THE ZONE OF INTERESTS TEST AND STANDING FOR JUDICIAL REVIEW IN AUSTRALIA

NATHAN VAN WEES*

I INTRODUCTION

Who should be granted standing for judicial review? Decisions on this question are said to 'have implications whose importance is disproportionate to their frequency'.[1] They affect access to justice and potentially meddle in political questions. This article assesses recent judicial and legislative debates on one aspect of standing law: the 'zone of interests' test. This analysis demonstrates the link between standing and different theories of statutory interpretation, as well as our understanding of Australia's political system. It also highlights the continuing divergence between 'mainstream' standing questions and the environmental field.

In most judicial review matters, the starting point for standing is the 'person aggrieved' test in the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*ADJR Act*') or its state equivalents.[2] This test requires an applicant to show that an administrative decision affects their right or special interest.[3] The zone of interests test provides a further requirement: the interest of the applicant must also be one recognised as relevant by the Act under which the administrative decision was made (the 'empowering Act'). That is, the standing test under the *ADJR Act* is read subject to the aims and objects of the particular empowering

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1 Roger Douglas, 'Uses of Standing Rules 1980–2006' (2006) 14 *Australian Journal of Administrative Law* 22, 34.

2 *ADJR Act* ss 3(4), 5(1), 6(1), 7(1); *Judicial Review Act 1991* (Qld) s 7(1); *Judicial Review Act 2000* (Tas) s 7(1). The ACT has recently removed the 'person aggrieved' test from the *Administrative Decisions (Judicial Review) Act 1989* (ACT) s 4A, as amended by *Administrative Decisions (Judicial Review) Amendment Act 2013* (ACT) s 6, though it was in place when *Argos Pty Ltd v Corbell* (2014) 254 CLR 394 was heard before the ACT Supreme Court and Court of Appeal. The *Administrative Law Act 1978* (Vic) s 11 grants standing to 'any person affected'; this operates in a substantially similar way to the 'person aggrieved' test.

3 I use the term 'interest' in the sense of 'special interest' in this paper. There are, of course, further nuances to the 'person aggrieved' test. The applicant's interest must rise above that held by the general public and must be more than a mere emotional or intellectual concern: see, eg, *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27, 35–7 (Gibbs CJ).

Act involved. This approach originates in United States ('US') law, and was recently rejected by the High Court of Australia in *Argos Pty Ltd v Corbell* ('*Argos*').[4]

This article examines current debates on standing and the role of the zone of interests test in the following order. Part II provides an overview of the zone of interests test in US law, and considers its rejection in *Argos*. I argue that the High Court did not always deal persuasively with Australian precedents. The following sections ask whether the Court was nevertheless right to reject the test. This question is considered through the lens of competing theories of legislative intention and judicial review. Part III argues that the zone of interests test emanates from a 'public choice' understanding of politics, in which legislation is a fine balance of competing interests, arrived at through interest group bargaining. I conclude that the zone of interests test is undesirable against this background. Part IV concludes that it is also an unjustified restriction where the traditional 'rights and interests' model of standing is satisfied, as it was in *Argos*.

Part V considers what happens when we move away from this traditional model. Cases involving environmental law tend to proceed on alternative 'enforcement' or 'public interest' models of judicial review. In doing so, they often adopt a zone of interests approach to standing. I argue that this is not inconsistent with *Argos*. Under these models, the zone of interests test is, in fact, useful.

The final part considers the future of the zone of interests test. Despite its rejection by the High Court, the test appears to have survived in the Federal Court. This suggests that *Argos* is a precedent which can be avoided when necessary. Alongside these judicial contests, zone of interests questions have also arisen in recent legislative debates on standing. In August 2015, the Commonwealth government proposed legislative amendments to remove one manifestation of the test from environmental standing laws.[5] On the other hand, the Administrative Review Council ('ARC') has argued for expanded use of zone of interest approaches in statutory standing regimes.[6]

Which of these various courses offers the most satisfactory outcome for the future of Australian standing law? I conclude that the zone of interests test is useful when applied to the alternative 'enforcement' or 'public interest' models of judicial review. These regimes provide for more liberalised standing. This article does not argue 'for' or 'against' this liberalisation more generally: the wisdom of widening access to the courts has been much debated, and is not a question which could be added to or resolved here.[7] Rather, my conclusion is more specific: *if* liberalisation is to occur, then the zone of interests test should

4 (2014) 254 CLR 394.

5 Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015 (Cth).

6 Administrative Review Council, 'Federal Judicial Review in Australia' (Report No 50, September 2012) 150–1 [8.19]–[8.22].

7 Elements of this debate are touched on below. An overview of the relevant arguments (in ultimately advocating for a more open model) can be found in Australian Law Reform Commission, *Standing in Public Interest Litigation*, Report No 27 (1985).

continue to be used. It serves as a useful analytical criterion to guide standing decisions under these models.

II ZONE OF INTERESTS TEST

The zone of interests test is a non-Constitutional requirement of US standing law. It looks to the empowering Act to determine whether standing for judicial review should be granted. This section provides an overview of the test in US law and then considers its recent rejection by the High Court of Australia in *Argos*. The Court's treatment of previous Australian authority on this point is not always convincing. *Argos* itself has already caused some confusion in lower courts.

A US Standing Law

An applicant for judicial review in the US must first show that they are 'adversely affected' or 'aggrieved' by an administrative decision.[8] This criterion is imposed by the *Administrative Procedure Act*. It requires that an applicant have a particular right or interest at stake, different from the interest held by the general public.[9] The zone of interests test adds a further condition: this interest will only suffice where it is *also* recognised as relevant by the Act under which the administrative decision was made (the 'empowering Act'). That is, the standing test of the *Administrative Procedure Act* is to be read as subject to the particular empowering Act at issue.

In the words of the Supreme Court, the zone of interests test asks whether 'the interest sought to be protected by the complainant is [also] arguably within the zone of interests to be protected or regulated' by the empowering Act.[10] The applicant's interest must 'fall within the realm of interests and goals relevant under' that Act.[11] Conversely, standing is withheld where 'the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the [empowering] statute that it cannot reasonably be assumed that Congress intended to permit the suit'.[12]

An instructive example of the test is found in *Air Courier Conference*.[13] In that case, an administrative decision (made under the *Private Express Statutes*)

8 *Administrative Procedure Act of 1946*, 5 USC § 702 (1946) ('*Administrative Procedure Act*'). This summary of US standing law is necessarily brief. For an overview of the voluminous US case law in this area, see Richard Pierce, *Administrative Law Treatise* (Wolters Kluwer, 5th ed, 2010) vol III, ch 16.

9 *Lujan v National Wildlife Federation*, 504 US 555, 573–4 (1992).

10 *Association of Data Processing Service Organisations Inc v Camp*, 397 US 150, 153 (1970).

11 William Buzbee, 'Expanding the Zone, Tilting the Field: Zone of Interests and Article III Standing after *Bennett v Spear*' (1997) 49 *Administrative Law Review* 763, 777. Some consider that the court may look to related legislation (including that passed after the Act at issue), but the point is contentious: *Clarke v Securities Industry Association*, 479 US 388, 401 (1987) ('*Clarke*'); *Milwaukee v Block*, 823 F 2d 1158, 1167 (7th Cir, 1987); *Air Courier Conference of America v American Postal Workers Union*, 498 US 517, 529–30 (1991) ('*Air Courier Conference*'); Pierce, above n 8, 1524–6.

12 *Clarke*, 479 US 388, 399–400 (1987).

13 498 US 517 (1991).

effectively ended the postal service's mail monopoly. Members of the Union sought review of the decision, as they stood to potentially lose their employment as a result of the increased competition. The Supreme Court found that the purpose of the *Private Express Statutes* was to establish a postal monopoly, which 'exists to ensure that postal services will be provided to the citizenry at large, and *not* to secure employment for postal workers'.[14] Thus, the Union was denied standing: it may have had a special interest in continuing employment, but those concerns fell outside the zone of interests arguably to be protected by the empowering Act.[15]

The test is not intended to be overly restrictive.[16] There need not be a statutory intent to *benefit* an applicant.[17] Rather, the focus is on the word 'arguably' to be protected: the applicant must only show some '"plausible relationship" ... to at least one of the concerns that actually motivated Congress to take legislative action'.[18] A practical example of this difference is seen in *National Credit Union Administration v First National Bank*.[19] In that case, a statute restricted the types of activities in which credit unions could engage. An administrative decision was made which expanded that scope. Banks were granted standing to challenge the decision. While the statute did not specifically intend to benefit banks, standing was appropriate because inherent in the limitation of one type of business (credit unions) is protection for its competitors (banks).[20]

The test 'represents a balancing of ... concerns grounded in the separation of powers'.[21] The intention of the legislature, as expressed in the empowering Act, becomes a central consideration in determining access to the courts.[22] This supports the separation of powers by preventing challenges to administrative

14 Ibid 528 (emphasis added).

15 Ibid 524–8.

16 *Clarke*, 479 US 388, 399–400 (1987). Indeed, the test was introduced as a relaxation of previous standing rules, which strictly required that an applicant hold a legal interest: Sanford Church, 'A Defense of the "Zone of Interests" Standing Test' [1983] *Duke Law Journal* 447, 449–50; Lynette McCloud, 'A Hot Debate: Application of the Zone of Interests Test to the Endangered Species Act' (1996) 4 *Missouri Environmental Law and Policy Review* 38, 40.

17 *National Credit Union Administration v First National Bank & Trust Co*, 522 US 479, 489, 492 (1998).

18 *Milwaukee v Block*, 823 F 2d 1158, 1166 (7th Cir, 1987). Focus on the word 'arguably' has recently been emphasised by the Supreme Court: *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v Patchak*, 132 S Ct 2199, 2210 (2012).

19 522 US 479 (1998).

20 Ibid 492–3.

21 Church, above n 16, 464. The separation of powers underlies US standing laws more generally: Buzbee, above n 11, 811; *Lujan v National Wildlife Federation*, 504 US 555, 560 (Scalia J) (1992).

22 The test was considered for some time to be 'prudential' (that is, judicially created and subject to congressional rejection), but recently confirmed to be a principle of statutory interpretation, forming part of the background against which Congress legislates: *Lexmark International v Static Control Components*, 134 S Ct 1377, 1387–8 (2014). The test, therefore, cannot apply where an applicant asserts that a common law or equitable right has been infringed: Church, above n 16, 468–70. The test primarily applies to matters covered by the *Administrative Procedure Act* § 702, which allows review by a person 'aggrieved by agency action within the meaning of a relevant statute'.

action which frustrate the purpose of the legislature in enacting the empowering Act.[23]

B *Argos*: Rejection of the Zone of Interests Test

In 2014, the High Court rejected the use of the zone of interests test in Australia. In *Argos*, the Court considered standing to challenge a decision made by the ACT Minister for Planning.[24] The Minister had granted approval under the *Planning and Development Act 2007* (ACT) ('*Planning Act'*) to a company to construct a supermarket. That approval was challenged by two existing supermarkets who operated in the vicinity, as well as a landlord of one of the supermarkets ('the applicants').

The interests of the applicants were competitive in nature: they stood to suffer financially as a result of increased competition. A question arose as to whether the empowering Act (the *Planning Act*) was concerned with competitive interests, and whether this was relevant to the interpretation of the 'person aggrieved' test under the *Administrative Decisions (Judicial Review) Act 1989* (ACT), then in the same terms as the Commonwealth *ADJR Act*. The judge at first instance held that 'the scheme of the *Planning Act* must be considered' in determining whether a party is a 'person aggrieved' under the *ADJR Act*.[25] This indicates a zone of interests approach. The Court of Appeal referred to the parties' submissions on this issue, but did not consider them in coming to a conclusion.[26] In both Courts, standing was denied to all applicants.[27]

The High Court unanimously rejected the zone of interests approach. It held that the subject matter, scope and purposes expressed in the empowering Act could not be used to exclude an applicant.[28] Rather, the interests needed to satisfy standing depend only upon the *ADJR Act* itself.[29] According to French CJ and Keane J, the *ADJR Act*'s 'person aggrieved' standing criterion 'does not alter according to the scope and purpose of the enactment under which the impugned decision is made'.[30] The result here was clear: the 'zone of interests' approach did not apply. The *ADJR Act* standing provision operates independently from the empowering Act.

A number of justifications were put forward for this approach. First, French CJ and Keane J considered that adding further requirements to the standing test would defeat the aim of the *ADJR Act*, which is to provide review across a wide

23 *Milwaukee v Block*, 823 F 2d 1158, 1166 (7th Cir, 1987).

24 (2014) 254 CLR 394.

25 *Argos v Corbell* (2012) 7 ACTLR 15, 27–8 [43] (Burns J).

26 *Argos v Corbell* (2013) 198 LGERA 187, 194 [24] (The Court).

27 Ibid 199 [50], 201 [59] (The Court); *Argos v Corbell* (2012) 7 ACTLR 15, 30 [55] (Burns J).

28 *Argos* (2014) 254 CLR 394, 409 [41] (French CJ and Keane J), 416 [68] (Hayne and Bell JJ), 418 [80] (Gageler J). This statement is subject to the use of the empowering Act in the 'legal operation' test, considered further below.

29 Ibid 417 [76]–[77] (Gageler J).

30 Ibid 409 [40] (French CJ and Keane J). Hayne and Bell JJ (at 415–16 [64], [68]) and Gageler J (at 418 [80]) also rejected the respondents' contention on this point. Justices Hayne and Bell found (at 417 [72]) that, in any event, the applicants' interests were not 'foreign to the Planning Act (or to the subject matter, scope and purposes of that Act)'.

range of decisions.[31] This indicates a preference for simplicity, rather than having standing tests diverge according to the particular empowering Act involved. I suggest, however, that this goal of consistency is illusory. It is well accepted that the ordinary 'special interest' test itself is 'a flexible one', the requirements of which 'will vary according to the nature of the subject matter of the legislation'.[32] The zone of interest test is no more context-dependent than the current special interest test.

Second, Gageler J considered that the zone of interests approach was logically contradictory. The *ADJR Act* allows for review on the ground that a decision was made outside the subject matter, scope or purposes of the empowering Act.[33] Such a wrongful decision would necessarily affect a person whose interests were beyond the scope of the Act. The zone of interests test, however, would exclude such an applicant. This would make the review scheme 'self-defeating'.[34] The same logic was used by the Australian Law Reform Commission to reject the test in 1985.[35]

Third, the Court found Australian authority for the test lacking, or at least, unpersuasive. In *Alphapharm v SmithKline Beecham (Australia)* ('*Alphapharm*'), Davies J referred to the zone of interests test in US law and stated that 'such a test may [also] be relevant under the law of ... this country'.[36] However, his Honour only applied the test to a provision for administrative review contained within the empowering Act itself.[37] The High Court rightly noted that the purposes of the empowering Act are clearly relevant to review procedures within that same Act. However, that does not mean that they also apply to the separate *ADJR Act* standing provision.[38] Thus, 'what could be said of the statute-specific review processes considered in *Alphapharm* could not be said of the general review processes of the *AD(JR) Act*'.[39]

More problematic were statements made by various members of the Federal Court in *Right to Life*, which did concern the *ADJR Act*.[40] In that case, Lockhart J stated that '[n]othing advanced by the appellant' related to the purposes of the empowering Act.[41] His Honour then denied standing to the applicant, noting

31 Ibid 411 [48] (French CJ and Keane J).

32 *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27, 36 (Gibbs CJ). This statement has been approved many times: see, eg, *Access for All Alliance (Hervey Bay) Inc v Hervey Bay City Council* (2007) 162 FCR 313, 329 [44]; *Ogle v Strickland* (1987) 13 FCR 306, 308; *Right to Life Association (NSW) Inc v Secretary for Department of Human Services and Health* (1995) 56 FCR 50, 81 (Beaumont J) ('*Right to Life*').

33 *ADJR Act* ss 5(1)(e), (2)(c).

34 *Argos* (2014) 254 CLR 394, 418 [79] (Gageler J).

35 Australian Law Reform Commission, above n 7, 132. The same argument is also found in commentary: Kenneth Culp Davis, 'The Liberalized Law of Standing' (1970) 37 *Chicago Law Review* 450, 458.

36 *Alphapharm Pty Ltd v SmithKline Beecham (Australia) Pty Ltd* (1994) 49 FCR 250, 260.

37 Ibid.

38 *Argos* (2014) 254 CLR 394, 409–10 [44] (French CJ and Keane J), 415 [65] (Hayne and Bell JJ), 419 [82] (Gageler J).

39 Ibid 409–10 [44] (French CJ and Keane J). Justice Gageler (at 419 [82]) used the same rationale to distinguish *Allan v Transurban City Link* (2001) 208 CLR 167.

40 (1995) 56 FCR 50.

41 Ibid 68.

that the *Alphapharm* decision rested on a similar basis.[42] In *Argos*, Gageler J considered that this was not a zone of interests analysis. Rather, these statements only formed 'a step in reasoning to the conclusion that the [applicant's] concern' was a mere emotional or intellectual one, comparable to that held by the rest of the public.[43] Justice Lockhart did, indeed, find that the applicant had a mere emotional or intellectual concern. However, contrary to Justice Gageler's reading, the zone of interests test was not a 'step in reasoning' to that conclusion. Rather, the zone of interests approach was said by Lockhart J to be '*another* powerful reason' to deny standing to the applicant.[44] That is, the merely emotional concern of the applicant *and* the zone of interests test provided separate and equally valid reasons to deny standing.

Justice Gummow (in dissent in the result) also adopted zone of interests-type language in *Right to Life*. His Honour stressed:

> the importance, in assessing whether the applicant is 'aggrieved' and in ascertaining the content of the terms 'interests', 'affect' and 'adversely', of the nature, scope and purpose of the particular enactment under which the decision has been made.[45]

Justice Gummow also referred to *Alphapharm* in this respect.[46] Chief Justice French and Keane J indicated that his Honour's statements were, in fact, only comments upon *Alphapharm* itself, rather than interpretation of the *ADJR Act*.[47] This is incorrect. The terms which Gummow J discussed in the passage above are those of the *ADJR Act*, and the three paragraphs preceding that statement in his Honour's judgment also concerned the *ADJR Act*.[48] The decision in *Right to Life* does support a zone of interests test. The High Court's attempt to neutralise this precedent is unconvincing.

The statements of Lindgren J in *Big Country Developments v Australian Community Pharmacy Authority* ('*Big Country*') were dismissed more directly.[49] In that case, a landlord sought review of a decision of the Pharmacy Authority which allowed a pharmacy (the landlord's tenant) to relocate to another building. Relocation would lower the value of the landlord's premises. Justice Lindgren held that the empowering Act was concerned with community access to pharmacies. The 'private commercial interest of … [the landlord was] not coincidental with [this] particular public interest'.[50] This made it 'clear' that the landlord was not a 'person aggrieved' under the *ADJR Act*, because its interest was not 'coincident with, or embraced by, the interests served by the [empowering] legislation'.[51] This is a straightforward application of the zone of

42 Ibid.
43 *Argos* (2014) 254 CLR 394, 419–20 [83].
44 *Right to Life* (1995) 56 FCR 50, 68 (emphasis added).
45 Ibid 84.
46 Ibid 84–5.
47 *Argos* (2014) 254 CLR 394, 409–10 [44].
48 *Right to Life* (1995) 56 FCR 50, 84.
49 (1995) 60 FCR 85.
50 Ibid 93.
51 Ibid 94.

interests test. In *Argos*, French CJ and Keane J explicitly stated that this 'should not be accepted' as a correct statement of the law.[52]

Justice Gageler also considered that previous cases could not be reconciled with a zone of interests approach.[53] For example, *Broadbridge v Stammers* permitted a postmaster to challenge a decision under the *Postal Services Act 1975* (Cth) to close a post office.[54] The postmaster would have lost his accommodation and position as a result of the closure. The Federal Court granted the postmaster standing, because his interests were clearly specially affected.[55] If a zone of interests approach had been adopted, standing would have been denied: employment and accommodation were irrelevant to the empowering Act's aim of regulating postal services. Indeed, that was the result of the test on the analogous facts in *Air Courier Conference*, considered earlier.[56]

One precedent strongly supported the High Court's decision in *Argos*. Oddly, the Court failed to advert to it. In *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund*, McHugh J found that the applicants had suffered damage sufficient to provide standing, despite the fact that nothing in the empowering Acts 'indicate[d] that ... [they] had any object or purpose of protecting the [applicants'] interests'.[57] His Honour went on to say that:

> To deny the [applicants] standing on the basis that they did not fall within the scope of protection afforded by the relevant provisions of the [empowering Acts] ... would be to adopt a test of standing which is inconsistent with the statements of principle [previously made by this Court].[58]

This is, perhaps, the clearest authority supporting the *Argos* decision.

I have argued here that the High Court did not always deal persuasively with prior case law. Nevertheless, its decision could, perhaps, be expected on the basis of principle. To some extent, the zone of interests test defers to Parliament on matters of standing, by placing the empowering Act at the centre of such questions.[59] It is therefore unsurprising that *Argos* rejected it: Australian courts prefer to retain control in this area. This is reflected, for example, in the restrictive interpretation of privative clauses and in decisions which hold that governmental recognition of environmental groups is no longer relevant to their standing.[60] In rejecting the zone of interests test, *Argos* carries on the judicial tradition of managing access to the courts.

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52 *Argos* (2014) 254 CLR 394, 410 [45]. Justice Gageler (at 420 [84]) saw Lindgren J as not, in fact, adopting this view for himself but rather recording the parties' arguments on the point. This is not the preferable interpretation. These statements were formulated as Justice Lindgren's conclusions, a point recognised by French CJ and Keane J.

53 Ibid 418–19 [80]–[81].

54 (1987) 16 FCR 296.

55 Ibid 298 (The Court).

56 See *Air Courier Conference*, 498 US 517, 524–8 (1991); Part II(A) above.

57 *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, 268 [55] ('*Bateman's Bay*').

58 Ibid 283 [102].

59 Peter Cane, 'Open Standing and the Role of Courts in a Democratic Society' (1999) 20 *Singapore Law Review* 23, 30.

60 Elizabeth Fisher and Jeremy Kirk, 'Still Standing: An Argument for Open Standing in Australia and England' (1997) 71 *Australian Law Journal* 370, 375; Matthew Groves, 'Murphy J's Dissent in

C Standing after *Argos*

Argos rejected the zone of interests test. While commercial protection may not have been the object of the *Planning Act*, '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'.[61] The interests of the supermarket applicants were affected and they were granted standing. Those of the landlord were not affected, and it was denied standing (except in the judgment of Gageler J).[62] This focuses on the traditional 'rights and interests' requirement for standing, with additional criteria eschewed.[63] The *ADJR Act* standing provision is to operate independently of the particular empowering Act at issue.

Nevertheless, all judgments did reserve some operation for the empowering Act, though it was somewhat obscurely defined. Chief Justice French and Keane J allow us to look to the empowering Act to determine the 'legal effect and operation of the decision'.[64] As explained by Hayne and Bell JJ, this aims to 'elucidate whether there is ... 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'.[65] Reference to the subject matter and purposes of the empowering Act allow a court to see 'the relationship between the impugned decision and the interests said to be affected'.[66]

I refer to this as the 'legal operation' test. It allows a court to look to the empowering Act to determine *whether* an interest is affected. That is, what are the consequences of a decision under the empowering Act? Do they include an effect upon the applicant? This differs from the zone of interests test, which asks whether the interest of an applicant who is plainly affected *also* falls within the scope of the empowering Act. The first asks whether an interest is affected; the second assumes that it is and then imposes further requirements. Interestingly, no judge in *Argos* actually felt the need to apply this legal operation test, indicating that it operates only 'in reserve': in some instances, the effect upon an applicant can be identified without reference to the empowering Act.

An example of this test could, perhaps, be found in *Jewel Food Stores Pty Ltd v Minister for the Environment, Land and Planning*.[67] In that case, Higgins J considered a decision to alter a Crown lease. The purpose of the power to amend Crown leases was to facilitate development. His Honour held that it was

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Australian Conservation Foundation v Commonwealth: The Birth of Public Interest Standing in Australia?' in Andrew Lynch (ed) *Great Australian Dissents* (Cambridge University Press, 2016) 189, 205–6.

61 *Argos* (2014) 254 CLR 394, 417 [73] (Hayne and Bell JJ).

62 Ibid 411 [49] (French CJ and Keane J), 413 [58] (Hayne and Bell JJ), 423 [91] (Gageler J).

63 The Court therefore also minimised the importance of previous tests of 'remoteness' or 'directness', describing these as 'conclusionary judgments' rather than tools of analysis: *Argos* (2014) 254 CLR 394, 408–9 [39]–[40] (French CJ and Keane J), 414–15 [62]–[63] (Hayne and Bell JJ).

64 Ibid 409 [43]. See also at 421 [86] (Gageler J).

65 Ibid 416 [68].

66 Ibid 416 [66]. See also at 409 [43] (French CJ and Keane J).

67 (1994) 122 FLR 269.

'permissible to have regard to the consequences which that approval authorises', which 'must include the prospect that the [planned] redevelopment thereby permitted will be carried out'.[68] The statutory purpose indicated the ways in which an applicant may be practically affected by the legal operation of the decision.

The difference between the zone of interests and legal operation tests has already caused some confusion in lower courts. In *Animals' Angels eV v Secretary, Department of Agriculture* ('*Animals' Angels*'), the Full Federal Court stated that:

> it appears that French CJ and Keane J, on the one hand, and Hayne and Bell JJ on the other hand, took a different view on whether standing was to be determined by reference to the objects or scope and purpose of the statute conferring power to make the decision.[69]

This is incorrect. The Federal Court here confused the two tests. It first cited French CJ and Keane J, rejecting the zone of interests test.[70] It then cited Hayne and Bell JJ, supporting the legal operation test.[71] Each of the three judgments in *Argos*, in fact, rejects the zone of interests test *and* adopts the legal operation test. This is possible because the two tests ask different questions, as explained above.

Chief Justice French and Keane J state clearly that the submissions in support of a zone of interests test 'should not be accepted'.[72] 'Consistently with that proposition', their Honours then write, it is necessary to support the separate legal operation test.[73] Justice Gageler similarly states that arguments in support of the zone of interests test 'must ... be rejected in principle'.[74] Again, his Honour later approves the legal operation test as a separate matter.[75] In these two judgments, there is a clear ratio in *Argos* rejecting the zone of interests test and supporting the legal operation test.

Though expressed with less clarity, the judgment of Hayne and Bell JJ reaches the same result. Their Honours reject *Alphapharm* as a basis for the zone of interests test.[76] They state clearly that '[r]eference is *not* made to the ... [empowering Act] for the purpose of giving some different meaning to the

68 Ibid 279.
69 *Animals' Angels* (2014) 228 FCR 35, 72 [119].
70 Ibid; *Argos* (2014) 254 CLR 394, 409 [41]–[42].
71 *Argos* (2014) 254 CLR 394, 415–16 [66]; *Animals' Angels* (2014) 228 FCR 35, 72 [119].
72 *Argos* (2014) 254 CLR 394, 409 [41]–[42].
73 Ibid 409 [43].
74 Ibid 418 [80].
75 Ibid 421 [86].
76 Ibid 415 [65]. It is the treatment of *Alphapharm* which can cause some initial difficulty in deciphering the judgment of Hayne and Bell JJ. Their Honours first consider an argument put by the applicants: *Alphapharm* should be overturned if it supports a zone of interests approach. Justices Hayne and Bell state that the applicants' submissions on this point 'should not be accepted': at 415 [64]. However, as noted in the text, their Honours then find that *Alphapharm* does not support the zone of interests test in any event: at 415 [65]. It is the latter statement which appears to be definitive: there is no authority for the test in *Alphapharm*, and so no need to overturn it as the applicants wished to do.

words' of the 'person aggrieved' test.[77] That is, there is no zone of interests test which affects interpretation of the *ADJR Act*.[78]

Having dealt with *Alphapharm*, the following paragraph of their Honours' judgment goes on to allow reference to the empowering Act only to identify the 'relationship between the impugned decision and the interests said to be affected'.[79] Their Honours state that it may be necessary to have regard to the 'proper construction and application' of the empowering Act in order to identify 'the connection between decision, interests and asserted effect' of the decision.[80] This is the legal operation test.

From this, the effect of *Argos* should be clear. The zone of interests test is rejected and a legal operation test supported. These conclusions are forceful in the joint judgment of French CJ and Keane J and the judgment of Gageler J, and somewhat less clear in that of Hayne and Bell JJ.[81] The Full Federal Court's statement that the judgments 'took a different view' on the proper use of the empowering Act is therefore incorrect.[82] This error stems from a failure to differentiate between the zone of interests test and the legal operation test.

A similar conflation of the two tests has occurred in the ACT Supreme Court. In *Concerned Citizens of Canberra Inc v Chief Executive (Planning and Land Authority)*, Refshauge J interpreted the comments of Hayne and Bell JJ on the legal operation test as 'contrary' to those of French CJ and Keane J.[83] Again, there is no basis for this distinction: each judgment in *Argos* supports the legal operation test *and* rejects the zone of interests test. These tests both have recourse to the empowering Act; one is permissible and the other is not. We can use the empowering Act to ask whether an interest is affected (legal operation test). We cannot use it to exclude an applicant whose interests are affected in any event (zone of interests test). While not always expressed with utmost clarity, *Argos* is more coherent than subsequent decisions may lead the reader to believe.

This section has outlined the origins of the zone of interests test in US law, considered its rejection in *Argos* and the misapplication of that decision in lower courts. Having assessed the legal foundations of *Argos*, the following Part asks whether the Court was *right* to reject the zone of interests test: is it desirable or not? This depends upon our understanding of politics and judicial review.

77 Ibid 416 [68] (emphasis added).

78 Indeed, Hayne and Bell JJ granted standing to the supermarket applicants because their interests were affected, notwithstanding the fact that their interests may have been irrelevant under the *Planning Act*: ibid 417 [73].

79 Ibid 416 [66].

80 Ibid 416 [67].

81 Even without the judgment of Hayne and Bell JJ, which is the most difficult to interpret, there is a majority among the other judges.

82 *Animals' Angels* (2014) 228 FCR 35, 72 [119].

83 *Concerned Citizens of Canberra Inc v Chief Executive (Planning and Land Authority)* (2015) 214 LGERA 252, 287 [272].

III THEORIES OF LEGISLATION AND JUDICIAL REVIEW

The zone of interests test asks whether the legislature intended to grant or withhold standing. How this intention is determined depends upon our background assumptions about the political process. Parts III and IV of this article consider two competing views. First, 'public choice' theory, which focuses on the role of interest groups. Second, 'public interest' theory, in which legislatures aim to resolve social problems for the benefit of the community. I conclude that *Argos* was right to reject the zone of interests test under either theory.

A Public Choice Theory

The zone of interests test looks to the empowering Act to determine whether the legislature intended to confer standing. How is this intention to be discerned? A significant body of scholarship has questioned the reality of legislative 'intention' itself. These doubts stem from the collective nature of the legislature: how can a body which has multiple members hold a single, coherent intention? Legislators may all have different reasons for voting in favour of a text, or understand a text differently.[84] The activity of a legislature is also subject to forms of agenda control. This means that legislative outcomes may be the result of manipulation, rather than intention.[85]

Reflecting these concerns, members of the High Court regularly deny the reality of subjective legislative intention. Many consider it a 'fiction'.[86] Legislative intention is considered by these judges to be something which is 'attributed':[87] it is 'asserted as a statement of compliance with the rules of construction, common law and statutory, which have been applied to reach the preferred results and which are known to parliamentary drafters and the courts'.[88]

There are good reasons to defend the reality of subjective legislative intention.[89] Perhaps the strongest is that it 'makes no sense to give any person or

84 Kenneth Shepsle, 'Congress is a "They", Not an "It": Legislative Intent as Oxymoron' (1992) 12 *International Review of Law and Economics* 239, 244; Michael Kirby, 'Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts' (2003) 24 *Statute Law Review* 95, 98–9; Frank Easterbrook, 'Text, History and Structure in Statutory Interpretation' (1994) 17 *Harvard Journal of Law and Public Policy* 61, 68.

85 This is based on Arrow's theorem and underlies the critique in (amongst others): Jeremy Waldron, *Law and Disagreement* (Clarendon Press, 1999) 125–6; Frank Easterbrook, 'Statutes' Domains' (1983) 50 *University of Chicago Law Review* 533, 547; Shepsle, above n 84, 244.

86 See, eg, *Queensland v Congoo* (2015) 89 ALJR 538, 549–50 [36]; *Momcilovic v The Queen* (2011) 245 CLR 1, 141 [341] (Hayne J); *Lacey v A-G (Qld)* (2011) 242 CLR 573, 592 [43]–[44]; *Dickson v The Queen* (2010) 241 CLR 491, 507 [32]; *Mills v Meeking* (1990) 169 CLR 214, 234 (Dawson J); *Zheng v Cai* (2009) 239 CLR 446, 455–6 [28]; Robert French, 'The Courts and the Parliament' (2013) 87 *Australian Law Journal* 820, 824; Kirby, above n 84, 98–9; Sir Anthony Mason, 'Administrative Law Reform: The Vision and the Reality' (2001) 8 *Australian Journal of Administrative Law* 135, 140.

87 *Queensland v Congoo* (2015) 89 ALJR 538, 549 [32] (French CJ and Keane J).

88 *Lacey v A-G (Qld)* (2011) 242 CLR 573, 592 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

89 This overview is necessarily brief. A further note is that while it is appropriate to look only to objective manifestations of intention (for 'rule of law' reasons), it is necessary to presuppose a subjective intention

body law-making power unless it is assumed that the law they make is the law they intend to make'.[90] If this were not the case, legislators would be akin to 'monkeys pounding randomly on keyboards'.[91] Moreover, legislative intention ensures that courts respect their constitutional position as interpreters of Parliament's will.[92] Finally, legislative intention is, in fact, the basis on which courts continue to proceed, irrespective of the philosophical doubts they may express.[93]

What is important here is that whatever the precise view of legislative intention we take, our choice will depend upon our 'bedrock assumptions about the legislative process' and 'some positive theory of politics'.[94] Courts 'must use *some* set of background presuppositions about legislatures and legislative behavior in order to give meaning to statutes'.[95] The interpretive approach behind the zone of interests test is no exception: it emanates from 'public choice' theory, which emphasises the role of interest groups in politics and the formation of legislation.

Public choice theory 'rejects the idea that politics is a process by which we somehow discover what is truly in the "public interest"'.[96] Rather, the legislative process is viewed through an economic lens. Legislation is a product which can provide benefits to interest groups. For example, it may restrictively license potential competitors, ensure favourable administrative decision-making criteria,

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behind those manifestations. On this debate, see: Oliver Wendell Holmes, 'The Theory of Legal Interpretation' (1899) 12 *Harvard Law Review* 417, 419; Max Radin, 'Statutory Interpretation' (1930) 43 *Harvard Law Review* 863, 872; John Manning, 'Textualism and Legislative Intent' (2005) 91 *Virginia Law Review* 419, 424, 434; Easterbrook, 'Statutes' Domains', above n 85, 535, 547; French, above n 86, 824; Richard Ekins and Jeffrey Goldsworthy, 'The Reality and Indispensability of Legislative Intentions' (2014) 36 *Sydney Law Review* 39, 44, 48; Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010) 247–8.

90 Joseph Raz, 'Intention in Interpretation' in Robert George (ed), *The Autonomy of Law: Essays on Legal Positivism* (Oxford University Press, 1999) 249, 258.

91 Jeffrey Goldsworthy, 'Legislative Intention Vindicated?' (2013) 33 *Oxford Journal of Legal Studies* 821, 840. If this were the case, it would not matter who we elect, as the results of any representative's act would not be one 'intended' by him or her: Raz, above n 90, 258–9.

92 Reed Dickerson, 'Statutory Interpretation: A Peek into the Mind and Will of a Legislature' (1975) 50 *Indiana Law Journal* 206, 217; Stephen Gageler, 'Legislative Intention' (Speech delivered at the Lucinda Lecture Series No 20, Monash University, 15 September 2014) 22–3. The link between statutory interpretation and the constitutional division of powers has also been recognised judicially: *Wilson v Anderson* (2002) 213 CLR 401, 418 [8] (Gleeson CJ); *Zheng v Cai* (2009) 239 CLR 446, 455–6 [28].

93 Dickerson, above n 92, 216; Susan Kenny, 'Constitutional Role of the Judge: Statutory Interpretation' (2014) 1 *Judicial College of Victoria Online Journal* 4, 5 <http://www.judicialcollege.vic.edu.au/sites/default/files/jcv_online_journal_vol01_0.pdf>.; Ekins and Goldsworthy, above n 89, 59–60.

94 Manning, above n 89, 424; Jerry Mashaw, 'The Economics of Politics and the Understanding of Public Law' (1989) 65 *Chicago-Kent Law Review* 123, 152. See also Courtney Simmons, 'Unmasking the Rhetoric of Purpose: The Supreme Court and Legislative Compromise' (1995) 44 *Emory Law Journal* 117, 120, 134; Frank Easterbrook, 'The Supreme Court 1983 Term – Foreword: The Court and the Economic System' (1984) 98 *Harvard Law Review* 4, 17; Waldron, above n 85, 121; Richard Ekins, *The Nature of Legislative Intent* (Oxford University Press, 2013) 228. Reliance on legislative processes is found in most of the authors cited in this discussion, regardless of their particular view.

95 Mashaw, 'Economics of Politics', above n 94, 152 (original emphasis).

96 Eamonn Butler, *Public Choice: A Primer* (Institute of Economic Affairs, 2012) 25.

or criminalise certain activity.[97] Interest groups 'buy' favourable legislation, by providing the resources which legislators need for re-election. 'Payment' may come in the form of donations, in-kind assistance, public support or outright bribery.[98] As in any marketplace, there are multiple buyers, sellers and products. Interest groups must therefore compete for the support necessary for different provisions in each Bill. The Act represents the final compromise of interests. The precise terms of the bargain are determined by the effectiveness and power of the various interest groups.[99]

This view of the political process denies the possibility of a coherent 'legislative intention'. Legislation is a finely balanced compromise between competing interest groups. It is not an attempt to pursue any *common* goal. 'Legislation is compromise', as Easterbrook writes, and '[c]ompromises have no spirit; they just are'.[100] If a particular interest is not reflected in a statute, the reason is that the relevant group failed to secure protection of it.

The zone of interests test is one practical outcome of this view.[101] The empowering Act was passed on the basis of a compromise which excluded certain interest-holders from consideration. According to the zone of interests test, this is a good reason to deny standing to that interest-holder. If statutes are akin to contracts between interest groups and legislators, '[t]he appropriate plaintiffs will be those who [can] claim "breach", not the larger class of persons affected by a bargain to which they are not "parties"'.[102] The court would be frustrating the balance of the legislative outcome to *subsequently* recognise excluded interest-holders as having some legitimate claim to consideration under the Act. Standing should be denied to such applicants, because it 'is not the business of the courts to give an interest group a benefit that was denied by the legislature'.[103] To do so would be 'to intervene in the legislative struggle on the side of one interest group, overriding opposing groups that had managed to thwart the enactment of an effective statute'.[104] As a result, US courts 'seem increasingly to look for very specific intent on the part of Congress to include a

97 George Stigler, 'The Theory of Economic Regulation' (1971) 2 *Bell Journal of Economics and Management Science* 3, 13–14; Jessica Pitts, '"Ag-Gag" Legislation and Public Choice Theory: Maintaining a Diffuse Public by Limiting Information' (2012) 40 *American Journal of Criminal Law* 95, 110; Easterbrook, 'Economic System', above n 94, 17.

98 Stigler, above n 97, 12.

99 The explanation here draws on more exhaustive descriptive accounts of public choice theory: see, eg, Jonathan Macey, 'Promoting Public-Regarding Legislation through Statutory Interpretation: An Interest Group Model' (1986) 86 *Columbia Law Review* 223, 227–8; Richard A Posner, 'The Evolution of Economic Thinking about Legislation and its Interpretation by Courts' in Luc J Wintgens (ed), *The Theory and Practice of Legislation: Essays in Legisprudence* (Ashgate, 2005) 53, 53–62; Shepsle, above n 84, 240.

100 Easterbrook, 'Text, History and Structure', above n 84, 68.

101 Easterbrook, 'Economic System', above n 94, 48, 51.

102 Ibid 18.

103 Richard Posner, 'Economics, Politics, and the Reading of Statutes and the Constitution' (1982) 49 *University of Chicago Law Review* 263, 279.

104 Ibid. Posner defends this approach: Richard Posner, 'Statutory Construction: In the Classroom and in the Courtroom' (1983) 50 *University of Chicago Law Review* 800, 809. See also Mashaw, 'Economics of Politics', above n 94, 135 (this interpretive practise mandates that 'remedial developments ... should be constrained').

class of litigants as direct beneficiaries of legislation before giving them standing to obtain judicial review'.[105] The zone of interests test is therefore intimately linked with public choice theory in US law.

B Public Choice Theory and the Zone of Interests

If we accept the public choice understanding of legislation, should we adopt the zone of interests test? The preceding discussion has shown that the two are closely linked. This may seem to suggest that we have no choice in the matter: if one is accepted, the other must follow. This is not the case. Public choice theory describes the political process. It is not a method of statutory interpretation. Courts must still choose whether or not to respect the terms of the interest group bargain. A court may instead choose to interpret a statute as if it was enacted for the benefit of the community as a whole, rather than particular interests.

Consider the US case of *Block v Community Nutrition Institute* ('*Block*').[106] The empowering Act established a marketing board for dairy producers. The board set prices for milk products, rather than allow these to be determined by market fluctuations. The question in the case was whether consumers had standing to challenge the pricing decisions of the board. We could see this as a scheme aimed at stabilising prices for the benefit of the public. On this view, 'Congress meant to protect consumers, and thus the courts are open to them'.[107] This is a 'public interest' view: legislation is for the general benefit of the community. The Court of Appeals adopted this view and granted standing to consumers, as their interests were affected by the board's decisions.[108]

Conversely, the Act could be considered to establish a cartel, with the legislation having been purchased by milk producers for their own benefit. This involves no intention to benefit the general public. A literalist interpretation method should be adopted, to strictly adhere to the terms of the interest group 'contract'.[109] Only milk producers are 'parties' to this contract and therefore only they should gain standing. Review by consumers would interfere with the compromise among interest groups.[110] On appeal, the Supreme Court adopted this view and applied the zone of interests test. This led the Supreme Court to deny standing to consumers, reversing the decision of the Court of Appeals.[111]

105 Mashaw, 'Economics of Politics', above n 94, 136.

106 467 US 340 (1984).

107 Easterbrook, 'Economic System', above n 94, 50. Note that this is *not* the interpretation favoured by Easterbrook himself.

108 *Community Nutrition Institute v Block*, 698 F 2d 1239, 1252 (DC Cir, 1983).

109 *National Labor Relations Board v Rockaway News Supply Co*, 197 F 2d 111, 115–16 (Clark J) (2nd Cir, 1952); Mashaw, 'Economics of Politics', above n 94, 135; Jonathan Macey, 'Special Interest Groups Legislation and the Judicial Function: The Dilemma of Glass-Steagall' (1984) 33 *Emory Law Journal* 1, 36.

110 Easterbrook, 'Economic System', above n 94, 50.

111 *Block*, 467 US 340, 342–52 (1984).

This illustrates that courts always have a choice as to their interpretive approach.[112] Thus, Mashaw criticises Easterbrook (a public choice theorist), because 'he gives no normative argument for moving from a positive prediction or explanation of what public law is like to a normative pronouncement about how interpretation should be conducted'.[113] That is, Easterbrook omits the link in the chain between explanation of the political process and the choice of interpretive practice. The fact that legislation is an 'interest group bargain' does not end the matter. The question becomes, 'should courts *uphold* the interest group bargain?'

As we saw above, the zone of interests test chooses to uphold the bargain. It grants standing only to those who gain protection of their interests in the empowering Act. The High Court should not do so. If we accept public choice theory, the legislative 'compromise' will always reflect political inequality, because this theory also accepts that 'money talks'. Inevitably, 'more powerful groups are more likely to see their interests reflected in legislation than weaker groups'.[114] The corollary of this is that those without resources to have their voices heard will not be able to influence the legislative outcome. This is also a problem for groups with a large but diffuse membership, for whom the costs of collective action are higher.[115]

When understood in light of public choice theories, legislation must therefore reflect some level of political inequality. If courts enforce the bargains struck by interest groups, this serves only to reinforce in the judicial system the inequalities of the political system.[116] Those with power gain statutory recognition of their interests. Those who lack political influence do not. The zone of interests test translates this into standing rules. The powerful are granted standing, because their interests are recognised by the statute. The weaker are denied standing, because their interests are not legislatively recognised. The zone of interests test makes access to the courts a question of political power. This is obviously undesirable.

This is not to argue that interest group politics is necessarily politically damaging. Liberal pluralism is a central aspect of a properly democratic polity

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112 In *Parker v Brown*, 317 US 341 (1943), for example, the Supreme Court came to the opposite conclusion on virtually identical facts, on the basis of a 'public interest' interpretation of a raisin marketing scheme. See Easterbrook, 'Economic System', above n 94, 52.

113 Mashaw, 'Economics of Politics', above n 94, 153. Even in the US, where public choice theory has considerable academic and judicial acceptance, choice of interpretive method is not always consistent: Posner, 'Reading of Statutes', above n 103, 279–80.

114 Macey, 'Special Interest Groups', above n 109, 20. See also Posner, 'Reading of Statutes', above n 103, 284–5; Oliver Wendell Holmes, 'Herbert Spencer: Legislation and Empiricism' in Harry Shriver (ed), *Justice Oliver Wendell Holmes: His Book Notices and Uncollected Letters and Papers* (Central Book Co, 1st ed, 1936) 104, 108. Pierce does, however, argue that most groups in Washington will have some level of effective representation: Pierce, above n 8, 1520.

115 Posner, 'Reading of Statutes', above n 103, 266; Stigler, above n 97, 13–14; Pitts, above n 97, 106; Easterbrook, 'Economic System', above n 94, 15–16. For a discussion of the costs of collective action, see Macey, 'Promoting Public-regarding Legislation', above n 99, 229.

116 William Landes and Richard Posner, 'The Independent Judiciary in an Interest Group Perspective' (1975) 18 *Journal of Law and Economics* 875, 876 (note that these authors defend public choice theory).

and interest group debate can produce public benefits.[117] To ignore this is to reduce the problem of public choice to 'democracy-bashing', as Mashaw writes.[118] However, there is no obvious reason why we should accept that resulting inequalities in political power should be carried over into the legal system. To do so may reinforce inequality and ignore genuine grievances.[119] The zone of interests test should be rejected where public choice theory is accepted: there is no reason for de facto political exclusion to become de jure judicial exclusion.

IV PUBLIC INTEREST THEORY AND THE RIGHTS AND INTERESTS MODEL

The zone of interests test is undesirable when we adopt a 'public choice' understanding of legislation. However, legislation need not be seen in this way. The example of *Block*, considered earlier, shows that courts have a choice in how they view and interpret legislation. Even if interest group politics is inevitable, legislation may still be considered a conscious decision by legislators as to what is in the public interest. It can be seen as aimed at redressing a problem for the benefit of the community. This view underlies many interpretive practices, including the 'mischief rule', which requires courts to consider the problem which Parliament sought to address.[120]

There are good reasons, in fact, to prefer this 'public interest' view of legislation in Australia to the 'public choice' theories so prevalent in the US. Interest groups in the US often provide 'precise legislative language for a proposed bill or amendment',[121] or succeed in having their own model legislation adopted in its entirety.[122] Interest group involvement is readily accepted by US

117 Public Administration Select Committee, *Lobbying: Access and Influence in Whitehall*, House of Commons Paper No HC 36-I, Session 2008–09 (2008) 5; Simmons, above n 94, 118 n 7.

118 Mashaw, 'Economics of Politics', above n 94, 145. Posner also notes that public choice and public interest theories will not conflict in *every* case: Posner, 'Reading of Statutes', above n 103, 269.

119 For this reason, Eskridge has argued that courts should not adopt interpretive practices which 'penalize people who have no effective access to the political process': William Eskridge, 'Politics without Romance: Implications of Public Choice Theory for Statutory Interpretation' (1988) 74 *Virginia Law Review* 275, 324.

120 Henry Hart and Albert Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Harvard, 1958) vol II, 1156–7; *Heydon's Case* (1584) 76 ER 637, 638.

121 Chuck McCutcheon, 'Lobbying' in Doug Goldenberg-Hart et al (eds), *Guide to Congress* (CQ Press, 7th ed, 2013) 833, 841. See also Anthony Nownes and Patricia Freeman, 'Interest Group Activity in the States' (1998) 60 *Journal of Politics* 86, 91, 92 (Table 2); Adrian Vermeule, *Mechanisms of Democracy: Institutional Design Writ Small* (Oxford University Press, 2007) 199–200; Matt Grossman, 'The Influence of Interest Groups in American Politics: Myth versus Reality' in Raymond J La Raja (ed), *New Directions in American Politics* (Routledge, 2013) 125, 129. This became more controversial in 2013, when it was revealed that Citibank drafted legislation reforming the banking system following the financial crisis: Eric Lipton and Ben Protess, 'Banks' Lobbyists Help in Drafting Bills on Finance', *New York Times* (New York), 24 May 2013, A1.

122 US state legislatures adopt hundreds of pieces of model legislation each year produced by the American Legislative Exchange Council ('ALEC'), a conservative lobby group which provides resources to legislators who support its proposals. See Julie Underwood and Julie Mead, 'A Smart ALEC Threatens

courts in defence of their interpretive practices.[123] The same cannot be said in Australia, where accounts of interest group activity do not generally include legislative drafting.[124] While Australian groups may have significant policy influence, statutory texts are not literal records of interest group compromises, as they may be in the US.

If we accept that legislation reflects the public interest, should we accept the zone of interests test? There is a stronger claim to be made in favour of the test here. A legislative preference for one type of interest over another could be seen as a democratic determination of community values. As Brian Preston writes:

> since the legislature is accountable to the public, it is reasonable for the courts to assume that legislation will reflect current social changes and expectations. It is therefore appropriate for the courts to 'take reflection from the legislative changes and to proceed upon a parallel course'.[125]

Exclusion of an applicant on the basis of the statutory zone of interests would reflect the 'public interest' of the Act. This could more readily be considered the result of a legitimate process, rather than political inequality.

This should not be accepted. Even where legislation is in the public interest, the zone of interests test is inconsistent with the 'rights and interests' model of judicial review. This is the model upon which the decision in *Argos* is based. Under this model, the role of the courts is to protect individual rights and interests from unlawful interference by executive action.[126] Any legitimate regime of standing rules must provide such protection. As Antonin Scalia has written, 'the Court must always hear the case of a litigant who asserts the violation of a legal right'.[127] This is correct. Where an individual's right or interest is affected, strong reasons would be required to deny judicial review. The public interest divined through the zone of interests test does not provide such reasons.

Public Education' (2012) 93 *Phi Delta Kappan* 51, 51–5; Beth Kutscher, '"Model Legislation": States, ALEC Take Reform into Their Own Hands' (2012) 42 *Modern Healthcare* 14, 14–15; Mike McIntire, 'Conservative Nonprofit Acts as a Stealth Business Lobbyist', *New York Times* (New York), 22 April 2012, A1; Alan Greenblatt, 'ALEC Enjoys a New Wave of Influence and Criticism', *Governing* (online), December 2011 <http://www.governing.com/topics/politics/ALEC-enjoys-new-wave-influence-criticism.html>.

123 See, eg, *Barnhart v Sigmon Coal*, 534 US 438, 461 (2002); *Ragsdale v Wolverine World Wide*, 535 US 81, 93–4 (2002).

124 See, eg, Trevor Matthews and John Warhurst, 'Australia: Interest Groups in the Shadow of Strong Political Parties' in Clive Thomas (ed), *First World Interest Groups: A Comparative Perspective* (Greenwood Press, 1993) 81; Mark Sheehan, 'Lobbying Defined and Observed' in Mark Sheehan and Peter Sekuless (eds), *The Influence Seekers: Political Lobbying in Australia* (Australian Scholarly Publishing, 2012) 1; John Warhurst, 'Interest Groups and Political Lobbying' in Andrew Parkin, John Summers and Dennis Woodward (eds), *Government, Politics, Power and Policy in Australia* (Pearson, 8th ed, 2006) 327. An exception (consisting of one amendment and one Act) is reported by Matthew Darke, 'Lobbying by Law Firms: A Study of Lobbying by National Law Firms in Canberra' (1997) 56(4) *Australian Journal of Public Administration* 32, 39, 40, 42.

125 Brian Preston, 'Judicial Review in Environmental Cases' (1993) 10 *Australian Bar Review* 147, 147, quoting *Osmond v Public Service Board (NSW)* [1984] 3 NSWLR 447, 465 (Kirby P).

126 Andrew Edgar, 'Extended Standing – Enhanced Accountability? Judicial Review of Commonwealth Environmental Decisions' (2011) 39 *Federal Law Review* 435, 447.

127 Antonin Scalia, 'The Doctrine of Standing as an Essential Element of the Separation of Powers' (1983) 17 *Suffolk University Law Review* 881, 885.

This is consistent with Joel Feinberg's theory of rights. For Feinberg, to hold a right is to be capable of making a claim against others.[128] Where such a claim is plausibly raised, one has a 'strong enough argument to be entitled to a hearing and given fair consideration'.[129] That is, the claimant can demand that the question be *heard*.[130] A model of review which is based on rights and interests cannot, consistent with that proposition, deny standing to those who plausibly claim to hold such a right or interest.[131] That would be a logical contradiction in the law. Where the 'rights and interests' model of review is satisfied, the zone of interests test must be rejected.

There is also a second problem in using the public interest of the empowering Act to exclude applicants: it is unrealistic for Parliament to foresee all of the ways in which government decisions may affect an individual. The omission of an interest from the empowering Act may not be an exhaustive statement of the public interest – it may simply be an oversight from a body which can never be omniscient. This is, indeed, the role of 'rights and interests' forms of judicial review: to assess individual cases, which the Parliament cannot do.

The problem of such individual cases is implicitly conceded by Richard Posner, US judge and prominent advocate for public choice interpretive practices. Posner considers that courts ordinarily ought to exclude applicants on the basis of a zone of interests analysis. The courts should 'honor the legislative compromise': those who cannot rely on a specific statutory remedy should be denied standing.[132] What if there is an omission by the legislature? Posner answers that 'if the omission [of such a remedy] was an oversight, or if Congress thought the courts would provide appropriate remedies for statutory violations as a matter of course, the judges should create the remedies necessary to carry out the legislature's objectives'.[133] This is not a coherent approach: how is a court to decide whether the omission was an oversight or a deliberate legislative decision? What exactly does the zone of interests tell us in such a situation? In the case of many empowering Acts, a legislature may simply not turn their minds to the issue of standing for a given applicant, or at all.

The 'silence' of the empowering Act may be interpreted in one of two ways. First, we may find that Parliament 'had no relevant intention one way or

128 Joel Feinberg, 'The Nature and Value of Rights' (1970) 4 *Journal of Value Inquiry* 243, 252–3. Australian standing law treats 'rights' and 'interests' as functionally equivalent. Recently, the UK Supreme Court stated that standing law would move away from 'rights' and towards 'interests', without fully explaining the effect of such a shift in emphasis: *AXA General Insurance Ltd v HM Advocate* [2012] 1 AC 868, 917–18 [62] (Lord Hope), 952 [170] (Lord Reed).

129 Feinberg, above n 128, 253.

130 Ibid 254, 257. This is not to say, as Ronald Dworkin does, that 'rights are trumps'. The claimant has no right to be victorious on the merits: that is a question determined by legal consideration of the empowering Act: see Ronald Dworkin, 'Rights as Trumps' in Jeremy Waldron (ed), *Theories of Rights* (Oxford University Press, 1984) 153, 153.

131 I use the term 'plausible' here to recognise that some claims will be spurious. Feinberg himself uses the term 'valid' in the same way, while recognising that whether such a claim withstands scrutiny cannot be determined until after a hearing: Feinberg, above n 128, 255.

132 Posner, 'Statutory Construction', above n 104, 813.

133 Ibid.

another', leaving room for common law principles to be applied.[134] If so, the common law's traditional protection of 'rights and interests' (as expressed above by Scalia) would favour standing being granted.

Alternatively, silence may still indicate that Parliament did hold an intention. This is found in the 'tacit, background assumptions' that inform our understanding of language.[135] Although not expressed, certain matters are taken for granted: '[i]f I have directed my son to stay at home and finish his homework, I will not think that he has disobeyed me if he has to run from the house to escape a fire'.[136] Can we assume that a zone of interests test is intended by the legislature? Perhaps we can in the US. There, 'Congress is presumed to "legislat[e] against the background of" the zone-of-interests limitation'.[137] In Australia, a similar statement may be made about the principle of legality, or the use of privative clauses.[138] It cannot be said of the zone of interests test. We cannot assume that the omission of any given interest in the empowering Act was *intended* by Parliament to result in standing being denied.[139] The zone of interests test should not be used where an individual's rights or interests are affected.

This Part has argued that the zone of interests test should be rejected in some situations. When allied to a public choice view of legislation, it is democratically noxious. When the opposite 'public interest' view of legislation is taken, but a 'rights and interests' model of judicial review is used, the zone test is an unjustified restriction on standing. *Argos* is based on the latter model. It was therefore right to reject the test. However, courts sometimes depart from that model. In the following Part, I will argue that when alternative conceptions of judicial review are adopted, the zone of interests test serves a useful role.

V ALTERNATIVE MODELS OF JUDICIAL REVIEW

This Part will show that determination of standing for environmental groups often involves a zone of interests analysis. Does this approach breach the principles in *Argos*? I conclude that it does not, because the environmental cases do not use the 'rights and interests' model of judicial review used by the High Court. They instead adopt alternative models, where the zone of interests test is

134 Jeffrey Goldsworthy, 'Is Parliament Sovereign? Recent Challenges to the Doctrine of Parliamentary Sovereignty' (2005) 3 *New Zealand Journal of Public and International Law* 7, 28. Goldsworthy is summarising debate on this issue, rather than necessarily presenting the views discussed here as his own.

135 Ibid.

136 Ibid.

137 *Lexmark International v Static Control Components*, 134 S Ct 1377, 1388 (2014), quoting *Bennett v Spear*, 520 US 154, 163 (1997).

138 James Spigelman, 'The Principles of Legality and Clear Statement' (2005) 79 *Australian Law Journal* 769, 773; Commonwealth, *Parliamentary Debates*, House of Representatives, 26 September 2001, 31 560 (Philip Ruddock) (commenting on the interpretive rule in *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598).

139 Bruce Dyer agrees, writing that it 'must be doubtful that Parliament actually turned its mind to the question of standing' when creating the empowering Act, and that 'it is by no means clear that Parliament would expect the courts to use the objects and purposes [of the empowering Act] to imply a restriction on standing': Bruce Dyer, 'Costs, Standing and Access to Judicial Review' [1999] (23) *AIAL Forum* 1, 17.

used as a method of *inclusion* rather than *exclusion*. When used in this way, it serves a useful function.

The following analysis adopts a public interest view of legislation. It is, of course, possible that environmental groups are simply interest groups purchasing legislation for their own benefit, no different from the banking lobby or milk producers.[140] It is possible that a unitary 'public interest' is a chimera.[141] These are not my assumptions here. Such public choice theories were dealt with in Part III. As in Part IV, this Part assumes that politics and legislation are aimed at securing the public interest. I assume that environmental groups seek to uphold that public interest. Unlike Part IV, however, the law discussed here departs from the traditional 'rights and interests' model of judicial review.

A Zone of Interests Analyses in Environmental Law

Standing decisions in matters involving environmental law often look to the degree of alignment between the aims of an environmental organisation and the aims of the empowering Act. These cases tend to depart from the High Court's decision in *Australian Conservation Foundation v Commonwealth* ('*ACF I*').[142] In that case, the Australian Conservation Foundation ('ACF') was denied standing. It was held to have no more than a mere emotional or intellectual concern in the environment, which did not rise above that held by any other ordinary member of the community.[143] Since that time, however, there has been a 'de facto abandonment' of this approach in judgments of lower courts in environmental cases.[144]

In *Australian Conservation Foundation v Minister for Resources* ('*ACF II*'), Davies J granted standing to the ACF. His Honour stated that 'public perception of the need for ... bodies such as the' ACF had 'noticeably increased' since *ACF I*.[145] As a result, the group had an important role:

> In my opinion, the community at the present time expect that there will be a body such as the Australian Conservation Foundation to concern itself with ... [environmental protection] and expects the Australian Conservation Foundation to act in the public interest to put forward a conservation viewpoint as a counter to the viewpoint of economic exploitation.[146]

The connection to standing is clear: if the community expects that there will be someone capable of challenging a decision on environmental grounds, the community must also expect that they will be *permitted* to make such a challenge. Matthew Groves has fairly described as 'mysterious' the way in which

140 Carol Harlow, 'Public Law and Popular Justice' (2002) 65 *Modern Law Review* 1, 13; Cane, above n 59, 30.

141 Cane, above n 59, 30; Margaret Allars, 'Standing: The Role and Evolution of the Test' (1991) 20 *Federal Law Review* 83, 106; Richard Stewart, 'The Reformation of American Administrative Law' (1975) 88 *Harvard Law Review* 1667, 1765; Richard Stewart, 'Administrative Law in the Twenty-First Century' (2003) 78 *New York University Law Review* 437, 445.

142 (1980) 146 CLR 493.

143 Ibid, 530–1 (Gibbs J), 539–40 (Stephen J), 547–8 (Mason J).

144 Douglas, above n 1, 36.

145 *ACF II* (1989) 76 LGRA 200, 205.

146 Ibid 206.

a judge may arrive at these 'vague notions about the perceived public acceptance of the role of environmental groups in public interest litigation'.[147] Similarly, Roger Douglas questions how these 'community values' could be identified by the judiciary in a legitimate way.[148]

Douglas considers that one method of determining which interests are considered by the community to be worthy of protection is 'extrapolation from law itself'.[149] This 'may involve determining whether an interest suffices to ground judicial review *by reference to the purposes of the relevant legislation*'.[150] This would constitute a zone of interests approach to standing. This approach has some merit in responding to the problem posed by Groves: if legislation is in the public interest (our basic assumption here), we can expect that it will reflect 'community values'. The interests expressed in legislation indicate that which needs and deserves protection. Those who share those interests gain standing.

This appears to be a valid reading of Justice Davies' decision. Adapting a statement from Brennan J in *Onus v Alcoa of Australia Ltd*, his Honour considered that environmental legislation constituted 'an important category of modern public statutory duties [which require] an effective procedure for curial enforcement'.[151] This reflects Douglas' proposal: environmental legislation can be 'extrapolated' to be seen as a reflection of the community's view that environmental interests are worthy of protection. This was then linked by Davies J to the 'paramount objective', 'function' and 'purpose and philosophy' of the ACF.[152] This is a zone of interests analysis.

This reasoning has subsequently been adopted elsewhere, most notably in *North Coast Environment Council v Minister for Resources*.[153] In that case, Sackville J concluded that the 'public interest' expressed in the empowering Act was relevant to the interests of the group.[154] Both the Environment Council and the Act were motivated by environmental concerns. As Andrew Edgar concludes, '[t]his linking of the Council's interests with the purposes of the relevant legislation is effectively the same as the "zone of interest" requirement in United States standing law'.[155]

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147 Groves, above n 60, 200. Interestingly, Groves cites survey data which subsequently confirmed a 'sudden jump in the perceived public importance of environmental concerns' in the year of Justice Davies' decision, 1989. The fact that his Honour appears to have correctly read the mood of the people does not, however, necessarily lend legitimacy to the approach.

148 Douglas, above n 1, 24.

149 Ibid.

150 Ibid 24–5 (emphasis added).

151 *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27, 73; *ACF II* (1989) 76 LGRA 200, 207.

152 *ACF II* (1989) 76 LGRA 200, 201, 205.

153 (1994) 55 FCR 492 ('*North Coast*'). See also *Tasmanian Conservation Trust Inc v Minister for Resources* (1995) 55 FCR 516, 552–3. Groves has noted that Murphy J also referred to the objects of the ACF in *ACF I*, 'as if to suggest that its objects of seeking to protect the environment were clearly relevant to its standing': Groves, above n 60, 204; *ACF I* (1980) 146 CLR 493, 554.

154 *North Coast* (1994) 55 FCR 492, 514–15.

155 Andrew Edgar, 'Standing for Environmental Groups: Protecting Public and Private Interests' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 140, 152. See also Andrew Edgar, 'Procedural Fairness for Decisions Affecting the Public Generally: A Radical Step towards Public Consultation?' (2014) 33 *University of Tasmania Law Review* 56, 80 n 140.

Judicial review of decisions under environmental legislation is therefore likely to attract a zone of interests type analysis. This is not the *only* standing criterion, however. The fact that an organisation's aims are stated to include environmental protection is insufficient on its own.[156] Nevertheless, the zone of interests analysis does contribute to a grant of standing and is an approach now contained in environmental legislation itself.[157]

How should this be viewed in light of the decision in *Argos*? If *Argos* invalidates the zone of interests test, the case law in this area may have to abandon this approach. I argue that this is not the case: despite similarities in methodology, the environmental cases are not inconsistent with *Argos*. Whereas *Argos* considers the use of the zone of interests test to *exclude* an applicant under a 'rights and interests' model of judicial review, the environmental cases undertake a zone of interests analysis to *include* applicants under alternative models of review.

B *Argos* and the Environmental Cases

1 Argos: *Exclusion under a 'Rights and Interests' Model*

The decision in *Argos* is situated within the 'rights and interests' model of judicial review. This remains the dominant paradigm in Australian administrative law.[158] According to this model, the role of the judiciary is to protect individuals' rights or special interests from infringement by unlawful executive action.[159] This model was satisfied in *Argos*: the supermarket applicants' interests were affected and they were granted standing. As a result, the question posed by *Argos* is, 'when the rights and interests model is satisfied, is it appropriate to then *exclude* an applicant on the basis of the (public) interests expressed in the empowering Act?' The Court's answer is 'no'. This focus on an exclusionary use of the zone of interests test is reflected in the judgment.[160]

Moreover, the Court concerned itself with three major precedents, each of which used the zone of interests test in an exclusionary way. In *Alphapharm*, the competitive commercial interests of the applicant were *not* relevant to the

156 *North Coast* (1994) 55 FCR 492, 512.

157 See, eg, *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 487; *Hazardous Waste (Regulation of Exports and Imports) Act 1989* (Cth) s 58(3). See Edgar, 'Standing for Environmental Groups', above n 155, 153.

158 Andrew Edgar, 'Public and Private Interests in Australian Administrative Law' (2013) 36 *University of New South Wales Law Journal* 202, 210. This has recently been emphasised by the High Court: *Kuczborski v Queensland* (2014) 254 CLR 51, 109 [184]–[186] (Crennan, Kiefel, Gageler and Keane JJ).

159 Edgar, 'Enhanced Accountability?', above n 126, 447.

160 See especially, *Argos* (2014) 254 CLR 394, 418 [80] (Gageler J). This interpretation seems also to be supported by the judgment of the Full Federal Court in *Animals' Angels* (2014) 228 FCR 35, 72 [119], which noted that Justice Gageler's judgment rejected the zone of interests approach only insofar as it '*limited* [an applicant's interests] to those which fall within the [zone of interests]' (emphasis in original). This is largely because the argument in the High Court on this point was put by the Minister: that is, the Court was asked to consider whether the applicants could be excluded by reason of the test. The Court's judgment responds to this framing. See AMC Projects Pty Ltd and Nikias Nominees Pty Ltd, 'Second and Third Respondents' Submissions', Submission in *Argos v Corbell*, C3/2014, 11 July 2014, 16–17 [58]–[59].

statutory scheme and this was cause for *exclusion*.[161] Similarly, the Court in *Big Country* found that the interests of the applicant were '*not* coincidental with the particular public interest described' in the empowering Act.[162] Standing was accordingly *denied*. In *Right to Life*, the last major precedent considered by *Argos*, Lockhart J considered that the 'very questions ... central to the existence of the appellant' were *not* those raised by the empowering Act. His Honour considered this to be 'another powerful reason which argues *against* the appellant having the requisite standing'.[163] In each of these cases, the zone of interests test is used to exclude applicants. *Argos* rejected these precedents. It therefore stands for the following proposition: when the rights and interests model of judicial review is satisfied, the zone of interests test should not be used to exclude an applicant. I have argued in Part IV that this is an appropriate decision.

2 The Environmental Cases: Inclusion under Alternative Models

The environmental cases do not contradict this ratio. These cases differ from *Argos* in two key respects. First, the environmental cases adopt a zone of interests analysis in order to include applicants, not exclude them. That is, they grant standing to applicants because their environmental aims are the same as those expressed in the statute. This was demonstrated earlier, in Part V(A).

Second, the environmental cases do not proceed under the rights and interests model of judicial review used in *Argos*. Certainly, the environmental cases do purport to apply the traditional 'rights and interests' model. For example, Sackville J in *North Coast* considered that the reasoning of *ACF II* was entirely consistent with the 'rights and interests' approach of *ACF I*.[164] As Peter Cane notes, this is disingenuous: 'in fact, these judges are playing with words. Environmental pressure groups have no personal interest in the environment – their interest is ideological or social'.[165] Because environmental groups do not fit neatly into standing tests under the traditional 'rights and interests' approach, these environmental cases adopt alternative models of judicial review. Typically, either an 'enforcement' or a 'public interest' model of review is used instead.

In using the zone of interests test as a basis for inclusion under alternative models of judicial review, the environmental cases ask a different question to that posed by *Argos*, and their answers are not inconsistent with those of the High Court. The question posed by the environmental cases can be framed as follows: 'in the *absence* of satisfaction of the rights and interests approach, is it appropriate to *include* an applicant on the basis of the interests expressed in the empowering Act under an alternative model of review?' The courts' answer is, 'yes'. Because it focused on the rights and interests model, *Argos* left this

161 *Alphapharm* (1994) 49 FCR 250, 261 (Davies J).
162 *Big Country* (1995) 60 FCR 85, 93 (emphasis added).
163 *Right to Life* (1995) 56 FCR 50, 68 (emphasis added).
164 *North Coast* (1994) 55 FCR 492, 511 (Sackville J).
165 Cane, above n 59, 36. Other commentators agree that seeking to fit environmental groups into the traditional 'rights and interests' model is disingenuous: Louis Jaffe, 'The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff' (1968) 116 *University of Pennsylvania Law Review* 1033, 1036; Fisher and Kirk, above n 60, 375, 380; Groves, above n 60, 203–4.

question unanswered. In the remainder of this discussion, I suggest that the lower courts have reached the correct answer.

3 Enforcement Model

The alternative models of review adopted in the environmental cases present a different role for the judiciary than that presumed by the rights and interests model. Under the enforcement model, the role of the judiciary is to uphold the rule of law.[166] This focuses less on the interest held by a particular applicant. All that is required is a party capable of demonstrating that executive power has been exercised beyond its proper bounds.[167] This provides more liberal standing than the 'rights and interests' test.

The enforcement model now constitutes the standard approach in the UK. The House of Lords considers the rights and interests model to be 'an unduly restrictive approach which had too often obstructed the proper administration of justice'.[168] It emphasises instead the courts' 'constitutional function of maintaining the rule of law'.[169] While consolidated in environmental cases, the approach applies to all matters.[170] Standing is still not completely open in British courts under this model, but it is significantly liberalised.[171]

This approach is arguably open to abuse.[172] Given the high cost of litigation, wider access to the courts is 'likely to be taken advantage of mainly by powerful commercial interests for their own purposes which are more likely to be hostile

166 This 'rule of law' emphasis is often seen as the antithesis of a focus on 'separation of powers': Edgar, 'Standing for Environmental Groups', above n 155, 148. However, enforcement also ensures that the executive does not stray beyond limits set by Parliament: Baroness Hale of Richmond, 'Who Guards the Guardians?' (2014) 3 *Cambridge Journal of International and Comparative Law* 100, 100.

167 This is a proceduralist conception of the rule of law, following Dicey's classic British statement of the concept: A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 9th ed, 1950) 183, 193, 195, 202–3. For views on substantive versus procedural notions of the rule of law, see Ronald Dworkin, *Political Judges and the Rule of Law* (Proceedings of the British Academy, 1978); Joseph Raz, 'The Rule of Law and its Virtue' (1977) 93 *Law Quarterly Review* 195.

168 *Walton v Scottish Ministers* [2012] UKSC 44, [90] (Lord Reed). The move towards this model is generally traced to the judgment of Lord Diplock in *R v Inland Revenue Commissioners; Ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 644.

169 *Walton v Scottish Ministers* [2012] UKSC 44, [90] (Lord Reed); *AXA General Insurance Ltd v HM Advocate* [2012] 1 AC 868, 913 [51] (Lord Hope), 943 [142] (Lord Reed); *R (Hussein) v Secretary of State for Defence* [2014] EWCA Civ 1087, [83]; *Eba v Advocate General for Scotland* [2012] 1 AC 710, 713 [8] (Lord Hope).

170 See, eg, *R (Al Bazzouni) v Prime Minister; R (Equality and Human Rights Commission) v Prime Minister* [2012] 1 WLR 1389, 1393 [5] (challenging the legality of certain interrogation techniques used by British forces in Iraq).

171 Protection of the rule of law is said not to require enforcement in every conceivable instance and an applicant must have the ability to capably present a case: see *AXA General Insurance Ltd v HM Advocate* [2012] 1 AC 868, 952 [170] (Lord Reed); *Walton v Scottish Ministers* [2012] UKSC 44, [153] (Lord Hope). The 'sufficient interest' requirement in the *Senior Courts Act 1981* (UK) c 54, s 31(3) would likely prevent completely 'open' standing: Timothy Endicott, *Administrative Law* (Oxford University Press, 2009) 397.

172 Edgar, 'Standing for Environmental Groups', above n 155, 159.

to, rather than protective of, the public interest'.[173] As Louis Jaffe writes, liberalised standing may have the unfortunate consequence of permitting applicants to seek 'enforcement of a law in a situation where little or no public interest is served or where it in fact would be disserved', even if no personal right or interest is at stake.[174]

This produces a problem. If the traditional rights and interests model is retained, some decisions are effectively beyond review.[175] Environmental groups struggle to fulfil standing criteria under that approach.[176] The enforcement model, however, may be too open. The difficulty here 'lies in managing an opening-up of the courts' procedures in a way which will enhance, rather than undermine, the legitimacy and quality of their decisions'.[177]

I suggest that abuse is avoided if the zone of interests test is added to the enforcement model. Under this approach, enforcement furthers the public interest rather than defeats it, because the applicant shares the public interest expressed in the Act. If a challenge is made on the ground that a decision will harm an endangered species, for example, only those genuinely concerned with the environment can bring the challenge. The law is enforced on the same basis upon which Parliament passed that law. This result is more desirable than the situation in which a right or interest is required (in which case no-one may be able to enforce the law) and the situation in which there is no restriction on enforcement (which may lead to abuse).

There are objections to this approach. If a community overwhelmingly supports a development, for example, why should an environmental group be able to challenge it? Why should *anyone* not directly affected be able to challenge it? There are two related responses to this. First, there is an inherent value in the rule of law; this is the basis of the enforcement model itself. Second, the community supports the development, but must also be taken to have concerns over the environmental impacts of such a development. This is a necessary supposition, because it has democratically passed the empowering Act which reflects those concerns.[178] Thus, Cane notes that the zone of interests test allows the democratic legislature to determine what counts as an interest to be protected, rather than leaving the question solely in the court's hands.[179] Enforcement which is genuinely motivated by environmental concerns is legitimated through the empowering Act.

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173 Lisbeth Campbell, 'Who Should Right the Public Wrong? The ALRC's Proposal for a Test for Standing' (1997) 5 *Australian Journal of Administrative Law* 48, 49. The same point is made by Cane, above n 59, 30.

174 Louis Jaffe, 'Standing Again' (1971) 84 *Harvard Law Review* 633, 638.

175 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Alert Digest*, No 9 of 2015, 9 September 2015, 3.

176 Ibid.

177 Joanna Miles, 'Standing in a Multi-Layered Constitution' in Nicholas Bamforth and Peter Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart, 2003) 391, 412.

178 Again, it must be remembered that this discussion assumes that legislation is in the public interest. If environmental groups are simply sectional interests 'purchasing' favourable legislation to benefit themselves, the public choice analysis in Part III would apply instead.

179 Cane, above n 59, 26–8. Note that Cane does not, himself, favour liberalisation of standing.

To the extent that an enforcement model is adopted, then, it is desirable that a zone of interests test is used alongside it. This is, in fact, consistent with judicial practice in the environmental cases analysed at the beginning of this section: the zone of interests test is used as a criterion for inclusion under a liberalised conception of standing. This method differs from that in *Argos*. There, the High Court first finds that an applicant should be included in judicial review because he or she has a right or interest which is affected. According to *Argos*, such an applicant cannot then be excluded by reason of the zone of interests test. In the environmental cases, however, the first finding is not made: the applicant does *not* have a right or interest affected. Adopting an alternative enforcement model, the zone of interests test then becomes useful as a basis for inclusion.

4 Public Interest Model

The public interest model of judicial review perceives a democratic deficit in the political process. The courts can 'cure' this defect, by ensuring that political consideration of interested parties is appropriately balanced.[180] The emphasis here is on *participation* as a key element of democratic decision-making.[181] These concerns are reflected in the environmental cases. As noted earlier, Davies J stated in *ACF II* that the public expected the ACF 'to act in the *public interest* to put forward a conservation viewpoint as a counter to the viewpoint of economic exploitation'.[182] This is not concerned with the rule of law or the interest of the applicant. Instead, it focuses on the need for public interest points of view to be heard in the judicial system in order to be truly effective.

Disaffection with processes of environmental decision-making has been noted both in Australia and elsewhere.[183] Brown cites the extension of standing in *ACF II* as an example of a response to this 'symptom of administrative failure to accommodate environmental concerns'.[184] Similarly, the *North Coast* decision has been described as 'an apparent extension towards public interest-based standing'.[185] In the US, Neustadter sees an 'expanded concept of standing … [as] crucial to a judicial function of review which assures that administrative decisions affecting environmental quality are as fully as possible responsive to competing views'.[186]

If we take this public interest model to be the underlying theoretical basis for the environmental cases, a zone of interests test is necessary to keep it 'in check'. As discussed below, there are serious concerns with a continual expansion of access to the courts on the basis that the political system is under-representative.

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180 Tom Campbell, 'Legal Positivism and Deliberative Democracy' (1998) 51 *Current Legal Problems* 65, 83; Gary Neustadter, 'The Role of the Judiciary in the Confrontation with the Problems of Environmental Quality' (1970) 17 *University of California Los Angeles Law Review* 1070, 1080, 1092.

181 Edgar, 'Australian Administrative Law', above n 158, 209; Jaffe, 'Citizen as Litigant', above n 165, 1044–5.

182 *ACF II* (1989) 76 LGRA 200, 206 (emphasis added).

183 A J Brown, 'The Wig or the Sword? Separation of Powers and the Plight of the Australian Judge' (1992) 21 *Federal Law Review* 48, 79–80; Neustadter, above n 180, 1071, 1088.

184 Brown, above n 183, 79–80.

185 Edgar, 'Australian Administrative Law', above n 158, 211.

186 Neustadter, above n 180, 1071, 1088.

This has the potential to turn the courts into a 'surrogate political process'.[187] This may not be desirable. If there is to be some representation, how should we decide who is admitted? As Stewart notes, this a 'threshold problem' for any such model of review.[188]

As in the enforcement model, the zone of interests test appears to be the most plausible solution. It admits only those who are recognised as holding the interests democratically approved by the community as relevant to the questions at hand. The test is useful here for the same reasons that it is desirable under the enforcement model.

There is an apparent tension in the use of the zone of interests test here, however. The public interest model presumes that there has been some political exclusion of an affected group or interest. Remedying this exclusion is the raison d'être of this model of judicial review.[189] The zone of interests test, however, necessarily presupposes some political inclusion: if that were not the case, environmental concerns would not be reflected in the empowering Act. This appears inconsistent. On one hand, standing is necessary because there is *exclusion* from the political process. On the other hand, standing is appropriate because there is *inclusion* in the political process.

This tension is more apparent than real, however. The zone of interests test recognises *legislative inclusion* as the basis of standing. Public interest models of judicial review recognise administrative or *executive exclusion* as justifying review. These two propositions are not inconsistent: we must only distinguish between the legislative and executive functions. The zone of interests test is therefore compatible with the public interest model of judicial review. Moreover, it is desirable when that model is adopted, for the reasons discussed above.

This Part has shown that *Argos* does not definitively answer the question of the place of the zone of interests test in Australian law. The High Court considered that question only insofar as it applied to the 'rights and interests' model of judicial review. That remains the dominant model in Australian law.[190] It does not, however, explain approaches to standing in environmental cases. When the rights and interests model does not apply, the question becomes whether the zone of interests test is an appropriate alternative basis for inclusion. I have argued here that it is.

VI THE FUTURE OF THE ZONE OF INTERESTS TEST

What is the future of the zone of interests test in Australian law, then? I have argued that, while *Argos* rejects the zone of interests test, it serves as a useful

187 Stewart, 'Reformation', above n 141, 1670; Stewart, 'Twenty-First Century', above n 141, 445.

188 Stewart, 'Reformation', above n 141, 1762. Galligan similarly questions how we decide which groups count as politically excluded 'minority' groups or those in need of special protection: D J Galligan, 'Judicial Review and Democratic Principles: Two Theories' (1983) 57 *Australian Law Journal* 69, 78.

189 Stewart, 'Reformation', above n 141, 1787. See also Campbell, 'Deliberative Democracy', above n 180, 77–8.

190 Edgar, 'Australian Administrative Law', above n 158, 210.

basis for inclusion of applicants when alternative (liberalised) models of judicial review are adopted. Is *Argos* likely to put a stop to this practice? The preceding analysis suggests that the environmental cases are not inconsistent with *Argos*. This Part first considers recent legislative debates over standing which touch upon the zone of interests question in the environmental context, and then discusses subsequent treatment of *Argos* in the Federal Court.

A 'Lawfare'

In August 2015, the Commonwealth government proposed to remove one instance of the zone of interests test in Australian law.[191] Section 487 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('*EPBC Act*') provides standing to groups where 'the objects or purposes of the organisation or association included protection or conservation of, or research into, the environment'.[192] This is a straightforward application of the zone of interests test.[193] The government intends to revert to the 'rights and interests' model, using the *ADJR Act* 'person aggrieved' test for standing.[194] This is intended to stop environmental 'lawfare': using litigation to obstruct development projects. In the government's view, standing was liberalised to an unacceptable extent.[195]

The conclusions in the preceding section do not indicate whether liberalisation of standing generally is a good thing. The wisdom of the move away from the 'rights and interests' approach is a broader debate, in which the competing views are well rehearsed.[196] It is not a question that can be resolved here. Rather, the conclusion drawn above is more specific: *if* liberalisation occurs through use of alternative models of review, then the zone of interests test provides a useful criterion for granting standing.

To that extent, the zone of interests test is a desirable aspect of the standing regime under the *EPBC Act* as much as in the environmental case law. The government disagrees. In the Minister's second reading speech for the amending Bill, he noted that:

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191 See Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015 (Cth). Following the rise of Malcolm Turnbull to the Prime Ministership, there was some speculation that this proposal would be withdrawn: Jane Lee, 'Turnbull's Elevation May Kill Bill', *The Age* (Melbourne), 27 September 2015, 14. Nevertheless, members of the government subsequently expressed their support for the Bill in a Senate report into the matter: Environment and Communications Legislation Committee, Senate, *Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015 [Provisions]* (2015) 27.

192 Sections 487(3)(a)–(b) also require that the organisation be incorporated or otherwise established within Australia and that the organisation has undertaken a series of activities relating to protection, conservation, or research into the environment in the preceding two years.

193 Edgar, 'Standing for Environmental Groups', above n 155, 152.

194 Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015 (Cth) sch 1 items 1–2.

195 Commonwealth, *Parliamentary Debates*, House of Representatives, 20 August 2015, 8987–90 (Greg Hunt). This followed consent orders made in the Federal Court, which overturned approval given to the Carmichael coal mine in Queensland.

196 Elements of this debate are touched on below. An overview of the relevant arguments (in advocating for a more open model) can be found in Australian Law Reform Commission, above n 7.

> Contrary to the intentions of the *EPBC Act*, the federal law is now being used to 'disrupt and delay' infrastructure. The strategy is almost completely disconnected from [the] concerns which were the intended purpose of the *EPBC Act*.[197]

In the government's view, the zone of interests test is failing. It has been 'distorted', in the Minister's words.[198] It creates only an illusion of alignment between the interests of the group and that of the *EPBC Act*. In reality, standing is still being used to frustrate the purposes of the Act, rather than further it.

Is the zone of interests test failing, or being manipulated? It is not. The zone of interests test requires that the interests of the environmental group align with those of the statute. In the 'lawfare' cases, that condition is satisfied. The group aims to protect the environment. That is achieved through ensuring strict compliance with environmental protection statutes. While this is not a palatable outcome for some, it is not a failure of the law. Moreover, reverting to the *ADJR Act* 'rights and interests' model is not desirable. When used to determine standing for environmental groups, that approach produces unpredictable and inconsistent outcomes.[199] As the Senate Standing Committee for the Scrutiny of Bills noted, this will not reduce litigation: it will simply 'redirect' it to contests over standing.[200] Official reviews have found that the zone of interests approach of the *EPBC Act* functions well.[201] If environmental decisions are to be subject to review, it is likely that a more liberalised standing regime is necessary. If that is the case, a zone of interests analysis remains an appropriate criterion for standing.

As well as the overwhelming support for its retention in the *EPBC Act*,[202] the ARC has also proposed wider legislative use of the zone of interests test. In 2012, the ARC considered whether 'open' standing should be permitted under the *ADJR Act*.[203] It rejected this proposal. Instead, it preferred the standing test for organisations provided under the *Administrative Appeals Tribunal Act 1975* (Cth). That test grants standing 'if the decision [at issue] relates to a matter included in the objects or purposes of the organisation or association'.[204] This undertakes a zone of interests analysis. It was preferred to completely 'open' standing because it provides some criteria to guide inclusion of applicants.[205] The

197 Commonwealth, *Parliamentary Debates*, House of Representatives, 20 August 2015, 8987 (Greg Hunt).

198 Ibid 8989 (Greg Hunt).

199 Senate Standing Committee for the Scrutiny of Bills, above n 175, 3; Fisher and Kirk, above n 60, 380.

200 Senate Standing Committee for the Scrutiny of Bills, above n 175, 4.

201 Allan Hawke, 'Report of the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999*' (Final Report, October 2009) 261 [15.81]; Chris McGrath, 'Review of the *EPBC Act*' (Australian State of the Environment Committee, Department of Environment and Heritage, 2006) 14. Hawke found that the standing provisions 'have created no difficulties and should be maintained': at 261.

202 The Senate Environment and Communications Committee received 135 submissions to its inquiry into the Bill, the vast majority of which supported retaining the *EPBC Act* in its current form. See the submissions available at *Submissions*, Parliament of Australia <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/EPBC_Standing_Bill/Submissions>. A summary of the principal contending arguments is found in Environment and Communications Legislation Committee, above n 191, 9–26.

203 Administrative Review Council, above n 6, 150–1 [8.19]–[8.22].

204 *Administrative Appeals Tribunal Act 1975* (Cth) s 27(2).

205 Administrative Review Council, above n 6, 150–1 [8.19]–[8.22].

ARC's proposal moves in the opposite direction to the government's plans for the *EPBC Act*.

B *Animals' Angels*

The zone of interests test is also unlikely to disappear quietly in the judicial arena, appearing to have survived the *Argos* decision. The Full Federal Court's decision in *Animals' Angels* was discussed briefly in Part II,[206] where I suggested that the judgment failed to appreciate the difference between the zone of interests test and the legal operation test. The case concerned standing for an animal welfare group to challenge cattle export licences. Animals' Angels is a German not-for-profit group concerned with animal welfare, particularly during transportation for export. It had no members in Australia, though it did have a 'representative' who sporadically carried out research and monitoring in Australia for the group.[207]

At trial, Edmonds J found that Animals' Angels did not satisfy the type of multifactorial approach used in the environmental cases and denied standing to the group.[208] On appeal, Kenny and Robertson JJ (Pagone J agreeing) held that the trial judgment did not 'adequately convey the duration and quality of the appellant's involvement in the live animal export trade from Australia'.[209] Their Honours held that the group had devoted significant resources to animal welfare in Australia, had been recognised by the Australian government as a relevant animal welfare body and had organisational aims relevant to the statutory question at hand.[210] It therefore granted standing to the group.

It could not be said that Animals' Angels satisfied the traditional 'rights and interests' approach. Rather, the decision replicates the enforcement or public interest approaches considered earlier. In granting standing, the Full Court's judgment also repeatedly referred to the connection between the organisation's 'objects or purposes' and the administrative decision.[211] That is, it adopted a zone of interests analysis. *Animals' Angels* therefore reinforces the link between alternative models of review and a zone of interests approach. As I have argued above, this link is a desirable one.

The Full Federal Court's decision in *Animals' Angels* was delivered nine days after the High Court's decision in *Argos*. This suggests two conclusions. First, that the inclusive use of the zone of interests test with alternative models of review is not inconsistent with *Argos*, and will continue to be used in that setting. This supports my own conclusion in Part V. Second, it seems that the Federal Court may be willing to find sufficient ambiguity in *Argos* in order to avoid it and reach the conclusions which it prefers. The zone of interests test is therefore likely to survive when courts adopt alternative enforcement or public interest

206 (2014) 228 FCR 35.
207 Ibid 69–71 [111]–[118].
208 *Animals' Angels eV v Secretary, Department of Agriculture* (2014) 141 ALD 158, 199–200 [123(9)].
209 *Animals' Angels* (2014) 228 FCR 35, 71 [119].
210 Ibid 72 [120].
211 Ibid 71–2 [119]–[120].

models of review. These models benefit by the use of the zone of interests test and it appears that *Argos* will not put a stop to this trend.

C Enforcement versus Public Interest Models

The conclusion that the zone of interests test is useful in liberalised standing regimes applies equally to the 'enforcement' and 'public interest' models. In each instance, the test serves the same function. Indeed, while this article has focused on environmental law cases, the zone test is also allied to these models in other contexts, such as animal welfare (considered above) and heritage building conservation.[212] The fact that the zone of interests test is a prominent criterion in each does not, however, make these models equivalent. Academic commentary often fails to distinguish between the two, because both represent a departure from the traditional 'rights and interests' model.[213] A distinction is necessary. Each involves commitment to distinct ideas about the role of the judiciary.

The public interest model sees a significant 'democratic deficit' in modern mass societies.[214] Political and administrative decision-making tends to serve only corporate or organised interests.[215] Assuming that it is effective, the role of judicial review is to 'cure' this democratic imbalance.[216] It provides an opportunity for citizen involvement in decision-making, including for those ordinarily excluded (by reason of social or economic power) from democratic politics.[217] Administrative law becomes 'a surrogate political process to ensure the fair representation of a wide range of affected interests in the process of administrative decision [making]'.[218] This makes liberalised standing necessary.[219]

This is controversial for some theorists, because the separation of powers may be distorted here.[220] Why should courts rectify democratic imperfections,

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212 Ibid 72 [120]; *National Trust of Australia (Vic) v Australian Temperance and General Mutual Life Assurance Society Ltd* (1976) 37 LGRA 172, 177.

213 See, eg, Preston, above n 125, 149, 168; Neustadter, above n 180, 1088.

214 Stewart, 'Twenty-first Century', above n 141, 445–6; Jaffe, 'Citizen as Litigant', above n 165, 1044; Karin Sheldon, 'Public Interest Law: A Step Toward Social Balance' (1971) 13 *Arizona Law Review* 818, 818.

215 See Jerry Mashaw, 'Bureaucracy, Democracy and Judicial Review' in Robert Durant (ed), *Oxford Handbook of American Bureaucracy* (Oxford University Press, 2010) 569, 569–71; Stewart, 'Reformation', above n 141, 1683–5; Edgar, 'Standing for Environmental Groups', above n 155, 156 (noting the problem of tokenistic consultation).

216 Stewart, 'Reformation', above n 141, 1728; Jaffe, 'Standing Again', above n 174, 633. Andrew Edgar finds that formalistic approaches to judicial review make it a largely ineffective means of shifting decision-making towards environmental ends, regardless of liberalised standing: Edgar, 'Enhanced Accountability?', above n 126, 437, 451, 461–2.

217 Joseph Raz, 'Rights and Politics' (1995) 71 *Indiana Law Journal* 27, 43. See also Michael Barker, 'Standing to Sue in Public Interest Environmental Litigation: From *ACF v Commonwealth* to *Tasmanian Conservation Trust v Minister for Resources*' (1996) 13 *Environment and Planning Law Journal* 186, 206; Preston, above n 125, 168; Stewart, 'Reformation', above n 141, 1760–1; Neustadter, above n 180, 1100; Fisher and Kirk, above n 60, 373, 381; Aileen Kavanagh, 'Participation and Judicial Review: A Reply to Jeremy Waldron' (2003) 22 *Law and Philosophy* 451, 453.

218 Stewart, 'Reformation', above n 141, 1670. Judicial review, then, 'allows the citizen to cast a different kind of vote': Neustadter, above n 180, 1099.

219 Neustadter, above n 180, 1098.

220 Harlow, above n 140, 2, 16; Cane, above n 59, 43, 50.

whether through a zone of interests test or otherwise? If political systems have become insufficiently responsive,[221] the solution is to make them responsive, not to shift their role onto the courts.[222] While the basis for an applicant's admission does not affect the substance of the court's work,[223] converting the courts into a 'surrogate political process' is (at the very least) questionable under orthodox constitutional principles.

The enforcement model is more philosophically acceptable. Upholding the rule of law is a continuation of the courts' ordinary function. It does not make the courts a refuge for those excluded from political processes. This is not to say that it is free from controversy,[224] but it is certainly closer to constitutional orthodoxy.

Both models effect a similar liberalisation of standing. Both models use the zone of interests test in a similar way. This shared use of the zone of interests test should not, however, mask the differences between the two.[225] The enforcement model avoids much unnecessary controversy: the court remains a place of *enforcement* of the law, not of *democratic participation*. If the zone of interests test continues to form the basis of liberalised standing, it is preferable to ally that test to the enforcement model, rather than the public interest model.[226]

VII CONCLUSION

This article has argued that the High Court's decision in *Argos* has not resolved all questions of the place of the zone of interests test in Australian standing law. The test serves as a useful point of analysis for the effect of

221 This has been judicially recognised in the UK: *R v Secretary of State for the Home Department; Ex parte Fire Brigades Union* [1995] 2 AC 513, 567.

222 Harlow, above n 140, 5; Cane, above n 59, 41; Mashaw, 'Bureaucracy, Democracy and Judicial Review', above n 215, 573, 585; P A Keane, 'Democracy, Participation and Administrative Law' (2012) 68 *AIAL Forum* 1, 14–15; Scalia, above n 127, 886.

223 An applicant admitted under any standing regime must raise a legal question for resolution by ordinary judicial means: Australian Law Reform Commission, above n 7, xx; Jaffe, 'Citizen as Litigant', above n 165, 1040–1. Edgar also notes that distinguishing between questions which affect an individual and those which have a 'public' dimension is very difficult: Edgar, 'Procedural Fairness', above n 155, 64. For a view which argues that standing regimes *do* affect the substance of the court's work (making their decisions more political in character), see T R S Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2001) 195–6.

224 It may, for example, lead to enforcement of rules which have lost their original public force. For Scalia, this is undesirable. He has argued that failure to enforce such laws is 'one of the prime engines of social change', a view echoed in Australia by McHugh J: Scalia, above n 127, 897; *Bateman's Bay* (1998) 194 CLR 247, 276–7. This, however, is unconvincing: it would be odd for Parliament to pass or retain a law which it does not intend to enforce. To borrow from the same article by Scalia, 'those are not the premises under which our system operates': Scalia, above n 127, 897.

225 It should be recognised that courts themselves do not ordinarily distinguish between these models in justifying their decisions. Which model is used in any given judgment is generally a matter of analysis for the commentator. To test whether a decision is more or less 'legitimate' according to these distinctions is not necessarily a test of easy application.

226 Edgar notes that the enforcement model is likely to prevail in this contest. The public interest model rests on a need to ensure inclusion of different views. This can lead to expansion of the grounds of review in a way which comes closer to merits review. This shift is not yet evident in Australian environmental decisions: Edgar, 'Enhanced Accountability?', above n 126, 449.

differing theories of politics and statutory interpretation. In Part III, I argued that the test emanates from public choice theory, which is democratically noxious when combined with the zone of interests test. In Part IV, I argued that where a public interest model of statutory interpretation is adopted, the test is an unjustified restriction on standing under a 'rights and interests' model of review. To this extent, the High Court was right to reject the test in *Argos*.

Part V suggests, however, that the zone of interests test is useful when alternative models of review are adopted instead. This is most commonly found in the environmental field. I concluded that if some liberalisation under enforcement or public interest models continues, the zone of interests test provides a useful criterion for standing.

What, then, is the likely fate of the zone of interests test? On one hand, the Commonwealth government is seeking to remove the test from the *EPBC Act*. On the other hand, the ARC supports its adoption for all judicial review matters. At the time of writing, it appears that the government's plan lacks political support.[227] By the same token, adoption of the ARC's proposal is unlikely. This would seem to leave resolution of the issue in the hands of the courts.

Argos has not effected such a resolution. Two decisions in lower courts have misunderstood the effect of *Argos*, in failing to distinguish between the zone of interests test and the legal operation test. Moreover, the Full Federal Court's decision in *Animals' Angels* indicates clearly enough that *Argos* is a precedent which can be avoided where necessary. This is not new in standing decisions: *ACF I* has been artfully avoided in environmental cases for decades. The High Court has turned a blind eye to this and, as a result, has not dealt with the enforcement or public interest models which those cases have developed. The zone of interests test is likely to survive as long as those models themselves survive. It will not – and should not – be applied under a rights and interests model. Its continued survival in liberalised standing regimes, however, is both necessary and desirable.

227 Lee, above n 191, 14.