IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY

No. C3 of 2014

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 VIZADIS 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

FIRST RESPONDENT'S SUBMISSIONS

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Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Concise statement of issues the respondent contends that the appeal presents

2. The first respondent, the Minister for the Environment and Sustainable Development (**Minister**) contends that the issue that the appeal presents is as stated in paragraph 3 of the Appellants' Submissions. The Minister does not consider that the issue described in paragraph 2 of the Appellants' Submissions properly arises from the Court of Appeal's judgment as the Court of Appeal did not apply any "general rule" that affectation of economic interests was not sufficient to establish standing.

Part III: Notice under section 78B of the Judiciary Act 1903

3. The Minister agrees with the appellants' view that no s 78B notice is required.

Part IV: Material facts

4. The Minister does not contest the narrative of facts in paragraphs 6-12 of the Appellants' Submissions, save that:

   a. Argos is the Crown Lessee of one parcel of land at the Kaleen Local Centre. There are seven other businesses operating at the Kaleen Local Centre.[1]

   b. In relation to paragraph 10. b), the Appellants have passed over Mr Duane's evidence that impacts of greater than 15% were significant while impacts of 10% were within "the normal competitive range".[2]

   c. In relation to paragraph 12, the primary judge did not implicitly accept that the proposed development may result in the closure of the supermarket. The primary judge found that the evidence was "not persuasive" that either the second or third plaintiffs will be unable to trade if the proposed development proceeded.[3]

Part V: Applicable constitutional provisions, statutes and regulations

5. The Minister accepts the appellant's statement of applicable statutes and regulations.

Part VI: Argument

Minister's position

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[1] CA bundle, Vol 3 p722, para [10]
[2] CA bundle, Vol 3 pp650-651, paras [4.3], [4.7] and [4.8]
[3] CA bundle, Vol 1, p44 at [49].

6. The Minister has assumed a limited role in the proceedings below, mindful of the rule of practice with respect to *Hardiman* respondents.[4] The Minister made no independent submissions below on the issue whether any of the applicants was a "*person who is aggrieved*" within the former s 5(1) of the *Administrative Decisions (Judicial Review) Act* 1989 (ACT) (**ADJR Act**) but adopted the submissions of the third respondent on that issue, and did not call or cross-examine any witnesses.[5]

7. In keeping with his limited role, the Minister proposes to address the statutory construction issue raised on the appeal but not to address the evidence in any detail. The Minister's overall position is that the Court of Appeal's decision that the Appellants were not "persons who are aggrieved" within the meaning of s 5(1) of the ADJR Act was correct and the appeal should be dismissed.

Proper construction of ss 3(4) and 5(1) of the ADJR Act

8. The appellants' central submission is that the words previously found[6] in s 3(4) of the ADJR Act – "a person whose interests are adversely affected by the decision" – extend, no matter what the nature of the decision in question, to every type of interest, any level of affectation, and require nothing more than a crude "but for" connection between the decision and the effect, or potential effect, on the relevant person.

9. If that construction be correct, then whenever any administrative decision is made which may improve the competitive position of a business enterprise, competing enterprises (and their lessors, trading partners, employees, persons who are economically dependent on their employees, and so forth) would necessarily have standing to challenge the decision under the various ADJR statutes and similarly worded statutes.

10. The appellants concede that their central submission is inconsistent with a long line of intermediate appellate and first instance decisions on the proper construction of the federal *Administrative Decisions (Judicial Review) Act* 1977 (Cth) (**Federal ADJR Act**).[7] The appellants ask this Court to overturn that line

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[4] *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13 at 35-36; *Campbelltown City Council v Vegan* (2006) 67 NSWLR 372 at 383 [58]; *Capital Airport Group Pty Ltd v Director-General of the NSW Department of Planning (No 2)* [2011] NSWLEC 83 at [251]-[252]. The fourth and fifth respondents made submitting appearances.

[5] Minister's written submissions on appeal at [3]-[4].

[6] The ADJR Act was amended by the *Administrative Decisions (Judicial Review) Amendment Act 2013* (ACT), and now confers standing on an "*eligible person*" rather than a "*person who is aggrieved*" (section 5(1)), except for certain classes of decision. An applicant for review of a decision made under the *Planning and Development Act 2007* (**Planning Act**) must still establish that its interests *"are or would be adversely affected"* (s 4A of ADJR Act as it presently stands).

[7] Appellants' Submissions at [28]-[33]. There are many other decisions apart from those cited by the appellants. See, for instance: *Animals' Angels eV v Secretary, Dept of Agriculture* [2014] FCA 398; at [102]-[103] Edmonds J; *Anstis v Secretary, Department of Family and Community Services* (2002) 195 ALR 245, at [35] (Kenny J); *Corio Bay & District Private Hospital NH Pty Ltd v Minister for Family Services* (1998) 157 ALR 181, 191 (Merkel J); *Yu Feng Pty Ltd v The Chief Executive Queensland Department of Local Government and Planning* (1998) 99 LGERA 122, 123, 128; (Mackenzie J) (similar provision in *Judicial Review Act* 1991 (Qld) *Canberra Tradesman's Union Club Incorporated v Commissioner for Land and Planning* (1998) 147 FLR 291 (Crispin J); *Shokker v Commissioner, Australian Federal Police* (1997) 73 FCR 279 (Nicholson J); *Queensland Newsagents Federation Ltd v Trade Practices Commission; ex parte Newsagency Council of Victoria Ltd* (1993) 46 FCR 38; (Spender J).

of authority on the basis that the construction they advance is one that gives better effect to the literal meaning of the text of s 3(4) and 5(1) of the ADJR Act.[8]

Words "person aggrieved" had pre-existing legal meaning when ADJR Act enacted

11. The first problem with the appellants' submission is that it assumes that the words "person aggrieved" in s 5(1) and the words "interests" and "adversely affected" in s 3(4) were used in the ADJR Act as if they were terms of common parlance and had no pre-existing legal meaning. That is not the case. As Gummow J observed in *Australian Institute of Marine and Power Engineers v Secretary, Department of Transport* (one of the authorities containing dicta to which the appellants object[9]), the term "person aggrieved" lacked novelty and had appeared in statutes over a long period of time to identify the class of persons given standing to utilise a procedure established by statute.[10]

12. A large number of pre-Federal ADJR Act authorities concerning the construction of "person aggrieved" provisions were collected in a chapter on statutory review in an edited book on standing published in 1979.[11] The authorities cover a wide variety of statutes, including statutes providing for appeals from lower courts to superior courts of record,[12] company law statutes,[13] planning statutes,[14] and copyright, patent and designs statutes.[15]

13. The pre-Federal ADJR Act authorities do not suggest that there the words "person aggrieved" have the same operation in every case. They underscore that the words take their meaning in each case from their particular statutory context. As Sugerman P commented in 1972 in *O'Keefe v Cottram*:[16]

> "There is a great deal of learning to be found in the books as to the meaning of 'person aggrieved' and similar expressions, but there is no magic in the words. Their meaning is coloured, from case to case, by the context in which they are used and the character of the particular subject matter which is being dealt with."

14. The point is that when the Federal Parliament selected the words "person aggrieved" it was not inviting the courts to give them the stripped-down

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[8] Appellants' Submissions at [13] and [76]-[82].
[9] Appellants' Submissions at [31].
[10] (1986) 13 FCR 124 at 131.
[11] P Bayne, "Statutory Review" in P Stein (ed), *Locus Standi* (Law Book Co, Sydney, 1979).
[12] For instance, *Day v Hunter* [1964] VR 845, which concerned s155(1) of the *Justices Act* 1958 (Vic), which provided a right of appeal from the Court of Petty Sessions to the Supreme Court exercisable by "any person who feels aggrieved by ... any order of the court".
[13] Re E&L Homes Pty Ltd [1974] Qd R 102, (Wanstall J), which concerned r 8(1) of the Companies Rules 1963 (Qld) and where it was held there was no practical difference between "person affected" and "person aggrieved". A similar provision (using the words "person aggrieved") still appears in s 1321 of the *Corporations Act* 2001 (Cth). It has been interpreted consistently with the principle that it "is to be seen in the light of the scope and purpose of the statute in issue": see *Australian Securities & Investments Commission v Forestview Nominees Pty Ltd (Receivers and Managers Appointed)* [2006] FCA 1530 at [36]-[40] (French CJ).
[14] See *Maurice v London County Council* [1964] 2 QB 362; *Byrne v Noarlunga District Council* [1970] SASR 523 at 527-8.
[15] As to which, see the instances referred to in *Australian Institute of Marine and Power Engineers v Secretary, Department of Transport* (1986) 13 FCR 124 at 131 (Gummow J).
[16] [1972] 1 NSWLR 319 at 320.

construction for which the appellants contend. It was selecting a verbal formula that had become a legal term of art. By 1977 it was no longer maintainable that the formula restricted rights of review or appeal to persons whose legal rights were infringed. That construction, which initially found wide support, was rejected by the Privy Council in 1961.[17] But nor did the courts in 1977 interpret the formula so as to accord standing to every person who had an interest that might be adversely affected by a decision, without regard to the nature of the interest, the degree of affectation, or the scope and purpose of the statute under which the decision was made. The Federal Parliament should not be taken to have intended the words to have a meaning that is at odds with their established legal meaning at the time that the ADJR Act was enacted.[18]

15. The Federal Parliament's intention with respect to standing under the Federal ADJR Act is confirmed by the terms of the Kerr Report.[19] As the appellants note, the standing provisions of the Federal ADJR Act implemented the recommendations of the Kerr Report.[20] The Kerr Report stated with respect to standing under the proposed new federal judicial review statute (emphasis added):

> "Only persons aggrieved or adversely affected by a decision will have standing before the Court. This would mean that <u>there would be a narrowing of the principles relating to standing applicable at present in respect of mandamus, prohibition and certiorari</u>. However, in an appropriate case the High Court could still be approached for those remedies by persons who would not be aggrieved persons or persons adversely affected..."[21]

16. The Kerr Report's observations about the more restrictive nature of the "person aggrieved" test as compared to the test for standing to seek the constitutional writs[22] are inconsistent with the almost unconstrained construction of the "person aggrieved" test advanced by the appellants. They also serve as a reminder that the Court is here dealing with a statutory judicial review jurisdiction and so need not be concerned by constitutional requirements with respect to the availability of judicial review.[23]

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[17] *Attorney-General of the Gambia v N'Jie* [1961] AC 617 at 634. The "legal rights" test had been established by *Ex parte Sidebotham* (1880) 14 Ch D 458, which concerned s 71 of the *Bankruptcy Act* 1869 (UK), which conferred a right of appeal on a "person aggrieved".

[18] See *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96 at 106-107 (Hayne, Heydon, Crennan and Kiefel JJ); and the cases referred to in Pearce & Geddes, *Statutory Interpretation in Australia* (LexisNexis, 7th ed, 2011) at [3.43]-[3.44] (pp 108-109). For authorities of this Court on the legislature adopting a legal technical term see: *Davies v Western Australia* (1904) 2 CLR 29 at 42-3; *Attorney-General (NSW); Ex rel Tooth & Co Ltd v Brewery Employees Union of NSW* (1908) 6 CLR 469 at [16]-[21]; *Yorke v Lucas* (1985) 158 CLR 661 at [12]; and *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249 at [9].

[19] Report of the Commonwealth Administrative Review Committee (August 1971, Parliamentary Paper No 144) (**Kerr Report**).

[20] Appellants' Submissions at footnote 17.

[21] Report of the Commonwealth Administrative Review Committee (August 1971, Parliamentary Paper No 144) at [254]; and see also the recommendation at [390.5].

[22] *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 92-93; (Gaudron and Gummow JJ).

[23] Further, the Court is dealing with a statutory judicial review jurisdiction which, at least in respect of some non-jurisdictional errors of law, is more advantageous for an applicant than the constitutionally prescribed measure of judicial review: cf s5(1)(f) of the ADJR Act (error of law) and the general law

17. Secondly, this case is concerned with the proper construction of the ADJR Act of the ACT, which was not enacted until 1989.[24] The appellants accept that the standing provisions of the ACT statute, when it was first enacted, mirrored those of the Federal ADJR Act.[25] But it follows that the legislature should be taken to have approved of the then existing case-law on the proper construction of those provisions. That case law accepted that application of the affectation of the person's interest needed to be more than "remote" or "indirect".[26] The legislature should be taken to have intended that the limiting principles laid down in the cases applied to the ACT statute. The appellants' construction sets them at nought.

Existing case law on remoteness should not be overturned

18. The Minister's position is that the proper principles for the construction of ss 3(4) and 5(1) of the ADJR Act are as stated in the three principal decisions referred to and applied by the Court of Appeal,[27] namely, *Australian Foreman Stevedores' Association v Crone*,[28] *Big Country Developments Pty Ltd v Australian Community Pharmacy Authority*[29] and *Jewel Food Stores Pty Ltd v Minister for the Environment, Land and Planning*.[30]

19. As Pincus J put the matter in *Crone's* case:

> "...it now seems to be accepted that questions of degree arise, at least in some standing disputes. Many governmental decisions indirectly affect the interests of a large number of people ... 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 has been made which is said to be favourable to one 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 one way or another dependent on the others – as employees, shareholders, or even personal dependents..."

20. The 'matter of judgment' referred to by Pincus J has come to be described in terms of "remoteness" (or "indirectness") and that terminology is adopted in these submissions.

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requirement that, unless appearing on the face of the record, an error of law is only reviewable if it is jurisdictional.

[24] As the appellants' note, the ADJR Act was an ordinance made under the *Seat of Government (Administration) Act* 1910 (Cth) and commenced on the same day as the *Australian Capital Territory (Self Government) Act* 1988 (Cth), being 11 May 1989.

[25] Appellants' Submissions at [14].

[26] Noting that the federal ADJR Act did not come into force until 1 October 1980. See *Marine Engineers* (1986) 13 FCR 124 at 131; *Ogle v Strickland* (1987) 13 FCR 306; *Broadridge v Stammers* (1987) 16 FCR 296 at 298; *Re McHattan and Collector of Customs* (1977) 18 ALR 154 at 157 (concerning "person aggrieved" but not under the ADJR Act); *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 382-383.

[27] *Argos Pty Ltd & Ors v Simon Corbell, Minister for the Environment and Sustainable Development & Ors* [2013] ACTCA 51 at [31]-[35].

[28] (1989) 20 FCR 377.

[29] (1995) 60 FCR 85.

[30] (1994) 122 FLR 269.

21. In making a judgment as to remoteness for the purpose of applying the standing provisions of the ADJR Act, the scope and purpose of the statute under which the decision in question was made is relevant. Lindgren J described the position in *Big Country* as follows:

> "The remedial provisions of the AD(JR) Act have much work to do: they are applicable to a wide variety of administrative decisions under diverse enactments. Such broad notions as "person aggrieved" and "interests adversely affected" by administrative decisions under enactments are intended to be relevant to the scope and purpose of the statutes involved in particular cases and are to be construed accordingly ... Although such considerations as whether an adverse affection is a direct or remote result of a decision and whether it is substantial or not will often be relevant to the issue of standing under the AD(JR) Act, that Act does not indicate a priori that any one consideration is to be conclusive: judgment must be suspended until the considerations revealed to be relevant by the facts of the particular case can be taken into account."[31]

22. The cases show that in its application in a particular instance, the judgment may involve consideration of:

a. the type of interest that is said to be affected and its comparative importance;

b. whether the interest will be affected immediately or directly by the decision or whether the affectation depends on the occurrence of some intermediate event or contingency;

c. the level of affectation of the interest;

d. the nature of the decision that is sought to be challenged and the extent to which, if any, that decision relates to, raises or depends upon the interest;

e. the extent to which, if any, the interest is one that the statute under which the decision was made is concerned, or seeks to protect or promote; and

f. any other relevant features of the statute under which the decision was made.

23. The appellants mount three main criticisms of the application of a principle of "remoteness":

a. the concept is not supported by the text of the former ss 3(4) and 5(1) of the ADJR Act;[32]

b. the concept is unacceptably vague and conclusory;[33] and

c. the ADJR Act cannot call up, in its application to a particular decision, the scope and purpose of the statute under which the decision was made.[34]

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[31] (1995) 60 FCR 85 at 93B-C.
[32] Appellants' Submissions at [13], [33], [40] and [82].
[33] Appellants' Submissions at [34]-[39].

24. None of the criticisms is warranted.

25. As to the claim that the approach is a-textual, amongst other things, the statutory language uses the word "by" ("a person aggrieved by a decision" and "a person whose interests are adversely affected by [a] decision"). The appellants accept that the word "by" requires that there be a causal relationship between the "decision" and the affectation of interest.[35]

26. Contrary to the appellants' construction, however, the causal inquiry is not answered by a "straight-forward" application of the "but for" test.[36] First, as this Court has recognised in other contexts, where a statute creates a causal requirement, causal questions are to be answered having regard to the scope and purposes of the statute in question.[37] That process may involve confining the causal relationship so as to exclude consequences that satisfy the "but for" test.[38] Further, once it is recognised that the statute requires a causal relationship between the decision and the affectation of interest, the concept of remoteness is familiar. Since remoteness is recognised in tort and contract as a concept that limits the consequences for which damages are recoverable and, on one view, is itself an aspect of the causal inquiry,[39] why should it not form part of the causal inquiry required by the ADJR Act?

27. As to the objections based on the concept of remoteness being unacceptably vague or conclusory, the fact that remoteness might not be capable of precise formulation is no reason for jettisoning it (just as it is not in other areas of the law). It does not "deepen ... any indeterminacy or imprecision in the application of the statute",[40] but provides a convenient short-hand reference to describe the making of the judgment described above.

28. Finally, the appellants seek to distinguish certain authorities (including a decision of this Court) to the effect that standing provisions should be construed in light of the statutory scope and purpose, on the basis that each of them concerned a provision located in the statute under which the decision under challenge was made and not in a general judicial review statute such as the ADJR Act.[41] This is a distinction without a difference. There is nothing illogical about the ADJR Act calling up, in its application to a particular decision, the scope and purpose of the enactment under which the decision

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[34] Appellants' Submissions at [41]-[49].
[35] Appellants' Submissions at [80].
[36] Appellants' Submissions at [13(a)] and [80].
[37] *Henville v Walker* (2001) 206 CLR 459 at [18], [66]-[69], [96] and [164]; *Travel Compensation Fund v Tambree* (2005) 224 CLR 627 at [30], [49], [54] and [79].
[38] For example, in claims for damages suffered "by" contraventions of statutory prohibitions on misleading or deceptive conduct, the misleading or deceptive conduct must be the "cause" of the loss and not just the "occasion" for it. Accordingly, it is not enough that there is a "but for" connection between the relevant conduct and the loss – a person (not necessarily the claimant) must have been induced into error: *Digi-Tech (Australia) Ltd v Brand* (2004) ATPR 46-248 at [159]; *Ingot Capital Investments Pty Ltd & Ors v Macquarie Equity Capital Markets Ltd & Ors* (2008) 73 NSWLR 653 at [12], [22] (Giles JA), [81] (Hodgson J) and [615], [618] (Ipp JA); *Ford Motor Company of Australia Ltd v Arrowcrest Group Pty Ltd* (2003) 134 FCR 522 at 539.
[39] *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506 at 535.
[40] Appellants' Submissions at [33].
[41] Appellants' Submissions at [41]-[49]. The authorities are *Alphapharm Pty Ltd v SmithKline Beecham (Aust) Pty Ltd* (1994) 49 FCR 250; *Allan v Transurban City Link Ltd* (2001) 208 CLR 167.

was made.[42] Indeed, most of the grounds of review set out in s 5 of the ADJR Act could not sensibly be applied without doing so.[43]

29. Further, broadly speaking, the legislature's purpose in enacting the ADJR Act was to consolidate and rationalise the law of judicial review and provide for statutory rights of review of administrative decisions in a single statute rather than separately in the various statutes under which reviewable administrative decisions were made.[44] In light of that purpose, it would be quite inappropriate to apply the standing provisions in the ADJR Act without sensitivity to the scope and purpose of the statutes to which its general review mechanisms apply.

Application in the particular case

30. The Court of Appeal's conclusion that the appellants lacked standing was correct. The connection between (i) the Minister's decision to grant development approval to the application for demolition of an existing derelict shopping centre building and construction of a new shopping centre at Giralang Local Centre; and (ii) the appellants' interests, was too remote to bring the appellants within the standing provisions of the ADJR Act.

31. The Minister's decision was made under s 162 of the Planning Act. It had no immediate consequences for the appellants. Consequences arose for the second appellant (**Cavo**) and the third appellant (**Koumvari**) only if: (i) the existing derelict shopping centre building was demolished; (ii) the new shopping centre building was constructed (with all necessary statutory approvals); (iii) the new shopping centre was successfully leased and business was conducted from there; (iv) customers began purchasing goods at the new shopping centre at Giralang instead of purchasing goods from the supermarket businesses operated by Cavo and Koumvari. Consequences only arose for the first appellant (**Argos**) if, in addition to (i)-(iv) above, Cavo was so impacted that it was unable to pay its rent and/or afford rent increases that it would otherwise be able to afford and Argos was not able to mitigate its loss by finding a new lessee.

32. The connection was, therefore, an indirect one and necessarily dependent upon increased trade competition not only actually occurring, but also being successfully contested. Importantly, given that the inquiry is a causal one, it was also a connection that required voluntary action in the future by third parties (the customers). Further, it was not a connection that lay entirely outside the appellants' control, in that as business people they could plainly take steps to seek to mitigate the extent to which their supermarket businesses were impacted (and no evidence was led to the contrary). The possibility of increased trade competition was also an exigency of business to which the appellants' were exposed irrespective of any decisions made under the

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[42] As Lockhart J observed in *Right to Life Association (NSW) Inc v Secretary, Department of Human Services and Health* (1995) 128 ALR 238 at 269, s5(1) of the ADJR Act "operates in an ambulatory fashion over a wide area of federal law".

[43] Particularly the "relevance grounds" in s5(2)(a) and (b).

[44] House of Representatives, Parliamentary Debates (Hansard), 28 April 1977 at 1394. Kerr Report at p 6 [18]; p 20, [58]; p 105 [335]; Australia, Senate, Administrative Decisions (Judicial Review) Bill 1977, Explanatory Memorandum at [4].

Planning Act – as Mr Duane's evidence about the "normal competitive range" confirmed.[45]

33. The evidence about degree of affectation was equivocal. The primary judge found that the proposed development, if it went ahead, would have an adverse impact on Cavo and Koumvari but made no finding as to the extent of any impact.[46] While the appellants now seek to rely on the expert evidence led at trial to establish standing, that evidence was primarily directed toward other issues (which explains its different focus).[47]

34. Of central importance in the present matter is that, contrary to some suggestions in the Appellants' Submissions, the Planning Act does not require that consideration be given to the commercial or trading interests of third parties such as the appellants.[48] The interest asserted by the appellants is wholly extraneous to the Planning Act.

35. Like any planning statute, the Planning Act is primarily concerned with amenity and environmental impacts. Subject to the overriding effect of the National Capital Plan, the purpose of which is to ensure that Canberra and the ACT are planned and developed in accordance with their national significance,[49] such impacts are addressed through various codes, containing rules and criteria, which form part of the Territory Plan.[50] Development is, generally speaking, required to be consistent with the applicable rules and criteria in the Territory Plan.[51]

36. The objects clause of the Planning Act refers to provision of a planning and land system that "contributes to the orderly and sustainable development of the ACT ... consistent with the social, environmental and economic aspirations of the people of the ACT."[52] The object of the Territory Plan is to ensure that "the planning and development of the ACT provide the people of the ACT with an attractive, safe and efficient environment in which to live, work and have their recreation."[53]

37. There is no reason to read "economic aspirations of the people of the ACT" in the objects clause of the Planning Act so that it extends to protecting people who conduct businesses from trade competition. It would be entirely inconsistent with the terms of the Planning Act and Territory Plan to do so. Criterion 33 of the Local Centres Development Code (**LCDC**)[54] (the Code applicable to the development in the present proceedings) is instructive in this regard. It requires that the proposal "have regard to any significant adverse

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[45] CA bundle, Vol 3 p650, paras [4.3]-[4.6]
[46] Primary Judgment at [48] and [49]
[47] As is apparent from the instructions given to each expert. See CA Bundle Vol 3, (Leyshon) p468 and 469; (Adams) p530 and 531; (Robertshaw) p536; (Purdon) at p610 and 611.
[48] Cf Appellants' Submissions at [39]
[49] There is a brief explanation of the relationship between the National Capital Plan and ACT planning law in the Court of Appeal Judgment at [9] and [10].
[50] The Territory Plan is addressed in Chapter 5 of the Planning Act.
[51] For instance, s119(1)(a) in relation to the "merit track" (being the development approval track with which these proceedings are concerned).
[52] Planning Act, s6; and see also the definition of "environment" in the Dictionary.
[53] Planning Act, s48.
[54] Extracted in Court of Appeal Judgment at [21].There are other references in the various codes that apply under the Planning Act to economic impacts.

economic impact on other commercially viable local centres." As was accepted by all parties below, criterion 33 is concerned with preserving the "commercial centres hierarchy" – an important concept in the National Capital Plan, Territory Plan and Territory planning law.[55] The terms of the National Capital Plan and Territory Plan make clear that the purpose of the commercial centres hierarchy is to facilitate the provision of appropriate commercial services to Territory residents and not to protect the trading or commercial interests of any particular person by limiting competition.[56] Similarly, criterion 33 of the LCDC does not refer to, and is not concerned with, protecting the commercial or trading interests of any particular person by limiting competition.

38. Further, as in *Alphapharm*, the Planning Act contains strict time limits for the determination of applications for development approval, including applications in the merit track.[57] The ability of the decision-making authorities to extend the time for the making of a decision is limited.[58] That reflects concerns about efficiency and, more broadly, the object of the Planning Act in contributing to "the orderly and sustainable development of the ACT". Without commenting on any particular case, in general, a trade rival will have an economic interest in delaying a person who has received planning approval from proceeding with its development. There must be a risk that the object of the Plan*ning Act* will be subverted if all trade rivals were accorded standing to challenge any planning approval decisions in favour of their competitors – yet that is the situation that the appellants' submissions, if accepted, will bring about.

39. Finally, it is notable that while the Planning Act provides for merits review of some planning decisions by persons who have suffered "material detriment", it expressly excludes from the definition of "material detriment" detriment that is suffered "only because the decision increases, or is likely to increase, direct or indirect competition with a business of the entity or an associate of the entity."[59] Of course, it would not be appropriate to assume that rights of merits review and judicial review with respect to decisions made under the Planning Act are co-extensive. Nonetheless, the approach that the Planning Act takes to merits review is consistent with the proposition that it is no part of its purpose to protect the commercial or trading interests of any particular person from competition.

40. Having regard to these matters, the Court of Appeal's conclusion that the appellants' interest was too remote from the Minister's decision under s 162 of the Planning Act was plainly correct. The Court of Appeal did not apply any "general rule" that economic interests were insufficient. It referred specifically to authorities that "economic interests may provide a basis for standing under

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[55] Primary Judgment at [24]-[29]; Court of Appeal Judgment at [15]-[21].

[56] See, in particular, the extracts from the National Capital Plan and the Territory Plan in the Primary Judgement at [24] and [26], and particularly the statement in Chapter 4 of the National Capital Plan: "The Territory Plan will provide for a range of lower order centres to meet the varying needs of residents" (emphasis added).

[57] See Planning Act s 118 (20 working days with no extension); s122 (30/45 working days) and s 131 (30/45 working days); and also see s 162(2) in relation to the time limits applicable where the Minister's call-in power is exercised.

[58] Planning Act ss166-169 provide in limited circumstances for extending the time for deciding a development application.

[59] Planning Act, s419.

the ADJR Act"[60] and that in some circumstances economic impact through trade competition alone could be sufficient.[61] In any particular case the remoteness test may mean that a person who is affected only by way of increased trade competition will not be accorded standing, and there are many examples of that in the case law.[62] That does not mean that the remoteness test has hardened into a general rule excluding economic impacts, as the appellants contend, or give the Court a reason to go to the opposite extreme.

Part VIII: Time for oral argument

41. It is estimated that presentation of the Minister's oral argument will take less than one hour.

Dated: 11 July 2014

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[60] Court of Appeal Judgment at [31], citing *Australian Foreman Stevedores' Association v Crone* (1989) 20 FCR 377.
[61] Court of Appeal Judgment at [36]-[37], citing *Boots Company (Australia) Pty Ltd v SmithKline Beecham Healthcare Pty Ltd* (1996) 65 FCR 282.
[62] *Anstis v Secretary, Department of Family and Community Services* (2002) 195 ALR 245, at [35] (Kenny J); *Helkban Pty Ltd v Commissioner For Land And Planning and Capital Business Park (Holdings) Pty Ltd* [2003] ACTSC 23 at [82] (Higgins CJ); *Canberra Tradesman's Union Club Incorporated v Commissioner for Land and Planning* (1998) 147 FLR 291;(Crispin J); *Corio Bay & District Private Hospital NH Pty Ltd v Minister for Family Services* (1998) 157 ALR 181, 191 (Merkel J); *Rayjon Properties Pty Ltd v Department of Housing, Local Government and Planning* (Qld) [1995] 2 Qd R 559; 255 (1994) 85 LGERA 251, 255; (Thomas J); *Big Country Developments Pty Ltd v Australian Community Pharmacy Authority* (1995) 60 FCR 85 (1995); (Lindgren J).