in this case simply because those cases have been cited. These cases do not propound or apply any "general rule". The Court did not read the cases as stating a "general rule". Neither in the cases discussed nor in the Judgment is there a statement or an application of a general rule that commercial interests cannot found standing.

ISSUE 3: Interests and objects of statute

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52. This is a matter quite discrete from a question of construing in its statutory context a standing test for seeking internal review (Cf AS[42]).[73]

53. The appellants contend that the Court erred in holding that an interest founding standing under s 3B(1)(a) must relate to the objects of the statute conferring the power to make the decision that is the subject of review (AS[3], [41]-[49]). This is a development in the case-law which was not directly in issue below (AS[41]-[49]). The appellants complain that three of the cases cited by the Court also dealt with this issue, and that it is an unfortunate development in the general law of standing because it
30 introduces complexity (AS [41]). The appellants ask the Court to disapprove *Alphapharm Pty Ltd v SmithKline Beecham (Australia) Pty Ltd*,[74] *Big Country* and *Right to Life Association (NSW) Inc v Secretary, Commonwealth Department of Human Services and Health*.[75]

54. The relevance of the objects of the statute is illustrated by *Big Country*. The private commercial interests of the applicants in retaining the pharmacy, like its competitor's interest in acquiring one, were not coincidental with the public interest identified as the object of the relevant legislation. That object was restructuring the pharmacy industry by the reduction of the number of pharmacies dispensing pharmaceutical
40 benefits, in the interests of all Australians as taxpayers and as patients.[76] The test of "person whose interests are adversely affected" was to be applied in light of the scope and purpose of the statute under which the decision was made.[77]

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[73] This additional issue did arise in *Alphapharm v SmithKline Beecham (Australia) Pty Ltd* (1994) 49 FCR 250 and *Allan v Transurban Citilink Ltd* (2001) 208 CLR 167.
[74] (1994) 49 FCR 492.
[75] (1995) 56 FCR 50.
[76] (1995) 60 FCR 85 at 93-4.
[77] (1995) 60 FCR 85 at 93.

55. In the present case this consideration directs attention to the object of the *Planning and Development Act* 2007 (ACT) ("*PD Act*"), which is to provide a planning and land system that contributes to the orderly and sustainable development of the ACT, consistently with the social, environmental and economic aspirations of the people of the ACT and in accordance with sound financial principles.[78] The object of the Territory Plan is to ensure, in a manner not inconsistent with the National Capital Plan, the planning and development of the ACT provides the people of the ACT with an attractive, safe and efficient environment in which to live, work and have their recreation.[79] There is nothing in the *Australian Capital Territory (Planning and Land Management) Act* 1988 (Cth), the National Capital Plan, the Territory Plan, in the objectives of the zones or most importantly in the *PD Act*, to suggest that there is a statutory object or purpose relevant to an exercise of power under s 162 of the *PD Act*, of protection of the commercial interests of owners of shopping centres or supermarkets, or the protection of existing supermarkets from competition. The National Capital Plan refers to a hierarchy of centres. This cannot be assumed to mean that the power under s 162 of the *PD Act* is to be exercised for the purpose of protecting an existing supermarket located in any kind of centre from competition by any proposed supermarket (Cf AS [65] – [67]).

56. Justice Burns found that the Minister had regard to any significant adverse economic impact on other commercially viable local centres.[80] The appellants contended that if a planning decision involves the taking into account of economic matters, or economic matters are relevant considerations the decision-maker is bound to take into account, or the decision may have a significant economic impact, then standing is achieved. Particular reliance was placed upon Criterion C33 of the Local Centres Development Code ("LCDC") and s 119 of the *PD Act* (AS [65]). C33 requires a proposal to have regard to any significant adverse economic impact on other commercially viable local centres.

57. The Court also rejected this claimed basis for standing (Judgment [47]-[49]). The Court considered the relationship between the claimed interests and the object of the *PD Act* in the course of rejecting the appellants' contention that any jeopardy to the Kaleen IGA or Evatt IGA was a relevant planning consideration (Judgment [47] – [49]). The appellants' submission conflated the question of standing with the question of what is a relevant consideration. The presence of C33 in the LCDC did not give standing to any person or entity claiming that the proposal failed to comply with C33. Nor did it give standing to any person or entity claiming that C33 of itself requires the Minister to have regard to any significant adverse economic impact on other commercially viable local centres.

58. The appellants submitted below that the fact that a particular matter features in a statutory decision-making scheme provides a launching pad for any person with a concern about that issue to achieve standing. They now advance the reverse contention. They seek to dispose of *Alphapharm*, *Big Country* and *Right to Life* because those cases direct attention to the mismatch between their commercial

[78] *PD Act* s 6.
[79] *PD Act* s 48.
[80] [2012] ACTSC 102 at [75]-[76].

interests and the objects of the *PD Act*. It is not an object of the *PD Act*, or of s 119 or s 120(f) specifically, to protect existing supermarkets from competition or from economic disadvantage. As a fall-back position, and as a claimed basis for distinguishing *Alphapharm*, the appellants revert to seizing upon a consideration that a statute requires to be taken into account, claiming that assertion of a concern or belief about that consideration establishes standing (AS[49]). This misconceives *Alphapharm* which imposes a requirement to match the interest with the objects of the statute rather than any matter mentioned within it, and does not abandon the requirement of an interest rather than a concern or belief.

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59. The respondents submit that the development in *Alphapharm*, *Big Country* and *Right to Life* is consistent with the requirement, both under the *ACF* test and under s 3B(1)(a) of the *ACT ADJR Act*, that standing be determined by reference to the nature and subject matter of the litigation. That includes the objects of the statute conferring power to make the decision. This development in the case-law does not involve any conflation of the objects of the statute under which the decision is made with those of the *ACT ADJR Act* (Cf AS[45]-[48]).

60. In any event it is not necessary to determine Issue 3. If the appellants' submission were
20 accepted it would not signify error in the Judgment, since the Court did not rely upon this development in the case-law.

ISSUE 4: Whether appellants met the test in s 3B(1)(a)

61. Justice Burns dismissed the application under the *ACT ADJR Act* not only on the basis that that the appellants did not have standing, but also having considered and rejected each of the six grounds of review.[81] On appeal the appellants agitated all six grounds again, but the Court determined the matter solely on the basis of lack of standing. This
30 was a case where standing was not determined at an interlocutory stage. The appellants had the opportunity fully to adduce evidence to establish that the Decision exposed their commercial interests to peril (AS[24]).[82]

62. In the "absence of persuasive evidence"[83] as to Kaleen IGA or Evatt IGA being put in jeopardy, or as to a reduction in profitability as a result of the Decision, Burns J made no finding as to the extent of impact upon the appellants' commercial interests. However Burns J was "prepared to accept" that the Giralang development would have an adverse economic effect on the second appellant, Cavo Pty Ltd ATF Demos Family Trust ("Cavo"), and the third appellant, Koumvari Pty Ltd as trustee for
40 Vizardis Family Trust, and possibly on the first appellant, Argos Pty Ltd ("Argos").[84] Even on that favourable assumption, the effect was too remote.[85] On appeal, the Court correctly described the nature of the interest that the appellants claimed was affected (Judgment [39] – [41]; AS [2]). The Court was not prepared to find that the appellants'

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[81] *Argos Pty Ltd and Ors v Corbell and Ors* (2012) 7 ACTLR 15; [2012] ACTSC 102.
[82] Cf *H A Bachrach Pty Ltd v Minister for Housing* (1994) 85 LGERA 134 at 137-8 per Kiefel J.
[83] [2012] ACTSC 102 at [53].
[84] [2012] ACTSC 102 at [49].
[85] [2012] ACTSC 102 at [53].

evidence demonstrated "a possible financial impact" of the Giralang development that was other than remote (Judgment [38]; Cf AS [7], [29]).

63. Neither Burns J, nor the Court, accepted the appellants' submissions that their evidence supported a finding that the Decision would cause them economic loss. Unlike *Bateman's Bay*,[86] where a factual finding was made that the claimed interest was proximate to the Decision, in the present case no such finding open on the evidence.

64. Each of the appellants filed an affidavit in support of its standing. Mr Chris Haridemos and Mr Alex Vizadis, the respective proprietors of the Kaleen IGA (the second appellant) and the Evatt IGA (the third appellant), claimed, in affidavits whose substantive passages were largely identical, that the Giralang development "will impact on the trade" of their supermarkets.[87] They did not disclose present or projected profit and loss, or indeed any financial information. Their claims that they "may be forced to close or "reduce the scale of .. operations .." of their supermarkets, were made in conditional terms: "[d]epending on the ultimate scale of that loss".[88] Their anticipations that they would be unable to comply with their leases, and that the centres would be affected, were conditional upon realisation of the contingency of being forced to close down or downsize operations.[89] No evidence was provided of a causal connection, present or future, between the Giralang development and loss of trade or commercial impact, or an estimate of the expected scale of any impact. Their evidence was about their concerns with regard to the future. It was not evidence of their commercial interests or the effect of the Decision on such interests.

65. The third affidavit by Mr Arthur Petsas, the director of Argos, the Crown lessee of the Kaleen local centre, stated beliefs that the centre would suffer a loss of trade and, depending upon the scale of that loss, may be forced to close or reduce its operations.[90] Mr Petsas made no claim to knowledge of the commercial viability of the lessee. His claim that he would have difficulty finding a new tenant was contingent upon Kaleen IGA closing down.[91] However Argos' lease to Cavo in any event expired on 3 August 2013.[92] There was no evidence of a commercial interest in receipt of rental revenue from Cavo beyond that date. Nor were Mr Petsas or the proprietors in a position to give evidence about the commercial interests of proprietors of other premises in the Kaleen or Evatt local centres.[93] They expressed their beliefs about those matters.

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[86] (1998) 194 CLR 247 at 266[48].

[87] Affidavit of Chris Haridemos, 23 March 2012, para 14 (CA bundle 724); affidavit of Alex Vizadis, 23 March 2012, para 14 (CA bundle 786),

[88] Affidavit of Chris Haridemos, 23 March 2012, para 15 (CA bundle 724); affidavit of Alex Vizadis, 23 March 2012, para 15 (CA bundle 786),

[89] Affidavit of Chris Haridemos, 23 March 2012, para 16 (CA bundle 724); affidavit of Alex Vizadis, 23 March 2012, para 16 (CA bundle 786). Mr Vizardis' additional claim of a threat to his livelihood was also expressed in contingent and general terms: para 16(c).

[90] Affidavit of Arthur Petsas, 23 March 2012, para 14 (CA bundle 802),

[91] Affidavit of Arthur Petsas, 23 March 2012, para 14 (CA bundle 802).

[92] Affidavit of Arthur Petsas, 23 March 2012, Annexure D (CA bundle 815),

[93] Affidavit of Chris Haridemos, 23 March 2012, para 16(b) (CA bundle 724); affidavit of Alex Vizadis, 23 March 2012, para 16(b) (CA bundle 786); Affidavit of Arthur Petsas, 23 March 2012, para 115(c),(d) (CA bundle 802).

66. To bolster their claim to standing, the appellants now also rely upon expert evidence that was admitted into evidence on the basis that it was relevant to a jurisdictional fact in provisions of the *PD Act*.[94] The primary judge rejected the appellants' contention as to a jurisdictional fact,[95] and found that the appellants' further reliance upon the expert evidence with regard to other grounds was an impermissible attempt to obtain review of the merits.[96]

67. Leaving aside the traffic experts, the expert witnesses for the appellants were Mr Anthony Adams and Ms Ellen Robertshaw, both town planners, and Mr Peter Leyshon, a town planner and retail analyst. In order to meet the jurisdictional fact issue and the expert evidence adduced by the appellants, the respondents provided affidavits by two economists, Mr Gavin Duane (who had prepared the economic impact assessment included in the development application[97]) and Mr Adrian Hack.

68. All experts agreed that the trade of a supermarket is affected by a number of factors. In the case of Kaleen IGA this included competition from the nearby Kaleen Supabarn, in the Kaleen group centre.[98] The gross floor area ("GFA") of the proposed supermarket was a key determinant of estimated trade. The experts disagreed as to how the GFA of the Giralang supermarket was to be calculated.[99] Ms Robertshaw said that consumer expenditure at the Giralang supermarket would involve a redirection of expenditure from Kaleen Supabarn and McKellar Foodworks store as well as Kaleen IGA and Evatt IGA, with predictions as to reduction in expenditure made more difficult by other variables such as a new centre at Lawson and a proposed new Aldi supermarket at the Kaleen group centre.[100]

69. Mr Adams challenged the assumptions on which Mr Duane calculated estimated turnover of various supermarkets, but was unable to provide more reliable data, or to provide his own estimate.[101] While the experts disagreed on forecast turnovers for the Giralang supermarket and the impacts on other supermarkets, none estimated it as likely to be more than 10%,.[102] Mr Duane regarded a 10% reduction in a centre's trade following the development of a competitor centre as being, for planning purposes, "within the normal competitive range".[103] Mr Hack's reference to a 10% loss in trade resulting in closure was made with reference to a centre, not a supermarket, and contrary to the appellants' submission (AS[10](b)), a centre that was already trading considerably below industry benchmarks or whose sustainability was already difficult.[104]

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[94] The letter of instruction to each expert requested an opinion on matters other than the commercial profitability or viability of the Kaleen IGA and Evatt IGA: CA bundle 468-9, 530-1,536, 610-611, 614-615, 634-637.
[95] [2012] ACTSC 102 at [56]-[60].
[96] [2012] ACTSC 102 at [62], [67], [73].
[97] IQ Location Economic Impact Assessment, 3 February 2010 ("Duane Report") (CA bundle 1805 - 1849).
[98] Affidavit of Gavin Duane, 16 February 2012, para 4.11 (CA bundle 652).
[99] Affidavit of Peter David Leyshon, 19 December 2011, para 2.3.9 (CA bundle 475).
[100] Affidavit of Ellen Robertshaw, 21 December 2012, para 7.5.2 (CA bundle 558)
[101] Affidavit of Anthony Talbot Adams, paras 68, 69, 79 (CA bundle 522-4).
[102] Affidavit of Gavin Duane, 16 February 2012, paras 4.12 - 4.15 (CA bundle 652); affidavit of Adrian Walter Hack, 20 February 2012, paras 17.1-17.2, 18.6 (CA bundle 621),
[103] Affidavit of Gavin Duane, 16 February 2012, para 4.3 (CA bundle 650).
[104] Transcript, 28 March 2012, p 204 (CA bundle, 261 lines 9-17).

70. None of the expert witnesses had access to any financial information of the appellants. None was in a position to assess the current and future causal contributions to the profit and loss of Kaleen IGA and Evatt IGA. There was no expert evidence on the present or future market for rental premises such as Kaleen IGA, or as to the trading position of an entity such as Argos.

71. This evidence did not support a finding that the development of a supermarket at the Giralang site (where a supermarket had operated until October 2004) would force closure of the Kaleen IGA or the Evatt IGA or a finding that it would have more than a minor effect on their profitability, let alone affect Argos, which was one step removed. The appellants had fears about an anticipated commercial impact. Even if they had interests rather than beliefs, Burns J made a sound judgment of degree that these were so remote from the Decision that the interests were not adversely affected. There is no basis for disturbing this factual finding.

Part VIII: Estimate of number of hours required for presentation of Second and Third Respondents' Oral Argument

72. The respondents estimate that one hour will be required for presentation of their oral argument.

Dated: 11 July 2014

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