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

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

BETWEEN:

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

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

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

AND

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

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

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

Australian Capital Territory Planning and Land Authority
Fourth Respondent

Australian Capital Territory Executive
Fifth Respondent

Combined Residents Action Association Incorporated
Association Number A05140
Sixth Respondent

APPELLANTS' REPLY

Filed on behalf of the Appellants by:
Bradley Allen Love Lawyers
9th Floor, Canberra House
40 Marcus Clarke St
Canberra ACT 2601
Contact: Alan Bradbury (t: (02) 6274 0940)

DX 5626 Canberra
t: +61 2 6274 0999
f: +61 2 6274 0888

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Part I: Certification

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

Part II: Concise reply to the arguments of the respondents

Reading in concepts extraneous to the statutory text

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

3. That approach gives primacy to the statutory text. As this Court has emphasised in that regard, the task of construction begins (and ends) with consideration of that text, considered in its context.[2] In different ways, the respondents seek to depart from that orthodox approach and read into the text words or concepts that are not there.

4. To that end, the first respondent says that the twice-appearing word 'by'[3] requires a causal inquiry, said to be infused with common law notions of remoteness derived from tort and contract. Why, the first respondent asks, do those concepts not equally form part of the inquiry under the ACT ADJR Act? (at 1st RS [26]).

5. But why, to pose an equally rhetorical question by way of response, would they do so? For, as this Court emphasised in *Allan*[4] and consistent with the orthodox approach to construction identified above, it is necessary to consider such matters by reference to the subject, scope and purpose of the statute, rather than by the application of decisions under the general law – be it the general law of standing or (even less obviously providing any useful analogy for present purposes) tort or contract.

6. The difficulties that otherwise arise are usefully illustrated by the first respondent's attempted application of that approach to explain the reasoning of the Courts below. In that regard, the first appellant asserts that there were no 'immediate' consequences for the appellants unless certain contingencies were satisfied – demolition of the old shopping centre; construction of the new shopping centre; successful leasing of that shopping centre and the attraction of the custom from the second and third appellants: 1st RS at [31], [32]. Two things should be said of that submission.

7. First, the result would be a radical and improbable narrowing of the statutory test. For, as noted at AS [39], it will generally be the case that contingencies of that nature may be said to apply to the affectation of almost all conceivably relevant interests. For example, 'physical' effects in the nature of overshadowing equally

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[1] As for the submissions in chief, the appellants refer to the *Administrative Decisions (Judicial Review) Act 1989* (ACT) as the **ACT ADJR Act** and to the Administrative Decisions (Judicial Review) Act 1975 (Cth) as the **Commonwealth ADJR Act.**

[2] *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 87 ALJR 98 at 107 [39] per French CJ, Hayne Crennan, Bell and Gageler JJ; *Thiess v Collector of Customs* (2014) 88 ALJR 514 at 518 [22] per the Court.

[3] See ss 3B(1)(a) ('adversely affected by') and 5(1) ('aggrieved by').

[4] *Allan v Transurban City Link Limited* (2001) 208 CLR 167 at 174 [15].

depend upon the centre being built.

8. Secondly, and somewhat ironically, economic interests will in fact be amongst the few interests 'directly' affected if (as appears to be the case) the first respondent argues that directness is to be understood as an 'immediate' effect, not dependent upon contingencies. The generally accepted basis for valuation of a business or an economic asset is the capitalisation of future maintainable earnings.[5] And, applying that methodology, a willing purchaser would be presumed to take into account the likely loss of revenue caused by the decision to grant development consent. Unlike any 'physical' disturbance, which will not come to pass until the decision is acted upon, the affectation of the appellants' economic interests depend upon none of the contingencies identified by the first respondent and are, in that sense, amongst the most 'directly' affected interests (rivalled only by the interests of the developers, who are relieved of a statutory prohibition). Far from explaining the reasoning of the Court below, the submissions of the first respondent serve to highlight the incoherent nature of that analysis.

9. The Court should reject those submissions and avoid the maze into which they lead. The causal inquiry required by the word 'by' is rather to be understood in the manner identified by Kiefel J in *H A Bachrach Pty Ltd v Minister for Housing*.[6] Notably, none of the respondents suggest that her Honour's reasoning was wrong. And no element of that reasoning was premised upon an inquiry into 'remoteness' or 'directness' resembling that urged by the first respondent.

10. The submissions of the second and third respondents go further and seek to divine an inquiry into 'remoteness' or 'directness' from almost all of the words of the statutory test. Thus, it is said, each of the terms 'interests', 'affected by' and 'adversely' incorporate tests of remoteness.[7] A number of points should be made in response to that submission.

11. First, the proposition that the words of the statute are to be read by reference to words that are not there is, in itself, difficult. The notion that those (unexpressed) conceptions have been silently incorporated in at least three distinct statutory terms raises the additional difficult possibility that they are to be applied in some form of compound fashion. How one does so when the inter-relationship between those matters is equally unexpressed is not explained by the respondents and seems likely to lead to further indeterminacy (eg what if one concludes that the interest is relatively 'remote' but that the affectation of that interest is relatively 'direct' or vice versa?).

12. Secondly, those submissions appear to turn largely upon the notion, reiterated a number of times, that the words of the statute may require 'judgments of degree' or sufficiency. But that proposition was accepted by the appellants in their submissions in chief.[8] The second and third respondents misstate the appellants' submissions in that regard and then spend much of their submissions demolishing their own straw argument.[9]

13. The submission in fact made by the appellants is that those questions of degree

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[5] See, eg, *Abrahams v Federal Commissioner of Taxation* (1944) 70 CLR 23 at 42; *Commissioner of Succession Duties (S.A.) v. Executor Trustee and Agency Co. of South Australia Ltd* (1947) 74 CLR 358 at 361-362 and *Emerald Quarry Industries Pty Ltd v Commissioner of Highways (SA)* (1979) 142 CLR 351 at 366 and 372.
[6] (1994) 85 LGERA 134 at 137 and see AS [24].
[7] See 2nd and 3rd RS at [26]-[44].
[8] See eg AS [13](a), [22] and [80].
[9] See 2nd and 3rd RS at [29].

are to be approached by asking whether the evidence established that the affectation of the appellants' interests was sufficient to meet the statutory test: that is, were those interests 'adversely affected' or did that affectation otherwise give rise to something properly characterised as a 'grievance' (see AS [80] and above). What is not at all clear is why one would turn from those questions posed by the statute to concepts that are entirely extraneous to the statutory text.

14. Thirdly, it is also wrong to suggest that the appellants advance the submission that a mere belief or concern is sufficient to satisfy the statutory test or that 'any ripple of affectation will do'.[10] Belatedly, the second and third respondents accept that the appellants do not 'expressly' advance the first submission.[11] Nor do the appellants 'implicitly' do so, if that is what is said.

15. Fourthly, the second and third respondents attempt to conceal the problematic nature of their proposed analysis by asserting that 'remoteness' and 'proximity' only 'operate as labels for the kind of judgment of degree that must be made': 2nd and 3rd RS at [26] (see also [25]). That comes close to accepting the submissions (actually) made by the appellants to the effect that, at most, those concepts might be said to be a shorthand statement of the ultimate inquiry posed by the statute (AS [43]). But, as the appellants also submitted in chief, the authorities appear to go further, treating those appellations as if they may be applied as substantive legal norms, but with indeterminate and shifting outcomes (AS [34]). The convenient 'label' has leaked into the statutory jar.

16. The difficulty is exemplified by the reasoning of the Court at first instance in this matter. It is not correct to assert that his Honour (or the CA in affirming his Honour's decision) determined the issue of the appellants' standing on the basis that the appellants had no more than 'fears about an anticipated commercial impact': cf 2nd and 3rd RS [71]. His Honour accepted, in terms, that the 'proposed development will have an adverse economic effect' upon the second and third appellants (emphasis added, at [49]). No notice of contention has been filed by the respondents seeking to disturb that finding.

17. It is also incorrect to assert that his Honour made some form of 'judgment of degree' regarding the level of affectation of the appellants' interests (if that is what is asserted by the respondents at 2nd and 3rd RS [71]). That would have required consideration of the evidence identified by the appellants at AS [10], which is nowhere to be found in his Honour's reasons.[12] Burns J eschewed consideration of those matters because he took the view that any such affectation would not suffice unless it could be concluded that the second and third appellants would be 'unable to trade' (at [49]) so as to 'put in jeopardy facilities...enjoyed by the community' (at [53]). The effect of the development upon the second and third appellants' 'profitability' (a fundamental consideration to any business owner), was said to be 'too remote' [53] or to involve an effect upon their interests that was not sufficiently 'direct' [51]. No question of degree is seemingly involved there: his Honour's reasons rather presuppose a rigid dichotomy between economic catastrophe (sufficient) and any lesser form of economic harm (insufficient). There is no middle ground upon which a judgment as to matters of degree might operate.

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[10] See 2nd and 3rd RS [28], [29] and [40] and cf AS [22].
[11] At 2nd and 3rd RS [34].
[12] The submission, if it is made, that the basis upon which that evidence was admitted was in some way limited to the judicial review grounds (see 1st RS at [33] and 2nd and 3rd RS at [66]) is not correct. Indeed, it is plain that the appellants sought to rely upon that material in their submissions on standing: see eg para [15] of the appellants' 'Outline of Reply' dated 23 March 2012 before the trial judge.

18. As submitted at AS [73]-[75], the reasoning process for arriving at that conclusion may reflect any one of a number of flawed analyses. But none of those bear any resemblance to the inquiry posed by the statute. The 'labels' have taken on a life of their own.

'Person aggrieved' – A term of art or vague statutory language?

19. On a related point, the respondents are at odds amongst themselves about the language in fact used in the statute. The first respondent submits that the term 'person aggrieved' is to be regarded as a 'legal term of art', thereby (it would seem) bringing with it the baggage of quite different statutory contexts (1st RS [14]). The answer to that submission is that, given the diversity of statutory contexts in which that term has appeared, no general proposition is established by the examples of its prior deployment.[13]

20. The first respondent further submits that the use of that term in the ACT ADJR Act (when first made as an ordinance) means that the 'legislature should be taken to have approved the then existing case law' on the similar term used in the Commonwealth ADJR Act, thereby importing conceptions of 'remoteness' and 'directness'(at 1st RS [17]). But the principle of construction there sought to be invoked (seemingly as a presumption as to what was in the mind of the Governor-General when he made the ordinance) is now understood to be 'of no great weight' and one that 'cannot be relied upon to perpetuate an erroneous construction'.[14] For the reasons given at AS [28]-[40], that is the current case. In any event, at the time the ordinance was made, it was far from a 'judicially settled'[15] proposition that the legal meaning of the words of the Commonwealth ADJR Act incorporated an inquiry into either 'directness' or 'remoteness'. While that terminology was used liberally in the authorities to which the first respondent refers, it was deployed in a fashion that (upon closer analysis) did nothing but conceal the underlying reasoning (see AS [34]).

21. The second and third respondents complain (at [25]) that, far from employing a term of art with a fixed legal meaning, the legislature has embraced 'vague statutory language'. Although not entirely clear, that 'vagueness' is seemingly said to be the gap which the notions of remoteness and indirectness have filled (as a matter of necessary judicial surgery). But, as this Court observed in *Health World Limited v Shin-Sun Australia Pty Limited*,[16] Courts have comfortably eschewed any attempt to define equivalent terms and have rather proceeded to deal with the particular problem before them, leaving it to later courts to deal with different problems in the light of their own peculiar circumstances. Indeed, there is a particularly cogent reason for doing so in the context of the ACT and Commonwealth ADJR Acts, being that identified at AS [25]: the diversity of contexts across which those enactments operate positively mandates flexibility to avoid stultification and frustration of the statutory objects. The 'vague' language (if it be properly described as such) is a virtue, not a vice, and is an important feature of the statutory design. Shackling the Act to remoteness would defeat the objective purpose revealed by the text.

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[13] See eg *Australian Institute of Marine and Power Engineers v Secretary, Department of Transport* (1986) 13 FCR 124 at 131 per Gummow J.
[14] See eg *Flaherty v Girgis* (1987) 162 CLR 574 at 594 per Mason ACJ, Wilson and Dawson JJ.
[15] Note *Electrolux Home Products Pty Limited v Australian Workers' Union* (2004) 221 CLR 309 at 325 [8] per Gleeson CJ.
[16] (2010) 240 CLR 590 at 599 [31].

Construction of the Court's reasons

22. It is said by the second and third respondents that 'in an effort to construct an error in the Judgment' the appellants have sought to distort the reasoning of the CA by taking out of context a single sentence in [29(d)] of the Court's reasons (to the effect that as a 'general rule mere detriment to the economic interests of a business will not give rise to standing'). Three points should be made in that regard.

23. First, as was accepted in the appellants' submissions in chief and again above,[17] it is unclear which of the strains of reasoning identified in the appellants' submissions in chief at [50]-[71] the CA in fact applied. However, it is tolerably clear that the statement of the Court at [29(d)] encapsulates, in a broad sense, the approach in fact taken by the Court. That is, that applying one or more of those analyses, the Court held that such interests are a special case, which will not as a 'general rule' satisfy the statutory test.

24. Secondly, it is wrong to suggest that the passage at [29(d)] merely 'describes the outcome' in the four cases there referred to by the Court of Appeal. The words 'general rule' mean what they say. They plainly connote some form of 'norm', which the Court understood to be relevant to the outcome of the legal issues before it. That is also clear from the Court's inclusion of that proposition amongst the 'general principles' that it described as having been well established and that are to be 'applied and understood in the specific statutory and factual context of each case' (at [30]).

25. Thirdly, and in any event, it is not the case that the statement in para [29(d)] stands alone. A proposition of that nature was 'applied' by the CA in the context of the current matter at [38], [44], [45] and [49], singling out interests in 'trade competition' or in the 'possible adverse financial impact of the development' as interests that will not, without more, satisfy the statutory test.

Proprietary nature of the interest

26. Even if all of that be wrong, a matter that none of the respondents have contested is that the loss of custom (which even the respondents own witnesses accepted would result from the development) is a diminishment or an adverse effect upon a proprietary interest in the nature of goodwill (see AS [81]). It cannot be doubted that an adverse affectation of a proprietary interest of that nature satisfies the statutory test, even if it be correct to say that the test has some attenuated operation in the area of economic interests.

Noel Hutley
nhutley@stjames.net.au
(02) 8257-2599 (telephone)
(02) 9221 8389 (facsimile)
5 St James Hall

Craig Lenehan
craig.lenehan@stjames.net.au
(02) 8257 2530 (telephone)
(02) 9221 8389 (facsimile)
25 July 2014

[17] At [73]-[75].