HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, BELL, GAGELER AND KEANE JJ

ARGOS PTY LTD & ORS APPELLANTS

AND

SIMON CORBELL, MINISTER FOR THE ENVIRONMENT AND SUSTAINABLE DEVELOPMENT & ORS RESPONDENTS

Argos Pty Ltd v Corbell, Minister for the Environment and Sustainable Development
[2014] HCA 50
10 December 2014
C3/2014

ORDER

1. *The appeal of the second and third appellants be allowed.*

2. *The first to third respondents pay the costs of the second and third appellants.*

3. *The appeal of the first appellant be dismissed with costs.*

4. *Set aside the orders of the Court of Appeal of the Supreme Court of the Australian Capital Territory made on 29 November 2013 insofar as they relate to the second and third appellants and, in their place, order that the second and third appellants have their costs of the proceedings to date in that Court.*

5. *Remit the matter, insofar as it relates to the second and third appellants, to the Court of Appeal for further hearing on grounds 4.2, 4.3 and 4.6 of the notice of appeal filed in that Court and dated 2 August 2012.*

On appeal from the Supreme Court of the Australian Capital Territory

Representation

N C Hutley SC with C L Lenehan for the appellants (instructed by Bradley Allen Love Lawyers)

P J F Garrisson SC, Solicitor-General for the Australian Capital Territory with J J Hutton for the first respondent (instructed by ACT Government Solicitor)

M N Allars SC for the second and third respondents (instructed by King & Wood Mallesons)

Submitting appearances for the fourth, fifth and sixth respondents

CATCHWORDS

Argos Pty Ltd v Corbell, Minister for the Environment and Sustainable Development

Administrative law – Judicial review – Standing – Minister approved development application for commercial development – Appellants conducted businesses near site of proposed development – Appellants alleged development would adversely affect their economic interests – Whether appellants are persons aggrieved by the Minister's decision.

Words and phrases – "person aggrieved", "person whose interests are adversely affected".

Administrative Decisions (Judicial Review) Act 1989 (ACT), ss 3B(1)(a), 5(1).

1 FRENCH CJ AND KEANE J. The first, second and third appellants carry on their respective businesses at premises located within the Australian Capital Territory ("the ACT"). The first respondent, the Minister for the Environment and Sustainable Development ("the Minister"), made a decision under s 162 of the *Planning and Development Act* 2007 (ACT) ("the Planning Act") to approve a proposal by the second and third respondents for a new commercial development at a site near the appellants' premises. The appellants sought judicial review of the Minister's decision under the *Administrative Decisions (Judicial Review) Act* 1989 (ACT) ("the ADJR Act").

2 Under s 5(1) of the ADJR Act, as it was at the time material to this matter, a person aggrieved by a decision was entitled to make an application to the Supreme Court of the ACT to have that decision reviewed on one or more of the grounds there stated. Section 3B defined "person aggrieved" relevantly in the following terms:

> "(1) For this Act, a reference to a ***person aggrieved*** by a decision includes a reference to –
>
> (a) a person whose interests are adversely affected by the decision".

3 The Supreme Court of the ACT, both at first instance and on appeal, held that none of the appellants was a "person aggrieved" by the Minister's decision within the meaning of s 3B of the ADJR Act and, on that basis, dismissed their application for judicial review.

4 In this Court, the appellants contended that the owner of a business, who is likely to suffer a loss of profitability from a greater exposure to commercial competition as a result of the Minister's decision, is a person aggrieved under s 3B(1)(a) of the ADJR Act for the purpose of seeking judicial review of that decision. For the reasons which follow, that contention should be accepted. As a result, the appeal by the second and third appellants should be allowed. As will appear, however, acceptance of that contention does not assist the first appellant.

Background

5 The first appellant holds a lease of Crown land at the Kaleen Local Centre[1] ("Kaleen"). The second appellant is the sub-lessee of the Crown lease at Kaleen; it operates a Supa Express supermarket (formerly an IGA supermarket)

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1 The first appellant is one of eight Crown lessees of the one parcel of land at Kaleen.

on that site. The third appellant holds a sub-lease of a Crown lease at Evatt Local Centre ("Evatt"); it operates an IGA supermarket on that site.

6 The second respondent lodged a development application ("the Development Proposal") on behalf of the third respondent under Ch 7 of the Planning Act. The Development Proposal envisioned a commercial development, including a supermarket and speciality shops, at the Giralang Local Centre ("Giralang").

7 In the ACT, town planning has been regulated by both Commonwealth and Territory legislation since the enactment of the *Australian Capital Territory (Self-Government) Act* 1988 (Cth). These complicated arrangements were summarised by the primary judge[2]. It is not necessary to repeat that summary.

8 It is sufficient for present purposes to note that the Planning Act provides for the division of the ACT into zones for the purposes of the Territory Plan[3]. The land relevant to the Development Proposal is within the Commercial CZ4 – Local Centre zone.

9 The objectives for the Commercial CZ4 – Local Centre zone are to:

> "(a) Provide for convenience retailing and other accessible, convenient shopping and community and business services to meet the daily needs of local residents
>
> (b) Provide opportunities for business investment and local employment
>
> (c) Ensure the mix of uses is appropriate to this level of the commercial hierarchy and enable centres to adapt to changing social and economic circumstances
>
> (d) Maintain and enhance local residential and environmental amenity through appropriate and sustainable urban design

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2 *Argos Pty Ltd v Corbell, Minister for the Environment and Sustainable Development* (2012) 7 ACTLR 15 at 18-23 [7]-[29].

3 *Australian Capital Territory (Planning and Land Management) Act* 1988 (Cth), Pt IV.

(e) Promote the establishment of a cultural and community identity that is representative of, and appropriate to, the place"[4].

10 The determination of the Development Proposal was subject to the Local Centres Development Code under the Territory Plan. This Code operated by reference to Rules, which generally required quantitative assessment, and Criteria, which required qualitative assessment[5]. Consideration of the issue of "Amenity" under the General Development Controls for Commercial Zones was subject to Criterion 33. That criterion stated:

> "A proposal to carry out development in a local centre must have regard to any significant adverse economic impact on other commercially viable local centres."[6]

The primary judge's decision

11 At first instance, the second and third appellants led evidence to the effect that if the Development Proposal were to proceed, increased competition would ensue, which would result in a loss of profit to their businesses at Kaleen and Evatt. The first appellant urged that a loss of trade by the second appellant at Kaleen might lead to the closure of the Kaleen IGA, which might, in turn, affect its economic interests as landlord.

12 The primary judge (Burns J) did not accept that the first appellant's interests were sufficiently affected to satisfy s 3B(1)(a) of the ADJR Act. His Honour accepted the evidence that the implementation of the Development Proposal would adversely affect the profitability of the businesses operated by the second and third appellants[7]. His Honour held that the "real question", as to whether the appellants had standing, was "whether the interests demonstrated by the [appellants] are so directly affected as to justify the right to challenge the

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4 Zone Objectives for CZ4 – Local Centre Zone.

5 *Argos Pty Ltd v Corbell, Minister for the Environment and Sustainable Development* (2012) 7 ACTLR 15 at 23 [29].

6 Local Centres Development Code (ACT).

7 *Argos Pty Ltd v Corbell, Minister for the Environment and Sustainable Development* (2012) 7 ACTLR 15 at 29 [49].

impugned decision."[8] His Honour resolved this question in the negative, concluding that:

> "the [appellants'] interests are simply that the increased competition provided by the development will have an effect on their profitability, based on how they currently run their business [but] this is too remote to make the second and third [appellants] persons aggrieved by the Minister's decision for the purposes of the ACT ADJR Act. As the first [appellant] is one step further removed in terms of the effect that the Minister's decision may have upon it, it follows that it too does not have standing to challenge the decision."[9]

13 The primary judge noted that Criterion 33 required a decision-maker to *consider* significant adverse economic impacts on other commercially viable centres. His Honour said:

> "the presence of C 33 in the Local Centres Development Code does not indicate a statutory intention to give standing to challenge an approval to which C 33 is relevant to parties whose only interest is a likely economic impact by the proposed development."[10]

14 Notwithstanding the primary judge's conclusion as to the appellants' want of standing, his Honour went on to consider the grounds advanced by the appellants for their challenge to the Minister's decision. His Honour rejected them on the merits[11].

Court of Appeal

15 The Court of Appeal of the Supreme Court of the ACT (Penfold and Cowdroy JJ and Nield AJ) dismissed the appellants' appeal, holding that none of them was a person aggrieved under s 3B(1)(a) of the ADJR Act. Because the

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8 *Argos Pty Ltd v Corbell, Minister for the Environment and Sustainable Development* (2012) 7 ACTLR 15 at 29 [51], citing *Australian Foreman Stevedores Association v Crone* (1989) 20 FCR 377.

9 *Argos Pty Ltd v Corbell, Minister for the Environment and Sustainable Development* (2012) 7 ACTLR 15 at 30 [53].

10 *Argos Pty Ltd v Corbell, Minister for the Environment and Sustainable Development* (2012) 7 ACTLR 15 at 28 [44].

11 *Argos Pty Ltd v Corbell, Minister for the Environment and Sustainable Development* (2012) 7 ACTLR 15 at 30-35 [55]-[85].

appellants' appeal was dismissed on this basis, the Court of Appeal did not consider the grounds of appeal concerned with the substantive merits of their application for review of the Minister's decision[12].

16 The Court of Appeal noted[13] the primary judge's conclusions that "the [appellants'] interests … were simply that the increased competition provided by the development would affect their profitability" and that "such possible effect was too remote to render them 'aggrieved persons'." The Court of Appeal characterised the appellants' claim to standing under s 3B(1)(a) of the ADJR Act as "merely concerned with addressing trade competition"[14] and "an interest … in trade competition only"[15]; and, on that basis, concluded that such an interest was insufficient to satisfy s 3B(1)(a) of the ADJR Act. It stated that "[a]s a general rule, mere detriment to the economic interests of a business will not give rise to standing"[16]. The appellants disputed the existence of that general rule.

17 The Court of Appeal proceeded on the basis that its approach was supported by the decision of Higgins J (as his Honour then was) in *Jewel Food Stores Pty Ltd v Minister for the Environment Land and Planning* ("*Jewel Food Stores*")[17]. Higgins J said that:

> "although the applicants have shown that the proposal could cause an economic impact upon them and that it is possible that that impact might be adverse, such an effect is not, in my view, sufficient to be a satisfactory

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12 *Argos Pty Ltd v Corbell, Minister for the Environment and Sustainable Development* (2013) 198 LGERA 187 at 191 [7].

13 *Argos Pty Ltd v Corbell, Minister for the Environment and Sustainable Development* (2013) 198 LGERA 187 at 193-194 [22].

14 *Argos Pty Ltd v Corbell, Minister for the Environment and Sustainable Development* (2013) 198 LGERA 187 at 198 [46].

15 *Argos Pty Ltd v Corbell, Minister for the Environment and Sustainable Development* (2013) 198 LGERA 187 at 199 [49].

16 *Argos Pty Ltd v Corbell, Minister for the Environment and Sustainable Development* (2013) 198 LGERA 187 at 195 [29(d)].

17 (1994) 122 FLR 269.

> basis for an application. They have merely shown, as in *Crone's* case, that their economic prospects have become less favourable."[18]

18 The reference by Higgins J to "*Crone's* case" was a reference to *Australian Foreman Stevedores Association v Crone*, where Pincus J had said[19]:

> "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 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."

19 The Court of Appeal also referred[20] to the decision of Lindgren J in *Big Country Developments Pty Ltd v Australian Community Pharmacy Authority* ("*Big Country*")[21]. In that case, Lindgren J held that the interests of the owner of a shopping centre were not materially affected by a decision of the Australian Community Pharmacy Authority to recommend approval of an application by a tenant of the centre to relocate the pharmacy. Lindgren J deprecated as impractical the "notion that any financial interest adversely affected falls within s 3(4) of the [*Administrative Decisions (Judicial Review) Act* 1977 (Cth)]."[22]

20 Special leave to appeal to this Court was granted by Crennan and Kiefel JJ on 16 May 2014[23].

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18 *Jewel Food Stores Pty Ltd v Minister for the Environment Land and Planning* (1994) 122 FLR 269 at 280.

19 (1989) 20 FCR 377 at 382. See also *Big Country Developments Pty Ltd v Australian Community Pharmacy Authority* (1995) 60 FCR 85 at 92-93.

20 *Argos Pty Ltd v Corbell, Minister for the Environment and Sustainable Development* (2013) 198 LGERA 187 at 196 [33]-[34].

21 (1995) 60 FCR 85.

22 (1995) 60 FCR 85 at 93.

23 [2014] HCATrans 101.

The arguments of the parties

21 The appellants submitted that there is "no general rule" that detriment to the economic interests of a business is not sufficient to satisfy the statutory test in s 3B(1)(a). It was said that, given the primary judge's findings as to the likely adverse effect of the Development Proposal on the profits of the second and third appellants, there was no reason to deny that their interests were adversely affected by the decision to approve it.

22 None of the active respondents was disposed to support the "general rule" propounded by the Court of Appeal. Rather, they argued that the decision of the Court of Appeal should be upheld on the basis that the interests of the second and third appellants were too remote or indirect to satisfy s 3B(1)(a) of the ADJR Act. In this regard, the second and third respondents cited the approach of Gummow J in *Australian Institute of Marine and Power Engineers v Secretary, Department of Transport*[24] that "a danger and peril to the interests of the applicant that is clear and imminent rather than remote, indirect or fanciful" must flow from the relevant decision.

23 The appellants deprecated any attempt to approach the interpretation of s 3B(1)(a) using concepts of remoteness, proximity or directness of effect[25]. The appellants argued that the application of criteria of remoteness, proximity and directness serves only to deepen the indeterminacy of the test for standing under the ADJR Act.

24 The first respondent, in addition to adopting the arguments advanced by the second and third respondents, sought to support the decision of the Court of Appeal on the basis that the scope and purpose of the Planning Act, under which the Minister's decision was made, serve to narrow the interests which satisfy s 3B(1)(a) of the ADJR Act. His contention was that the statutory framework within which the decision was made also establishes the scope of adverse effect on interests for the purposes of s 3B(1)(a) of the ADJR Act. On this approach, the interests of a person are relevantly affected by a decision only if they are "coincidental with the particular public interest"[26] addressed by the legislation under which the decision is made.

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24 (1986) 13 FCR 124 at 133.

25 *Argos Pty Ltd v Corbell, Minister for the Environment and Sustainable Development* (2013) 198 LGERA 187 at 195-196 [31].

26 *Big Country Developments Pty Ltd v Australian Community Pharmacy Authority* (1995) 60 FCR 85 at 93-94. See also *Right to Life Association (NSW) Inc v*

(Footnote continues on next page)

25 The first respondent said that the policy considerations to be gleaned from the ACT planning scheme, and particularly Criterion 33, are concerned solely with local amenity rather than the individual interests of traders in being protected from competition. On that basis, a complaint by an established trader of a loss of profitability, as a result of a decision, is not a complaint about a relevant adverse effect.

26 In response to the first respondent's contention, the appellants conceded that one must have regard to the legislation giving rise to the administrative decision under review in order to ascertain the legal and practical operation of that decision, but contended that the relevant planning law does not limit the operation of the ADJR Act[27]. It was said that, where a decision is shown to have an adverse practical effect upon a person's interests, it is irrelevant whether or not the interests of the putative applicant are "coincidental with the particular public interest"[28] sought to be achieved by the Planning Act.

Economic interests

27 The ADJR Act was based on the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ("the Commonwealth ADJR Act"). Relevantly, ss 3B(1)(a) and 5(1) of the ADJR Act mirror ss 3(4) and 5(1) of the Commonwealth ADJR Act respectively. Accordingly, judicial exegesis of the Commonwealth ADJR Act assists in the interpretation of the ADJR Act.

28 Relatively early in the life of the Commonwealth ADJR Act, it was accepted that a practical effect upon a person's business could satisfy s 3(4) of that Act. In *Tooheys Ltd v Minister for Business and Consumer Affairs* ("*Tooheys*")[29], Ellicott J said, in relation to s 3(4) of the Commonwealth ADJR Act:

Secretary, Department of Human Services and Health (1995) 56 FCR 50 at 68-69, 84-85.

27 *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at 393-394 [36]-[37], 414-415 [96]-[102]; [2012] HCA 56.

28 *Big Country Developments Pty Ltd v Australian Community Pharmacy Authority* (1995) 60 FCR 85 at 93-94. See also *Right to Life Association (NSW) Inc v Secretary, Department of Human Services and Health* (1995) 56 FCR 50 at 68-69, 84-85.

29 (1981) 36 ALR 64 at 79.

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

29 The primary judge and the Court of Appeal accepted, as a fact, that the approval of the Development Proposal would adversely affect the profitability of the businesses owned and operated by the second and third appellants. Having so concluded, the courts below erred in then asking whether a test of "directness" could be satisfied on the basis that those adverse effects depended on uncertain market forces and competitive responses[30]. The findings of fact, made on the balance of probabilities, determined the factual basis on which the issue was to be decided and, accordingly, resolved the uncertainties for the purposes of this litigation.

30 The active respondents did not seek to challenge the findings that the second and third appellants' businesses would be likely to suffer a reduction in profitability as a result of the implementation of the development at Giralang approved by the Minister's decision. The second and third respondents argued that the appellants had shown only "fears" about economic competition, but not an adversely affected interest for the purposes of s 3B(1)(a). In the absence of a challenge to the factual findings, however, the second and third respondents' assertions do not affect the ground on which the issue is to be determined.

31 The decision of Higgins J in *Jewel Food Stores* does not support the approach of the Court of Appeal. Higgins J said that "neither the applicants nor any of their customers have any legitimate expectation that competition will be restricted so as to protect their economic interests."[31] However, his Honour's decision was based on the conclusion that the evidence as to the level of economic impact on the applicants resulting from the decision sought to be challenged was "purely speculative"[32], and did not show that a competing business would have an adverse effect on the applicants' business. That conclusion was critical to his Honour's decision. That this is so may be seen

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30 cf *Argos Pty Ltd v Corbell, Minister for the Environment and Sustainable Development* (2013) 198 LGERA 187 at 199 [51].

31 (1994) 122 FLR 269 at 280.

32 (1994) 122 FLR 269 at 279-280.

from the circumstance that Higgins J accepted as correct[33] the view of Ellicott J in *Tooheys*[34] that an "effect … in the conduct of a business" is a sufficient interest for the purpose of the Commonwealth ADJR Act.

32 Similarly, in *Crone's* case, Pincus J denied standing to applicants who could not show that the success of their challenge to the decision in question would be a practical benefit to them[35]. In the present case, if the question is asked whether, as Pincus J put it in *Crone's* case, the second and third appellants will "gain anything of significance"[36] if they succeed in their challenge to the decision, the answer is clearly in the affirmative. Based on the factual findings below, they will enjoy the level of profitability which was likely to be denied them in consequence of the approval of the Development Proposal.

33 Standing to challenge a decision under the ADJR Act is determined by s 3B(1) of the Act; but the authorities which address the question of standing under the general law afford some assistance in understanding the kinds of interest which may be relevant and the kinds of effect that may be regarded as adverse. In *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd*[37], speaking of the sufficiency of an interest required to support an application for a declaration or injunction under the general law, Gaudron, Gummow and Kirby JJ said:

> "Upon the true construction of its subject, scope and purpose, a particular statute may establish a regulatory scheme which gives an exhaustive measure of judicial review at the instance of competitors or other third parties. An example is the special but limited provision by the legislation considered in *Alphapharm Pty Ltd v SmithKline Beecham (Australia) Pty Ltd* for judicial review of successful applications for registration. However, the circumstance that the plaintiff conducts commercial activities in competition with those which it seeks to restrain is not necessarily insufficient to provide it with a sufficient interest in the subject matter of the action". (footnote omitted)

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33 (1994) 122 FLR 269 at 280.

34 (1981) 36 ALR 64 at 79.

35 (1989) 20 FCR 377 at 379-382.

36 (1989) 20 FCR 377 at 383.

37 (1998) 194 CLR 247 at 266 [48]; [1998] HCA 49.

34 Under the planning regime relevant here, as indeed under the general law, no trader has an interest in hindering competitors or being protected from competition. It is a matter of public policy that no trader has an interest in being protected from "competition per se" or "mere competition"[38]. In *Buckley v Tutty*[39], Barwick CJ, McTiernan, Windeyer, Owen and Gibbs JJ observed:

> "There is both ancient and modern authority[40] for the proposition that the rules as to restraint of trade apply to all restraints, howsoever imposed, and whether voluntary or involuntary."

35 Neither the Planning Act nor the Territory Plan evinces any intention to permit decision-makers to accommodate private traders' desires to be protected from competition per se. In this case, however, the second and third appellants demonstrated, as a matter of fact, that their businesses will suffer a loss in profitability as a result of the decision which they sought to challenge. And if their challenge to the lawfulness of the decision proves to have merit, the consequences of the competitive pressures resulting from the decision they seek to challenge can properly be described as a situation of "unfair competition", rather than mere competition[41].

36 The position of the first appellant is different. There was no finding of fact that the second appellant's business would be likely to fail as a result of increased competition consequent upon the implementation of the Development Proposal. As a result, there was no finding that the first appellant would, in turn, lose the benefit of its lease to the second appellant. Nor was there a finding that, in the event of the failure of the second appellant, the lettable value of the first

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38 *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688 at 702; *Dewes v Fitch* [1920] 2 Ch 159 at 181; *Lindner v Murdock's Garage* (1950) 83 CLR 628 at 634, 649; [1950] HCA 48.

39 (1971) 125 CLR 353 at 375; [1971] HCA 71.

40 Instructive examples of "ancient" authority supporting the proposition that involuntary restraints are unenforceable as contrary to public policy include *Ipswich Tailors' Case* (1614) 11 Co Rep 53(a) [77 ER 1218] and *Gunmakers' Co v Fell* (1742) Willes 384 [125 ER 1227]. In the first of these cases, it was held that ordinances of a corporation which purported to impose restraints upon trade were unenforceable in the absence of specific statutory authority ((1614) 11 Co Rep 53(a) at 54(a) [77 ER 1218 at 1220]). In the second of these cases, it was held that a bylaw of a corporation chartered by the Crown which purported to restrain trade was unenforceable ((1742) Willes 384 at 388 [125 ER 1227 at 1228-1229]).

41 *Co-Mac Pty Ltd v Queensland Gaming Commission* [2009] QSC 33 at [20].

appellant's land would be reduced by the implementation of the proposed development. The appeal by the first appellant fails at this point.

Directness, remoteness and proximity

37 In the application of s 3B(1)(a) of the ADJR Act, judgments of fact and degree may be required. That is not unusual where the issue of standing is contested[42].

38 In *Re McHattan and Collector of Customs*[43], Brennan J said:

> "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".

39 The judgments of fact and degree required to resolve the "problem … inherent in the language of the statute" may conveniently be expressed in terms of directness or remoteness or proximity. But these terms are expressions of conclusionary judgments; their use does not indicate the deployment of tools of analysis.

40 In the present case, once it was shown, on the balance of probabilities, that the second and third appellants would suffer a not insignificant loss of profitability in their businesses, no further inquiry as to directness or remoteness or proximity was required[44] in order to determine whether their interests were adversely affected by the decision in question. The adverse effect upon their interests was sufficient to support the conclusion that they were persons aggrieved for the purposes of s 3B(1)(a) of the ADJR Act. Further, as explained in the next section of these Reasons, the statutory criterion for standing under

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42 *Robinson v Western Australian Museum* (1977) 138 CLR 283 at 302-303; [1977] HCA 46; *Seamen's Union of Australia v Utah Development Co* (1978) 144 CLR 120 at 130, 159; [1978] HCA 46.

43 (1977) 18 ALR 154 at 157. See also *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 at 42; [1981] HCA 50.

44 *H A Bachrach Pty Ltd v Minister of Housing* (1994) 85 LGERA 134 at 137; *Loveridge v Pharmacy Restructuring Authority* (1995) 39 ALD 103, referred to in *Big Country Developments Pty Ltd v Australian Community Pharmacy Authority* (1995) 60 FCR 85 at 94-95.

s 3B(1)(a) does not alter according to the scope and purpose of the enactment under which the impugned decision is made.

Interests and relevant considerations

41 The first respondent submitted that the standing provision of the ADJR Act has to be applied with reference to the scope and purpose of the statute under which the decision under review was made. The second and third respondents submitted in similar vein that standing was to be determined by reference to the nature and subject matter of the litigation including the objects of the statute conferring power to make the decision. Those submissions should not be accepted.

42 The test for standing to apply for review of a decision under the ADJR Act is expressed in that Act. The applicant must be "a person aggrieved", a criterion which may be satisfied if the applicant is a person whose interests are adversely affected by the decision. The text of the criterion, on its face, does not allow for its expansion or contraction according to the scope and purpose of the enactment under which the decision is made. It is not to be read or applied with reference to normative considerations based on the policy of the enactment. To do so by reference to individual enactments would undermine an important purpose of the ADJR Act, which was to simplify judicial review processes[45].

43 Consistently with that proposition it will be necessary to have regard to the enactment under which the impugned decision is made and the legal effect and operation of the decision in order to determine how the interests of the applicant for review may be adversely affected or the applicant otherwise a person aggrieved.

44 Reference was made to decisions of the Federal Court which might be thought to support a contrary view. One decision said to be in point in this respect was that of the Full Court of the Federal Court in *Right to Life Association (NSW) Inc v Secretary, Department of Human Services and Health* ("the *Right to Life Case*")[46], a case concerning an application under the Commonwealth ADJR Act. The Full Court held by majority that the applicant Association, which was a public advocacy body, did not have standing on that account. Lockhart J, in the majority, held that the applicant had not shown a grievance "beyond that which any person has as an ordinary member of the

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45 *Kioa v West* (1985) 159 CLR 550 at 594 per Wilson J; [1985] HCA 81; *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (2000) 199 CLR 343 at 355-356 [32] per Gleeson CJ, McHugh, Gummow and Hayne JJ; [2000] HCA 9.

46 (1995) 56 FCR 50.

public."[47] Beaumont J reached a similar conclusion[48]. Gummow J, in dissent in the result, held that it was unnecessary to determine the question of standing because of the want of a reviewable decision. In the course of his Honour's reasoning, however, he referred to the importance of the scope and purpose of the enactment under which a decision has been made in assessing whether an applicant is "aggrieved" and in ascertaining the content of the terms "interests", "affect" and "adversely". In so doing, his Honour referred to *Alphapharm Pty Ltd v SmithKline Beecham (Australia) Pty Ltd*[49], which was a case in which the relevant review provisions were part of the Act under which the impugned decision was made. So it was possible to say, as his Honour observed of that case, that "the purposes or ends which the Parliament sought to advance by enacting the statute were not those with which the applicant was concerned and seeking to advance by the processes of judicial review"[50]. But what could be said of the statute-specific review processes considered in *Alphapharm* could not be said of the general review processes of the ADJR Act.

45 The observations made by Gummow J in the *Right to Life Case* were relied upon by Lindgren J in *Big Country*[51]. It is not necessary to discuss the detail of the case, save to mention the proposition in his Honour's judgment that[52]:

> "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." (citations omitted)

As already indicated, that proposition should not be accepted.

46 It may be noted that in the *Right to Life Case*, Lockhart J, in holding that the applicant for review had not shown a grievance, said[53]:

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47 (1995) 56 FCR 50 at 69.

48 (1995) 56 FCR 50 at 82.

49 (1994) 49 FCR 250.

50 (1995) 56 FCR 50 at 84-85.

51 (1995) 60 FCR 85.

52 (1995) 60 FCR 85 at 93.

53 (1995) 56 FCR 50 at 69.

> "There is no advantage likely to be gained by the appellant if successful in the proceeding nor disadvantage likely to be suffered if it fails."

The application of a test by reference to advantage and disadvantage in the present case would support the contentions of the second and third appellants.

47 It may be accepted that the public interest in town planning is properly and relevantly served by ensuring that local shopping centres do not become wastelands by excessive competition between traders. That is the concern addressed by Criterion 33. It may also be accepted that Criterion 33 is concerned with the public interest, and not the interest of individual traders in being protected from competition. But the circumstance that an effect upon a private interest is not a consideration relevant to the making of the decision does not mean that such an interest is not adversely affected by the decision so as to afford an affected person standing to challenge the lawfulness of the decision on grounds that *are* relevant to its validity.

48 In summary, as Lockhart J[54] said in the *Right to Life Case*, "[t]he term a 'person aggrieved' is not a restrictive one; it is of very wide import." The courts should not be astute to graft restrictions onto the general language of s 3B(1)(a) of the ADJR Act. It must be borne in mind that the ADJR Act is intended to facilitate judicial review of administrative decisions made under a wide range of statutes and having a wide range of practical effects upon members of the community. The availability of judicial review serves to promote the rule of law and to improve the quality of administrative decision-making as well as vindicating the interests of persons affected in a practical way by administrative decision-making. Accordingly, the scope of s 3B(1)(a) of the ADJR Act should not be artificially narrowed by glosses upon its broad language.

Conclusion and orders

49 The second and third appellants were entitled to seek review of the first respondent's decision. The first appellant was not. Because the Court of Appeal did not determine the merits of the appeal by the second and third appellants, it will be necessary to remit the matter for further determination of the grounds related to the merits of their appeal.

50 The Court should order:

1. The appeal of the second and third appellants be allowed.

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54 (1995) 56 FCR 50 at 65.

2. The first to third respondents pay the costs of the second and third appellants.

3. The appeal of the first appellant be dismissed with costs.

4. Set aside the orders of the Court of Appeal of the Supreme Court of the Australian Capital Territory made on 29 November 2013 insofar as they relate to the second and third appellants and, in their place, order that the second and third appellants have their costs of the proceedings to date in that Court.

5. Remit the matter, insofar as it relates to the second and third appellants, to the Court of Appeal for further hearing on grounds 4.2, 4.3 and 4.6 of the notice of appeal filed in that Court and dated 2 August 2012.

51 HAYNE AND BELL JJ. Section 3B(1)(a) of the *Administrative Decisions (Judicial Review) Act* 1989 (ACT) ("the ADJR Act") provided[55], at the times relevant to this matter, that a reference in that Act to a "person aggrieved" by a decision includes a reference to "a person whose interests are adversely affected by the decision".

52 The issue in the appeal to this Court is whether any of the first, second or third appellants is "a person whose interests are adversely affected by the decision" of the first respondent ("the Minister") to approve, under the *Planning and Development Act* 2007 (ACT) ("the Planning Act"), a development application made by the second and third respondents for a commercial development at the Giralang Local Centre in the Australian Capital Territory. The second and third appellants each conduct a supermarket business at a Local Centre near Giralang. The first appellant is the second appellant's landlord.

The course of proceedings

53 The appellants led evidence at trial to the effect that approval of the development would reduce the annual turnover of the Kaleen and Evatt Local Centres, at which the second and third appellants conduct their respective supermarket businesses.

54 The primary judge (Burns J) accepted[56] that the proposed development will have an adverse economic effect on the second and third appellants and that "it is possible that" the economic interests of the first appellant "may come to be indirectly affected by the proposed development". But the primary judge concluded[57] that the interests of the appellants "are simply that the increased competition provided by the development will have an effect on their profitability, based on how they currently run their business" and that this was "too remote" to make the second or third appellants "persons aggrieved" by the Minister's decision. The primary judge held[58] that the effect on the first appellant was "one step further removed in terms of the effect that the Minister's decision

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55 The *Administrative Decisions (Judicial Review) Amendment Act* 2013 (ACT) repealed s 3B of the ADJR Act, removed references to a "person aggrieved" and substituted provisions allowing an "eligible person" to make an application under the ADJR Act.

56 *Argos Pty Ltd v Corbell, Minister for the Environment and Sustainable Development* (2012) 7 ACTLR 15 at 29 [49].

57 (2012) 7 ACTLR 15 at 30 [53].

58 (2012) 7 ACTLR 15 at 30 [53].

may have upon it" and that it followed that it too was not a person aggrieved by the decision.

55 The Court of Appeal of the Supreme Court of the Australian Capital Territory (Penfold and Cowdroy JJ and Nield AJ) dismissed[59] the appellants' appeal against these conclusions. The Court of Appeal did not disturb the findings of fact made by the primary judge.

56 By special leave, the appellants appeal to this Court. The appeal by the second and third appellants should be allowed and consequential orders made in the form proposed by French CJ and Keane J.

A "person aggrieved"

57 The three appellants alleged that each was a person aggrieved because its interests are adversely affected by the Minister's decision. The effect on interests to which the appellants pointed was what they said would be the economic consequences, for each, of the Minister's decision. The second and third appellants alleged that if the Minister's decision stood, each would have reduced turnover and would earn about eight or ten per cent less profit from its business than it would have expected to earn if the Minister had not approved the development at Giralang. By contrast, the first appellant alleged that, if the development at Giralang went ahead, it might (not would) lose the benefit of the lease it had made with the second appellant because the second appellant might (not would) go out of business.

58 The facts established demonstrated that each of the second and third appellants is a person whose interests are adversely affected by the Minister's decision. The facts established did not show that the first appellant is a person whose interests are adversely affected by that decision. The second and third appellants are persons aggrieved; the first appellant is not.

The decided cases

59 Extensive reference was made by both the primary judge and the Court of Appeal to the many cases that have been decided about questions of standing generally and about who is a "person aggrieved" for the purposes of various forms of statutory review provisions. Careful attention to authority is always

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59 *Argos Pty Ltd v Corbell, Minister for the Environment and Sustainable Development* (2013) 198 LGERA 187.

necessary. But it is equally important[60] not to treat what is said in the decided cases as a sufficient substitute for the statutory language. If care is not taken, what is said in explanation of the decision reached in a particular case too easily takes on a life of its own separated from the facts and circumstances which explain its particular expression. More importantly, what is said in the decided case becomes separated from the applicable statutory text.

60 Contrary to what was said[61] by the Court of Appeal in this case, applying s 3B(1)(a) of the ADJR Act does not begin from recognising some supposed "general rule" that "mere detriment to the economic interests of a business will not give rise to standing". No rule of that kind finds any footing in the text of the ADJR Act and no party in this Court sought to support such a rule. Rather, as has now long been recognised[62], the relevant words – "a person whose interests are adversely affected by the decision" – are expressed very generally. To adopt what was said[63] in a different but related context, those words should be "construed as an enabling, not a restrictive, procedural stipulation".

61 The focus of the inquiry required by the words is upon the connection between the decision and interests of the person who claims to be aggrieved. The interests that may be adversely affected by a decision may take any of a variety of forms. They include, but are not confined to, legal rights, privileges, permissions or interests. And the central notion conveyed by the words is that the person claiming to be aggrieved can show that the decision will have an effect on his or her interests which is different from ("beyond"[64]) its effect on the public at large. Here, the effect was said to be economic.

62 It is inevitable that there will be cases where deciding whether a person's interests are adversely affected by a decision will require judgments of fact and degree. The effect to which the second and third appellants pointed was immediate and direct. In effect, each said that: "If the Minister's decision stands,

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60 cf *Weiss v The Queen* (2005) 224 CLR 300 at 312-313 [31]-[33]; [2005] HCA 81; *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 ALJR 458 at 490-491 [137]; 295 ALR 638 at 677; [2013] HCA 7.

61 (2013) 198 LGERA 187 at 195 [29].

62 *Tooheys Ltd v Minister for Business and Consumer Affairs* (1981) 36 ALR 64 at 79.

63 *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 267 [50]; [1998] HCA 49.

64 *Tooheys* (1981) 36 ALR 64 at 79.

and is carried into effect, I will earn less profit." By contrast, the first appellant pointed to a less immediate and direct effect. In effect, it said that: "If the Minister's decision stands, and is carried into effect, my tenant may go out of business and, if that happens, I may lose the benefit of the lease I have made."

63 The difference between the two claims can be expressed in several different ways. Earlier in these reasons it was expressed as a difference between "would result" and "might result". But the same ideas can be expressed by reference to "direct" as opposed to "indirect" effects, or by describing one consequence as more "remote" than another. None of these expressions is, or should be, used as if it were a term of art having a single fixed meaning. And none of these expressions is, or should be, used as if, divorced from the context in which it is used, it provides a satisfactory, self-contained explanation of the application of the statute. Each is used as a means of describing the qualitative judgment that is made.

Person aggrieved by a planning decision

64 The first to third respondents submitted that deciding whether the appellants were persons aggrieved by the Minister's decision required consideration of the scope and purpose of the Act under which the Minister made that decision. The appellants submitted that, if such a principle is to be seen as established or applied by the Full Court of the Federal Court of Australia in *Alphapharm Pty Ltd v SmithKline Beecham (Australia) Pty Ltd*[65], the principle should be disapproved. The appellants' submission should not be accepted. But its rejection does not entail the conclusion that the second and third appellants were not each a person aggrieved by the Minister's decision.

65 As was later explained in this Court's decision in *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd*[66], *Alphapharm* concerned a regulatory scheme established by a statute which gave an exhaustive measure of judicial review at the instance of competitors or other third parties. Unsurprisingly, the conclusion reached[67] in *Alphapharm* depended "[u]pon the true construction of [the Act's] subject, scope and purpose".

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65 (1994) 49 FCR 250. See also *Right to Life Association (NSW) Inc v Secretary, Department of Human Services and Health* (1995) 56 FCR 50; *Big Country Developments Pty Ltd v Australian Community Pharmacy Authority* (1995) 60 FCR 85.

66 (1998) 194 CLR 247 at 266 [48].

67 (1998) 194 CLR 247 at 266 [48]. See also *Allan v Transurban City Link Ltd* (2001) 208 CLR 167 at 174 [16], 195-196 [84]; [2001] HCA 58.

66 The ADJR Act provides for judicial review of decisions made under many different enactments. It should go without saying that regard must be had to the subject matter, scope and purpose of the ADJR Act in construing the words of s 3B(1)(a): "a person whose interests are adversely affected by the decision". But content cannot be given to that expression, in its application to a particular decision, without regard to the subject matter, scope and purpose of the Act under which the decision was made and the proper construction of that Act. Only then can the relationship between the impugned decision and the interests said to be affected adversely be properly identified.

67 Often, perhaps very often, the connection between decision, interests and asserted effect will be obvious and evidently relevant. But that may not always be so, and in such a case it will be necessary[68] to identify both the interest of the applicant relied on, and whether it is adversely affected by the decision, having regard to the proper construction and application of the Act under which the impugned decision was made.

68 Reference is not made to the Act under which the decision is made for the purpose of giving some different meaning to the words of s 3B(1)(a) of the ADJR Act. Rather, reference to the Act under which the decision is made will elucidate whether there is, in the circumstances of the decision in question, a relevant and sufficient connection between the decision, the applicant's interests and the asserted effect on those interests to show that the applicant is a "person aggrieved" by the decision.

69 In this case, the decision at issue was made under the Planning Act. Section 6 of that Act records that the Act's object is:

> "to provide a planning and land system that contributes to the orderly and sustainable development of the ACT –
>
> (a) consistent with the social, environmental and economic aspirations of the people of the ACT; and
>
> (b) in accordance with sound financial principles."

70 The particular development approval which the appellants seek to challenge was for the development of the Giralang Local Centre. The relevant development application was supported by an "economic impact assessment". The development approval permitted, among other things, the construction of new commercial premises, including a new supermarket and retail outlets.

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68 *Right to Life Association (NSW) Inc* (1995) 56 FCR 50 at 84 per Gummow J.

71 At the time of the development approval, the Territory Plan, created by Ch 5 of the Planning Act, zoned the Giralang Local Centre as a "Commercial CZ4 – Local Centre Zone". By what was called the "Local Centres Development Code", the Territory Plan provided rules controlling the development of Local Centres. One of those rules was that:

> "A proposal to carry out development in a local centre must have regard to any significant adverse economic impact on other commercially viable local centres."

72 All this being so, the first to third respondents' submissions that the economic interests of the second and third appellants are in some way foreign to the Planning Act (or to the subject matter, scope and purposes of that Act) cannot be sustained.

73 It may well be right to say, as the second and third respondents did, that the Planning Act does not have as an object or purpose the "protection of the commercial interests of [individual] owners of shopping centres or supermarkets, or the protection of existing supermarkets from competition". But it by no means follows that an individual owner or operator is not adversely affected by a planning decision that will have direct commercial consequences for that owner or operator. As the Planning Act makes plain in its statement of objects[69], it is concerned with the general commercial health of the Territory. So much appears from the use of the expressions "the orderly and sustainable development of the ACT", "the social, environmental and economic aspirations of the people of the ACT", and "sound financial principles". Claims of individual adverse effect are not irrelevant to the pursuit of those general objectives.

74 Contrary to what appears to have been an implicit premise for this aspect of the first to third respondents' submissions, no sharp line can be drawn between "planning" or "amenity" considerations on the one hand, and the economic consequences of permitting a particular development on the other. Development of one area may often have immediate effects on other areas. And ultimately, that was the root of not only the appellants' concerns about the development but also their claims to be aggrieved by the decision to permit it.

75 The second and third appellants established that they are persons aggrieved; the first appellant did not.

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69 s 6.

76 GAGELER J. To draw a conclusion that a person meets the statutory description of "a person whose interests are adversely affected" by a decision requires: first, identification of a decision of the designated kind; second, examination of the legal or practical operation of that decision; and, third, the making of a judgment that the legal or practical operation of the decision has been to result in an adverse effect on identified interests of the person. The nature of the requisite interests, and the nature and degree of the requisite adverse effect, depend on the statutory context in which the description appears.

77 The present context is the *Administrative Decisions (Judicial Review) Act* 1989 (ACT), in a form modelled on the *Administrative Decisions (Judicial Review) Act* 1977 (Cth). The provisions of those two Acts are relevantly indistinguishable and it is therefore convenient to refer to them both as "the ADJR Act".

78 The ADJR Act's reference to a decision is to a decision of an administrative character made, or purported to be made, under any of a wide range of enactments. A person who meets the ADJR Act's description of a person whose interests are adversely affected by such a decision meets its further description of a person who is "aggrieved" by the decision. Meeting that further description is a condition precedent to seeking an order of review, by which the decision might be set aside, or declared to be invalid, on any one or more specified grounds. The grounds include that the person who purported to make the decision did not have jurisdiction to make the decision[70] and that the decision was not authorised by the enactment in pursuance of which it was purported to be made[71].

79 The ADJR Act in that way permits a person whose interests are adversely affected by a purported decision of an administrative character, made outside the subject-matter, scope or purposes of the enactment under which it was purported to be made, to seek an order setting it aside or declaring it invalid. The ADJR Act would be self-defeating were the person denied that permission on the basis that the interests of the person so affected were themselves outside the subject-matter, scope or purposes of the same enactment.

80 The argument of the first respondent, that the interests to which the ADJR Act refers are limited to those which fall within the subject-matter, scope and purposes of the particular enactment under which a decision was made or purported to be made, must for that reason be rejected in principle. The argument, unsurprisingly, is also unsupported by authority either in this Court or

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70 Section 5(1)(c).

71 Section 5(1)(d).

in the numerous decisions of the Federal Court which have now applied the ADJR Act for nearly 35 years.

81 One of many cases which would require reconsideration were the argument to be accepted is *Broadbridge v Stammers*[72]. There a postmaster who stood as a practical matter to lose his position and accommodation as a result of a decision made under the *Postal Services Act* 1975 (Cth) to close a post office was held to be a person aggrieved by that decision for the purposes of the ADJR Act. The Full Court of the Federal Court adopted the earlier language of Gummow J in *Australian Institute of Marine and Power Engineers v Secretary, Department of Transport*[73] in treating it as sufficient in the circumstances of the case that[74] "there flow[ed] from the decision ... a danger and peril to the interests of the applicant that [was] clear and imminent rather than remote, indirect or fanciful, and the applicant [had] an interest in the matter of an intensity and degree well above that of an ordinary member of the public". No part of the reasoning sought to link the identified interests of the applicant in keeping his position and accommodation to the subject-matter, scope and purposes of the *Postal Services Act*.

82 *Alphapharm Pty Ltd v SmithKline Beecham (Australia) Pty Ltd*[75], on which the first respondent principally relies, does not assist the first respondent's argument. The holding of the Full Court of the Federal Court in that case was that a pharmaceutical company was not a person whose interests were affected by a decision to register its competitor's drug under the *Therapeutic Goods Act* 1989 (Cth) ("the TG Act") for the purposes of a provision of that Act which conferred an entitlement to administrative review of the merits of a decision made under the TG Act. There was no dispute in that case that the pharmaceutical company was a person aggrieved by the decision to deny it administrative review so as to entitle it to challenge that decision under the ADJR Act. The contextual distinction so illustrated by the case was articulated by Davies J when he explained that a review "which forms part of the process of administrative decision-making, is provided to promote the achievement of the objects of the statute" but that "the object of judicial review is to ensure that the law is observed"[76]. *Allan v Transurban City Link Ltd*[77] was similarly a case about administrative review.

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72 (1987) 16 FCR 296.

73 (1986) 13 FCR 124 at 133-134.

74 (1987) 16 FCR 296 at 298.

75 (1994) 49 FCR 250.

76 (1994) 49 FCR 250 at 260.

83 *Right to Life Association (NSW) Inc v Secretary, Department of Human Services and Health*[78], on which the first respondent also relies, was a case about judicial review under the ADJR Act, but it also does not assist the first respondent's argument. The Full Court of the Federal Court in that case upheld the dismissal of an application brought by an incorporated association under the ADJR Act for an order of review of what was identified as a decision made under the TG Act not to stop clinical trials of a substance claimed to produce abortion. One member of the Full Court, Gummow J, held that there was no decision with the result that no question arose as to whether the association was a person aggrieved. The other two members of the Full Court, Lockhart and Beaumont JJ, held that there was a decision and went on to hold that the association was not shown to have been a person aggrieved by that decision. Lockhart J placed weight on the lack of coincidence between the objects of the association (relating to raising community awareness of the sanctity of human life) and the objects of the TG Act (relating to the quality, safety, efficacy and timely availability of therapeutic drugs)[79]. His Honour did so, however, not to exclude the interests of the association as irrelevant to the inquiry into its potential status as a person aggrieved by the decision made under the TG Act. His Honour rather did so as a step in reasoning to the conclusion that the concern of the association with the decision was "only an intellectual, philosophical and emotional concern" of a nature and degree comparable with that which might be held by "an ordinary member of the public" and that the association was not affected by the decision "in any way to an extent greater than the public generally"[80].

84 *Big Country Developments Pty Ltd v Australian Community Pharmacy Authority*[81] comes no closer to assisting the first respondent. There a landlord whose tenant was a pharmacist was held not to be a person aggrieved for the purposes of the ADJR Act by a decision made under the *National Health Act* 1953 (Cth) ("the NHA") to recommend approval of the tenant's application for approval to supply pharmaceutical benefits from other premises to which the tenant wanted to relocate at the expiration of the lease. Lindgren J recorded a submission that, in order to qualify for the purposes of the ADJR Act, "a particular 'interest' affected must be one which falls within the 'zone of interests' contemplated by the enactment under which the decision impugned was made"[82].

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77 (2001) 208 CLR 167; [2001] HCA 58.

78 (1995) 56 FCR 50.

79 (1995) 56 FCR 50 at 68.

80 (1995) 56 FCR 50 at 69.

81 (1995) 60 FCR 85.

82 (1995) 60 FCR 85 at 91.

Although he noted that the "private commercial interest" of the landlord was "not coincidental with the particular public interest" which underlay the relevant provisions of the NHA[83], Lindgren J did not adopt that submission. His Honour's conclusion that the landlord was not a person aggrieved for the purposes of the ADJR Act was instead based on his much more precise identification of the private commercial interest of the landlord as "the prospective commercial advantage" of "having a captive pharmacist who must succumb to commercial exigencies by 'negotiating' a further lease"[84]. The prospect of obtaining such a "windfall benefit", Lindgren J concluded, was not the kind of "interest" which was protected by the ADJR Act, with the result that the landlord did "not qualify as a 'person aggrieved' by reason of the susceptibility of its commercial interests to adverse effects which would result from [the] decision"[85]. The correctness of that conclusion, based on the opportunistic and exploitative nature of the particular commercial interest of the applicant in that case, in my view, is not open to doubt.

85 Far from supporting the first respondent's argument that the interests to which the ADJR Act refers are confined by the subject-matter, scope and purposes of the particular enactment under which the decision was made, or purported to be made, *Big Country Developments* illustrates the quite different proposition earlier stated by the Full Court of the Federal Court in *United States Tobacco Co v Minister for Consumer Affairs*[86] that "interests" is used in the ADJR Act not as in "common parlance" but as the "broadest of technical terms" which "[have] long been an expression used in the law with respect to parties so as to require an involvement with a case greater than the concern of a person who is a mere intermeddler or busybody"[87]. What *Big Country Developments* highlights is that the technical term has normative content.

86 The Full Court in *United States Tobacco* correctly emphasised that "[t]he necessary interest need not be a legal, proprietary, financial or other tangible interest" and need not "be peculiar to the particular person"[88]. The Full Court also correctly emphasised the requirement "that the applicant demonstrates

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83 (1995) 60 FCR 85 at 93.

84 (1995) 60 FCR 85 at 94.

85 (1995) 60 FCR 85 at 95.

86 (1988) 20 FCR 520.

87 (1988) 20 FCR 520 at 527.

88 (1988) 20 FCR 520 at 527.

genuine affection of an interest which attaches to him"[89]. That demonstration of genuine affection may be by reference to the legal or practical operation of the decision, and may be informed but cannot be exhausted by a consideration of the subject-matter, scope and purposes of the enactment under which the decision was made. What it means, in the language adopted by the Full Court quoting Brennan J in a different context in *Re McHattan and Collector of Customs*[90], is that "if the interests relied on are of such a kind that a decision of the given character could not affect them directly, there must be some evidence to show that the interests are in truth affected"[91].

87 The first to third respondents astutely eschew reliance on the approach of the Court of Appeal of the Supreme Court of the Australian Capital Territory that economic interests are presumptively excluded from the purview of the ADJR Act[92]. The argument of the first respondent being rejected, the outcome of the appeal turns on the sufficiency of the evidence to show that particular economic interests of the appellants were adversely affected by the decision which they seek to review.

88 The decision which the appellants seek to review was that of the first respondent to approve the application made by the second respondent on behalf of the third respondent for approval under Ch 7 of the *Planning and Development Act* 2007 (ACT) of a commercial development at the Giralang Local Centre which included a supermarket and speciality shops. The second and third appellants respectively operate supermarkets at the Kaleen Local Centre and at the Evatt Local Centre. The first appellant holds the crown lease at the Kaleen Local Centre and sublets the supermarket there to the second appellant.

89 The economic evidence before the primary judge established that the proposed development at the Giralang Local Centre would be likely to result in the first year of its operation in at least an 8.5% reduction in the annual turnover of the Kaleen Local Centre and a 7.5% reduction in the annual turnover of the Evatt Local Centre. Directors of the second and third appellants each gave evidence to the effect that, depending on the scale of the reduction in turnover, each supermarket might be forced either to close or to reduce the size of its operations. A director of the first appellant gave evidence that the second appellant was an "anchor tenant" critical to ensuring that the Kaleen Local Centre

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89 (1988) 20 FCR 520 at 529.

90 (1977) 18 ALR 154 at 157.

91 (1988) 20 FCR 520 at 529-530.

92 *Argos Pty Ltd v Corbell, Minister for the Environment and Sustainable Development* (2013) 198 LGERA 187 at 195 [29], 197 [38].

remains a viable business operation and that the closure or downsizing of its supermarket would be likely to affect the continuing profitability of the Kaleen Local Centre as a whole. No director was cross-examined.

90 Without referring to the evidence in detail, the primary judge said[93]:

> "I am prepared to accept that the proposed development will have an adverse economic effect on the second and third [appellants]. The interest of the first [appellant] is one step removed from those of the second and third [appellants], but it is possible that its economic interests may come to be indirectly [affected] by the proposed development."

His Honour went on to describe the appellants' interests, collectively, as "simply that the increased competition provided by the development will have an effect on their profitability, based on how they currently run their business"[94]. He went on to characterise the interests of the second and third appellants as "too remote". From that, he said, it followed that the first appellant, being "one step further removed" from the decision of the first respondent, also "[did] not have standing to challenge the decision"[95].

91 Having found that the decision would be likely to have an adverse effect on the profitability of the second and third appellants, and to have the potential adversely to affect the profitability of the first appellant, the primary judge was, in my view, wrong to dismiss those interests as too remote to allow each of the appellants properly to be characterised as a person whose interests were adversely affected by the decision. The likelihood of the decision resulting in a significant adverse effect on the profitability of the second and third appellants was sufficiently shown from demonstration of the projected reduction in turnover. The potential for the decision to result also in a significant adverse effect on the profitability of the first appellant was not a matter of mere speculation. It was sufficiently shown to arise as a real risk to which the first appellant would be subjected by reason of the same projected reduction in turnover. The effect of the decision on the economic interests of each appellant was accordingly shown by the evidence to be both real and of an intensity and degree well above the effect of the decision on an ordinary member of the public. Each, in my view, was shown to be a person whose interests were adversely affected by the decision.

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93 *Argos Pty Ltd v Corbell, Minister for the Environment and Sustainable Development* (2012) 7 ACTLR 15 at 29 [49].

94 (2012) 7 ACTLR 15 at 30 [53].

95 (2012) 7 ACTLR 15 at 30 [53].

92 I would allow the appeal of each appellant.