HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY M103/2025

BETWEEN:

MINISTER FOR PLANNING
Appellant

and

IGA RETAIL SERVICES PTY LTD
(ACN 002 454 686)
First Respondent

SHEPPARTON PTY LTD
(ACN 620 846 184)
Second Respondent

GREATER SHEPPARTON CITY COUNCIL
Third Respondent

KATHY MITCHELL AM AND PETER MARSHALL
(AS MEMBERS OF A PANEL APPOINTED BY THE MINISTER FOR PLANNING UNDER SECTION 153 OF THE PLANNING AND ENVIRONMENT ACT 1987)
Fourth Respondent

LASCORP INVESTMENT GROUP PTY LTD
Fifth Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

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

Part II: Issues

2. The principal issue in this appeal is whether the Court of Appeal erred in holding that s 39 of the *Planning and Environment Act 1987* (Vic) (**PE Act**) does not prevent the first and second respondents (the **IGA parties**) from seeking the relief sought in the originating motion filed by them in the Supreme Court of Victoria.

3. That issue is to be determined by answering the questions of statutory construction as to whether: a failure to comply with a step in the procedures in Pt 3 Divs 1-3 and Pt 8 of the PE Act anterior to a Minister's decision to approve an amendment to a planning scheme is intended to result in the invalidity of that step, or any subsequent step; and, accordingly, whether s 39(8) of the PE Act must be read down, consistently with *Kirk v Industrial*

Court (NSW),[1] so as not to extend to a judicial review proceeding in the Supreme Court of Victoria seeking relief for jurisdictional error in respect of an alleged failure to comply.

Part III: Section 78B notice

4. Notice has been given under s 78B of the *Judiciary Act 1903* (Cth): CAB 52.

Part IV: Citations

5. The citation for the decision below is *IGA Retail Services Pty Ltd v Minister for Planning* [2025] VSCA 180 (**J**): CAB 8.

Part V: Facts

6. Pursuant to the procedures in Pt 3 of the PE Act for the amendment of a planning scheme, a delegate of the appellant (the **Minister**) authorised the third respondent (the **Council**), as the relevant "planning authority", to prepare a proposed amendment to the Greater Shepparton Planning Scheme: J [5]. The Council exhibited the amendment and received public submissions, including from the IGA parties, which were referred to a planning panel: J [5]. The panel[2] conducted public hearings and provided a report to the Council recommending that the amendment be adopted, subject to certain changes: J [6].

7. The Council resolved on 23 April 2024 to adopt the amendment with the changes recommended by the panel (the **April resolution**): J [9]. The Council later viewed the April resolution as defective, and so, on 23 July 2024, it again resolved to adopt the amendment with the changes recommended by the panel and to submit the adopted amendment to the Minister, which it did on 16 August 2024: J [10].

8. Prior to the Minister considering approval of the amendment, the IGA parties commenced a proceeding in the Supreme Court of Victoria, by Originating Motion (**OM**), seeking orders in the nature of certiorari quashing the April resolution and the panel report and declarations that the April resolution and the panel report were invalid.[3] That relief was sought on grounds that: (1) the report was affected by errors comprising legal unreasonableness, a failure to consider submissions, and the giving of inadequate

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1 (2010) 239 CLR 531.

2 The members of the panel in their official capacity are the fourth respondent to this appeal and have filed a submitting appearance in this Court: CAB 61.

3 OM, 3 at [2]-[6] (Appellant's Book of Further Materials (**ABFM**), 7).

reasons;[4] (2) the report was invalid or liable to certiorari for error of law on the face of the record; and (3) by reason of the invalidity or quashing of the report, the April resolution was invalid.[5] The IGA parties also sought an injunction restraining the Minister from approving the amendment under s 35 of the PE Act on the basis that if the Council's adoption of the amendment is invalid or is quashed, the Minister has no power to approve the amendment.[6]

9. Justice Quigley reserved two questions for determination by the Court of Appeal: CAB 6. The first, which gives rise to the issue on this appeal, was: "Does s 39 of the [PE Act] prevent the [IGA parties] from seeking the relief sought in the originating motion filed in this proceeding (S ECI 2024 02935)?" The second question was whether the Court of Appeal's earlier decision in *East Melbourne Group Inc v Minister for Planning*[7] was plainly wrong. The Court of Appeal answered the first question "no"; and the second question "unnecessary to answer": J [2].

10. The Minister has not yet made a decision as to whether to approve the amendment: J [11]. The second respondent has also brought parallel proceedings in the Victorian Civil and Administrative Tribunal (the **Tribunal**) under s 39(1) of the PE Act concerning the same subject matter as the Supreme Court proceeding.[8]

Part VI: Argument

Overview

11. The Court of Appeal erred in concluding that s 39 did not prevent the IGA parties from seeking the relief sought in the OM. The text, context and purpose of Pt 3 of the PE Act indicate that failures to comply with procedures preceding a decision by the Minister whether to approve a planning scheme amendment, of the kind identified in the grounds of the OM, are not jurisdictional errors. Such non-compliances do not result in invalidity, but may (before an amendment is approved) be the subject of an action in the Tribunal under s 39(1). Section 39(8) is therefore effective in its terms to preclude an action being

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4 These grounds are alleged to constitute jurisdictional error: OM, [21], [28], [34(b)] and [35(b)] (ABFM, 13-14, 16, 20). The alleged inadequacy of reasons is said, alternatively, to involve error of law on the face of the record: OM, [34(c)], [35(c)] (ABFM, 20).

5 OM, [36]-[38] (ABFM, 20-21).

6 OM, 3, [41] (ABFM, 7, 21).

7 (2008) 23 VR 605.

8 Nos P799/2024 and P891/2024, both commenced after the Supreme Court proceeding was commenced: see ABFM, 32, 37.

brought in the Supreme Court in respect of such non-compliance, without needing to be read down by reference to the *Kirk* principle. Consequently, s 39(8) is effective to preclude the action that the IGA parties seek to bring by their OM.

The PE Act

12. The PE Act establishes "a framework for planning the use, development and protection of land in Victoria in the present and long-term interests of all Victorians".[9] A planning authority must prepare any amendments to a planning scheme for which it is a planning authority.[10] Relevantly, Pt 3 of the PE Act provides for a proposed amendment to be, in an ordinary case:

    (a) (in Pt 3 Div 1) exhibited and notified by the planning authority;

    (b) (in Pt 3 Div 2) open to public submissions and (subject to s 23(1)(a) or (c)) referred to a planning panel (the composition and procedure of which is governed under Pt 8); and

    (c) (in Pt 3 Div 3) adopted by the planning authority (s 29) and then submitted to the Minister (s 31) who, under s 35, has power to approve the amendment (with or without changes) or refuse to approve the amendment.

13. However, the procedures in Pt 3 Divs 1 and 2 and Pt 8 anterior to the Minister's decision under s 35 can be bypassed by the Minister exercising her power under s 20 to disapply the notice requirements if the Minister "considers that compliance with any of those requirements is not warranted, or that the interests of Victoria or any part of Victoria make such an exemption appropriate".[11] When the notice provision in s 19 is disapplied by exercise of the s 20 power, Pt 3 Div 2 and Pt 8 are also, in effect, disapplied. Without s 19, the right to make a submission under s 21(1) does not arise. Without any submissions, the planning authority's responsibilities under ss 22 and 23 are not enlivened, including the power in s 23(1)(b) to refer any contentious submission to a

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9 PE Act, s 1. See also s 6(1)(b) ("A planning scheme for an area … may make any provision which relates to the use, development, protection or conservation of any land in the area").

10 PE Act, s 12(1)(d). Depending on the circumstances, a planning authority may be an entity other than a municipal council: see ss 8-9A. In particular, the Minister may be a planning authority (s 8).

11 PE Act, s 20(2). Where the Minister is the planning authority, the Minister may exempt herself from any of the requirements in s 17, s 18, s 19, or the regulations: s 20(4). Section 20A confers a discrete regulation-making power to similar effect as s 20.

planning panel appointed under Pt 8. There being no function for a planning panel to perform, Pt 8 also has no application.

14. In short, by exercising her power under s 20, the Minister may move the proposed amendment directly to Pt 3 Div 3, which enables an amendment to be made by (only) the planning authority adopting the amendment under s 29(1) and the Minister approving it under s 35(1).

15. The Minister's power under s 35(1) is broad: the Minister may approve the amendment (or part of it), with or without changes, or not approve the amendment (or part of it). An amendment only has effect once approved by the Minister and after gazettal (ss 36, 37).

16. An approved amendment may be disallowed by either House of Parliament (s 38).

17. Section 39(1) of the PE Act (in Pt 3 Div 3) confers jurisdiction on the Tribunal to determine matters concerning "a failure of the Minister, a planning authority or a panel to comply with Division 1 or 2 or this Division or Part 8 in relation to an amendment which has not been approved". Section 39(7) provides:

> An amendment which has been approved is not made invalid by any failure to comply with Division 1 or 2 or this Division or Part 8.

18. Section 39(8) provides:

> Except for an application under this section, a person cannot bring an action in respect of a failure to comply with Division 1 or 2 or this Division or Part 8 in relation to an amendment which has not been approved.

The Court of Appeal decision

19. The Court of Appeal identified that s 39(8), on its face, would operate to preclude the IGA parties' action in the Supreme Court: J [92]-[94]. However, it then held that the "supervening consideration" of the *Kirk* principle — that "[l]egislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power"[12] — required, in accordance with s 6(1) of the *Interpretation of Legislation Act 1984* (Vic), that the word "'action' in s 39(8) must be read not to extend to a judicial review proceeding in the Supreme Court seeking relief for jurisdictional error": J [95]-[98].

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12 *Kirk* (2010) 239 CLR 531 at [100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

20. The Court observed that "reading s 39(8) as broadly as its language would permit would produce the consequence that there would be no ability to bring a proceeding in the supervisory jurisdiction of the Court alleging that, in taking the steps that they have, the Council and the panel exceeded their jurisdiction": J [99]. That conclusion, however, wrongly assumes the answer to the central question of whether the anterior steps in Pt 3 Divs 1-3 and Pt 8 impose requirements that go to the jurisdiction of the planning authority and the panel.

21. Only after reaching this conclusion did the Court of Appeal turn to that question: J [99]-[115]. The Court concluded that s 39(7) "could not save an anterior step in the amendment process from being invalid for jurisdictional error" and that, even if it were a "no-invalidity" provision, it could only have that effect after an amendment has been approved: J [112]. In other words, the Court again proceeded on the incorrect assumption that a failure to comply with an anterior step in Pt 3 Divs 1-3 would result in invalidity.

Consequences of breach of a condition is a question of statutory construction

22. *Kirk* established that "[i]t is … impossible for a State Parliament to impose limits upon the administrative … authority of a body which it sets up with the intention that any excess of that authority means invalidity, and yet … deprive the Supreme Court … of authority to declare and enforce the limits it has set".[13] Accordingly, "it is the boundary between jurisdictional error and non-jurisdictional error that marks the limits upon State legislative power to abrogate the supervisory jurisdiction of a State Supreme Court".[14] Jurisdictional error, in the sense of that concept as it defines limits imposed by Ch III of the *Constitution*, "consists of a material breach of an express or implied condition of the valid exercise of a decision-making power conferred by" the relevant Act.[15]

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13 *Duncan v Independent Commission Against Corruption* (2015) 256 CLR 83, [35] (Gageler J), referring to *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598, 616 (Dixon J).

14 *Public Service Association of South Australia Inc v Industrial Relations Commission (SA)* (2012) 249 CLR 398, [30] (French CJ), citing *Kirk* (2010) 239 CLR 531, [100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

15 *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22, [23] (Gageler and Keane JJ), quoted in *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123, [31] (Kiefel CJ, Gageler and Keane JJ). See also *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 280 CLR 321, [2] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ, Beech-Jones J agreeing at [38]).

23. But *Kirk* "did not deny the competence of State legislatures to alter the substantive law to be applied by … [the] courts".[16] Parliament retains power to specify the consequences of a breach of an express or implied condition on the conferral of a decision-making power. As Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ said in *LPDT* and citing *Project Blue Sky Inc v Australian Broadcasting Authority*,[17] "[a] statute which contains an express or implied condition of a conferral of decision-making authority is not always to be interpreted as denying legal force and effect to every decision that might be made in breach of that condition".[18]

24. The question of statutory construction — whether a material breach of a statutory condition or precondition[19] will result in invalidity (and so will constitute jurisdictional error) — "ask[s] whether it was a purpose of the legislation that an act done in breach of the provision should be invalid".[20] The question is what Parliament is taken to have intended,[21] which is to be "ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition".[22]

25. *Project Blue Sky* demonstrates that "the statutory consequence of non-compliance with a statutory condition of an exercise of power is as much a question of statutory construction as is the content of the condition".[23] Parliament may legislate "legal requirements which it is unlawful to disregard, yet failure to fulfil them does not mean that the resulting act

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16 *Duncan* (2015) 255 CLR 83, [29] (French CJ, Kiefel, Bell and Keane JJ, Nettle and Gordon JJ agreeing at [45]). Cf *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602, 633 (Gaudron and Gummow JJ, Brennan CJ, Dawson and Toohey JJ agreeing at 609).

17 (1998) 194 CLR 355, [91] (McHugh, Gummow, Kirby and Hayne JJ).

18 *LPDT* (2024) 280 CLR 321, [4] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ, Beech-Jones J agreeing at [38]).

19 *Miller v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 278 CLR 628, [26] (Gageler CJ, Gordon, Edelman, Jagot and Beech-Jones JJ).

20 *Project Blue Sky* (1998) 194 CLR 355, [93] (McHugh, Gummow, Kirby and Hayne JJ). That dictum has been described as identifying "[t]he broad test" for jurisdictional error: *Hossain* (2018) 264 CLR 123, [66] (Edelman J). Cf *Tasker v Fullwood* [1978] 1 NSWLR 20, 24 (the Court) ("The intention being sought is the effect upon the validity of the act in question").

21 *Project Blue Sky* (1998) 194 CLR 355, [41] (Brennan CJ), [78], [94] (McHugh, Gummow, Kirby and Hayne JJ); *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506, [171] (Edelman J).

22 *Project Blue Sky* (1998) 194 CLR 355, [91] (McHugh, Gummow, Kirby and Hayne JJ).

23 *Attorney-General (Tas) v Casimaty* (2024) 98 ALJR 1139, [32] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ).

is"[24] invalid; rather, the failure "give[s] rise only to political, administrative or other non-legal consequences",[25] such that review of such failures could be excluded consistently with *Kirk*. There remains "considerable scope for the legislative conferral of jurisdiction on an administrator in terms which by-pass entirely the traditional grounds of judicial review".[26]

Non-compliance with anterior steps is not jurisdictional error

26. Construing Pt 3 Divs 1-3 and Pt 8 in their context, those provisions evince a legislative intention that, within the scheme of those provisions, a failure to comply with a step anterior to the Minister's decision under s 35 does not result in the invalidity either of the non-compliant step itself, or of a consequential step taken under Pt 3, including Ministerial approval under s 35.[27] The provisions for the procedures anterior to approval are of a kind recognised by Brennan CJ in *Project Blue Sky*: namely, provisions requiring, not the repository of the power, but "some other person to do or to refrain from doing something … before the power is exercised but non-compliance with the provision does not invalidate a purported exercise of the power".[28] That construction is supported by several features of Pts 3 and 8.

27. **Nature of a planning scheme amendment**. Just as a "planning scheme… is delegated legislation",[29] so too is an approved amendment to a planning scheme.[30] By s 38, Parliament has reserved for itself the power to revoke such delegated legislation, once made. The anterior procedures must be understood in that light.

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24 *Wei* (2015) 257 CLR 22, [25] (Gageler and Keane JJ), quoting *Clayton v Heffron* (1960) 105 CLR 214, 247 (Dixon CJ, McTiernan, Taylor and Windeyer JJ).

25 *Casimaty* (2024) 98 ALJR 1139, [32] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ).

26 Gageler, "The legitimate scope of judicial review" (2001) 21 *Australian Bar Review* 279, 290, quoted with approval in *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1, [120] (Edelman J). See further *Graham* at [99] (Edelman J) ("a privative clause could substantially reduce the circumstances in which judicial review would be permissible, without this leading to invalidity"). Compare statutory provisions expressly excluding conditions for exercise of power that are generally implied by common law: see, eg, *Migration Act 1958* (Cth), ss 76E, 198AHAA, 501(5).

27 Cf *Clayton* (1960) 105 CLR 214, 247 (Dixon CJ, McTiernan, Taylor and Windeyer JJ), quoted with approval in *Wei* (2015) 257 CLR 22, [25] (Gageler and Keane JJ).

28 *Project Blue Sky* (1998) 194 CLR 355, [38] (Brennan CJ).

29 *Clark v Cook Shire Council* [2008] 1 Qd R 327, [40] (Keane JA, Williams JA agreeing at [6], Lyons J agreeing at [51]).

30 *Mackenzie v Head, Transport for Victoria* [2020] VSC 328, [142] (Richards J); *Seventh Columbo Pty Ltd v Melbourne City Council* [1998] VSC 7, [28] (McDonald J); *MA Zeltoff Pty Ltd v Stonnington City Council* [1999] 3 VR 88, [26] (Balmford J); *Maroondah City Council v Fletcher* (2009) 29 VR 160, [216] (Redlich JA).

28. **Nature of the procedural requirements**. The procedures set out in Pt 3 Divs 1-3 and Pt 8 have a public importance in that they provide for public notice of, and an opportunity to participate in, the amendment process. Section 29(1), which begins with the words "[a]fter complying with Divisions 1 and 2 [of Pt 3]", requires compliance with the provisions described before a planning authority may adopt an amendment. Nevertheless, "mere use of imperative language to express a condition imports no presumption that non-compliance with the condition is intended to result in invalidity".[31]

29. **The Minister's powers**. The anterior procedures produce no substantive effect on legal rights or interests. Rather, they facilitate the Minister's decision under s 35 to approve an amendment. Only after approval and commencement can an amendment make enforceable provision for the use and development of land.[32]

30. As noted above, in making a decision under s 35, the Minister may approve an amendment, with or without changes and subject to any conditions the Minister imposes, or refuse to approve an amendment.[33] The Minister is thus given control of whether the amendment is made at all and, if it is, of its content (including, where a panel report has been prepared, whether it should accord with any recommendations made by the report) and of the date (after gazettal) it comes into effect. The conferral on the Minister of a supervening power to decide the matters with which the anterior procedures are concerned — whether subordinate legislation is made and, if so, with what content — indicates Parliament's intention that compliance with the anterior procedures is not an essential preliminary.[34]

31. Further, conferral on the Minister of broad powers to disapply the procedures in Pt 3 Divs 1-2 and Pt 8 suggests that, although those procedures (when not disapplied) are intended to be obligatory, non-compliance is to have an administrative cure (in the Tribunal); they were not so essential that non-compliance would spell invalidity.[35]

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31 *Miller* (2024) 278 CLR 628, [28] (Gageler CJ, Gordon, Edelman, Jagot and Beech-Jones JJ). See also *Tasker* [1978] 1 NSWLR 20, 24 (the Court).

32 PE Act, ss 6(1)(b), 16, 35(1), 36-7, 114(1), 119(1)(a)(i), 126.

33 The Minister's control of the timing of commencement after gazettal is given by PE Act, s 37(b).

34 *Project Blue Sky* (1998) 194 CLR 355, [92]-[93] (McHugh, Gummow, Kirby and Hayne JJ); *Muin v Refugee Review Tribunal* (2002) 76 ALJR 966, [183] (Gummow J); *Tasker* [1978] 1 NSWLR 20, 23-24 (the Court). Cf *Forrest & Forrest Pty Ltd v Wilson* (2017) 262 CLR 510, [104] (Nettle J, dissenting).

35 Cf *Forrest & Forrest* (2017) 262 CLR 510, [24] (Kiefel CJ, Bell, Gageler and Keane JJ).

32. **Power of Parliamentary revocation**. An amendment approved by the Minister may nevertheless be revoked under s 38(2) by the Parliament. Section 38(1)-(2) require the Minister to notify the approval of an amendment to each House of Parliament and provide that either House may by resolution revoke the amendment, wholly or in part.

33. Such provisions manifest "that aspect of responsible government which renders individual Ministers responsible to the Parliament"[36] and moreover makes the Minister's decision-making "subject to a specific form of parliamentary accountability".[37] Nor is Parliament's review confined to the outcome. If the Minister makes an exemption under s 20, the effect of which is to bypass the procedures in Pt 3 Divs 1-2 and Pt 8 (see [13]–[15] above), s 38(1A)-(1B) require details of the exemption to be notified to Parliament. That Parliament has provided for its own review of an amendment weighs against the need to attribute the consequence of invalidity to non-compliance so as to enliven the supervisory jurisdiction of the Court.[38]

34. **Tribunal's jurisdiction**. By s 39(1), Parliament has given jurisdiction to the Tribunal to deal with any complaint of a failure to comply with Pt 3 Divs 1-3 or Pt 8 where the application is made before an amendment has been approved. By s 39(4), the Tribunal is empowered to "determine a matter referred to it" under s 39(1). The Tribunal can direct the planning authority or the Minister not to adopt or approve an amendment unless they take the action specified by the Tribunal, and make any declaration it considers appropriate (s 39(4)), but it cannot vary a decision or set it aside and make another decision (s 39(5)). There is no express requirement in s 39(4) that the action specified by the Tribunal's direction be an action that would bring about compliance with the relevant provision(s) of Pt 3 Divs 1-3 or Pt 8, but the existence of the power indicates that the action specified in a Tribunal direction may, in effect, cure or supplant the failure to comply that enlivened the Tribunal's jurisdiction under s 39(1).[39] That is, a failure to comply with the anterior procedures in Pt 3 Divs 1-3 and Pt 8 can be cured or supplanted

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36 *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, [55] (Gummow, Hayne, Crennan and Bell JJ).

37 *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507, [102] (Gleeson CJ and Gummow J, Hayne J agreeing at [176]). See also at [246] (Callinan J).

38 Cf *Jia Legeng* (2001) 205 CLR 507, [102] (Gleeson CJ and Gummow J, Hayne J agreeing at [176]); *Disorganized Developments Pty Ltd v South Australia* (2023) 280 CLR 515, [82] (Steward J, dissenting but not on the point of principle there discussed). This may be viewed as one example of the "political, administrative or other non-legal consequences" referred to in *Casimaty* (2024) 98 ALJR 1139, [32] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ).

39 See, eg, *Rockford Constant Velocity Pty Ltd v Melbourne City Council* [2024] VSC 343, [90] (Quigley J).

by a direction by which the Tribunal determines the matter. This indicates that those anterior procedures are not in the nature of essential preliminaries. Rather, they indicate that constraints on procedures in Pt 3 Divs 1-3 and Pt 8, anterior to approval under s 35, are "condition[s] … giving rise only to administrative consequences in the event of non-compliance".[40]

35. The intent of s 39(8), which provides that a person cannot otherwise bring an action in respect of any such failure, is to make the Tribunal's jurisdiction exclusive. By s 39(1) and (8), Parliament has sought to direct that any complaint as to a failure to comply with Pt 3 Divs 1-3 or Pt 8, before approval of the amendment, should be taken up with the Tribunal and not with the Supreme Court. The Tribunal's constitutive Act "sets up [the Tribunal] as a forum for speedy and inexpensive resolution of specific kinds of disputes".[41] By conferring jurisdiction on the Tribunal to hear applications of this kind, the PE Act is "implementing its stated purpose"[42] of providing for the just and timely resolution of disputes without unnecessary formality. That express legislative policy, or intention, is consistent with an attributed intention that any such failure should not be subject to judicial review, but may instead be remedied in the Tribunal's administrative jurisdiction.

36. The evident purpose of these provisions is consistent with the objective of the planning framework identified in s 4(2)(j) of the PE Act: "to provide an accessible process for just and timely review of decisions without unnecessary formality". That purpose is also evident in the following statement in the second reading of the Bill introducing s 4J, which applied s 39 to amendments to the Victoria Planning Provisions:[43]

> Subsections (7) and (8) of section 39 already contain a restriction on the jurisdiction of the Supreme Court, for the purposes of section 85 of the Constitution Act 1975… A similar extension of the restriction in jurisdiction in section 39(7) is … needed to ensure that when an amendment to a planning scheme included in an amendment to the Victoria Planning Provisions is approved there is certainty in the operation of the planning scheme as amended. This certainty is required because a planning scheme forms the basis for the assessment of major development and investment opportunities, for protection of resources and the environment, and for enforcement action to prevent any unlawful use or development of land… Parliament has already vested

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40 *Miller* (2024) 278 CLR 628, [25] (Gageler CJ, Gordon, Edelman, Jagot and Beech-Jones JJ).

41 *Director of Housing v Sudi* (2011) 33 VR 559, [34] (Warren CJ).

42 *Sudi* (2011) 33 VR 559, [34] (Warren CJ), in relation to the *Residential Tenancies Act 1997* (Vic).

43 Victoria, *Parliamentary Debates*, Legislative Assembly, 14 November 1996, 1247 (Robert Maclellan, Minister for Planning and Local Government) (underlining added).

> jurisdiction in the Administrative Appeals Tribunal as the appropriate forum to deal with planning matters and has, correspondingly, already limited the jurisdiction of the Supreme Court in relation to planning scheme amendments and permit appeals. The primary reason for this is to allow for relevant planning matters to be decided quickly and inexpensively by a specialist tribunal.

37. This statement points to forms of public inconvenience that s 39 was intended to avoid, but which would not be avoided if — on the Court of Appeal's construction — alleged non-compliance with anterior procedures referred to in s 39 resulted in invalidity susceptible to judicial review in the Supreme Court, as well as to administrative review in the Tribunal (as has occurred in this matter). The public inconvenience that would result counts against attributing an intention to Parliament that invalidity is the result of non-compliance.[44] "Courts have always accepted that it is unlikely that it was a purpose of the legislation that an act done in breach of a statutory provision should be invalid if public inconvenience would be a result of the invalidity of the act".[45]

38. Further, the scheme does not result in the creation of any "islands of power immune from supervision or restraint".[46] The Tribunal's exercise of jurisdiction is subject to the Supreme Court's entrenched supervisory jurisdiction and to appeal on a question of law,[47] with appeals lying from those jurisdictions ultimately to this Court.[48]

39. **Section 39(7)**. After an amendment has been approved, the Tribunal has no jurisdiction under s 39(1) and, by s 39(7), Parliament has provided that the product of the process prescribed by Pt 3 — an approved amendment — is not made invalid for failure to comply with the antecedent procedures in Pt 3 Divs 1-3 or Pt 8. Rather, as noted above, Parliament has by s 38 reserved to itself ultimate power of review of an amendment.

40. In construing s 39(7), the Court of Appeal (at J [101]-[115]) did not properly assess the significance of that provision for the operation of the PE Act and for the scope of judicial review in the manner required by *Project Blue Sky*. In particular, it did not frame the question as whether s 39(7) evinces an intention that failures to comply with the anterior

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44 Compare *Casimaty* (2024) 98 ALJR 1139, [42] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ).

45 *Project Blue Sky* (1998) 194 CLR 355, [97] (McHugh, Gummow, Kirby and Hayne JJ). See also *Wei* (2015) 257 CLR 22, [27] (Gageler and Keane JJ).

46 *Kirk* (2010) 239 CLR 531, [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

47 *Victorian Civil and Administrative Tribunal Act 1998* (Vic), s 148.

48 *Constitution*, s 73. See, eg, *Osland v Secretary, Department of Justice* (2008) 234 CLR 275 and *Osland v Secretary, Department of Justice [No 2]* (2010) 241 CLR 320.

procedures would result in invalidity.[49] The Court instead framed the question as whether s 39(7): "validate[s] anterior steps";[50] "extends to the steps that precede the approval";[51] or "appl[ies] to any step taken before an amendment".[52] That is, their Honours enquired whether s 39(7) was framed to have direct operation to validate actions arising in administration of anterior procedures.[53]

41. In *Deputy Commissioner of Taxation v Richard Walter Pty Ltd*,[54] and then in *Federal Commissioner of Taxation v Futuris Corporation Ltd*,[55] s 175 of the *Income Tax Assessment Act 1936* (Cth) (**ITAA**) was held to have the effect that breaches of procedures anterior to the final decision concerned would be errors within jurisdiction and would not result in invalidity of the final decision. The reasoning in those decisions supports, by analogy, a construction of s 39(7) as having a similar significance within the scheme of the PE Act.

42. Section 175 of the ITAA provided that "[t]he validity of any assessment shall not be affected by reason that any of the provisions of this Act have not been complied with". Section 175 was related to the conclusive evidence provision in s 177(1). Section 175A provided that a taxpayer may object to an assessment in the manner set out in Part IVC of the *Taxation Administration Act 1953* (Cth), which at material times provided for review or appeal proceedings in the Administrative Appeals Tribunal and Federal Court of Australia on a restricted ground that the assessment was excessive.[56]

43. In *Richard Walter*, the taxpayer had brought a Federal Court proceeding under s 39B of the *Judiciary Act 1903* (Cth) that was an "attack … not directed to the final, mechanical

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49 *Project Blue Sky* (1998) 194 CLR 355, [93] (McHugh, Gummow, Kirby and Hayne JJ); *Futuris* (2008) 237 CLR 146, [23] (Gummow, Hayne, Heydon and Crennan JJ).

50 Subheading above J [101].

51 J [101], holding "[w]e do not accept… that s 39(7), by necessary implication, extends to the steps that precede the approval". The attribution in J [101] of a contrary view to the Minister was misplaced; the Minister's proposed construction of s 39(7) was contended to flow from *Project Blue Sky*: See Minister's Written Case below, [21], [25], [37(1)], [39] (ABFM, 26, 30-31).

52 J [102], which continues "[s]ection 39(7) does not address the different question as to whether compliance with relevant steps in pt 3 divs 1-3 or pt 8 condition … jurisdiction"; and J [112] ("s 39(7) could not save an anterior step…").

53 See, eg, *Australian Education Union v General Manager, Fair Work Australia* (2012) 246 CLR 117, [36] (French CJ, Crennan and Kiefel JJ); *CD v The Commonwealth* (2025) 99 ALJR 1388, [19] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ).

54 (1995) 183 CLR 168.

55 (2008) 237 CLR 146.

56 See the descriptions of provisions in *Richard Walter* (1995) 183 CLR 168, 187 (Mason CJ), 197-8 (Brennan J); *Futuris* (2008) 237 CLR 146, [21]-[22] (Gummow, Hayne, Heydon and Crennan JJ).

stage of assessing … but to … antecedent determinations" under s 177F that amounts of tax benefits be included in the taxpayer's assessable income.[57] Chief Justice Mason held that "the effect of s 175 is that compliance with particular provisions of the Act is not essential to the validity of an assessment"[58] and therefore that ss 175 and 177, understood as complementary provisions, "do no more than require the making of an assessment, due compliance with the statutory provisions not being essential to the validity of an assessment".[59] As a result, his Honour held that the taxpayer's Federal Court proceeding "must fail".[60] Justices Dawson and McHugh adopted similar reasoning to conclude that the Act's requirements relating to the making of an assessment were "directory only".[61]

44. Section 175 was again considered in *Futuris*, where Gummow, Hayne, Heydon and Crennan JJ decided that the paths of reasoning in "the several sets of reasons in *Richard Walter*" ought not as such to be followed, including because *Project Blue Sky* had relevantly "changed the landscape".[62] Eschewing the distinction between mandatory and directory provisions,[63] their Honours said that "[t]he significance of s 175 for the operation of the Act and for the scope of judicial review outside Pt IVC is to be assessed in the manner indicated in *Project Blue Sky*".[64] That is, "the question … is whether it is a purpose of the Act that a failure by the Commissioner in the process of assessment to comply with provisions of the Act renders the assessment invalid; in determining that question of legislative purpose regard must be had to the language of the relevant provisions and the scope and purpose of the statute".[65] Applying that approach, their

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57 *Richard Walter* (1995) 183 CLR 168, 202 (Brennan J). See further s 177F of the *Income Tax Assessment Act 1936* as excerpted at 178.

58 *Richard Walter* (1995) 183 CLR 168, 182. Similarly at 187 ("[s 175] is of critical importance because it indicates that compliance with any of the provisions of the Act is not essential to validity"), and 188 ("s 175, the effect of which is to ensure that the validity of an assessment does not depend upon compliance with any of the particular provisions of the Act").

59 *Richard Walter* (1995) 183 CLR 168, 187.

60 *Richard Walter* (1995) 183 CLR 168, 188.

61 *Richard Walter* (1995) 183 CLR 168, 223 (Dawson J); and 240, 242-243 (McHugh J). Justices Brennan, Deane and Gaudron construed the Act by applying the so-called *Hickman* principle but, in essence, accepted that s 175 operates to ensure validity notwithstanding any failure to comply with any of the provisions of the Act: see at 195, 198, 204 (Brennan J) and 210–11 (Deane and Gaudron JJ). In *Futuris* (2008) 237 CLR 146 at [68], Gummow, Hayne, Heydon and Crennan JJ held that "there is no scope … for the operation of the so-called *Hickman* principle" in construing s 175.

62 *Futuris* (2008) 237 CLR 146, [70].

63 But compare *Wei* (2015) 257 CLR 22, [25]-[26] (Gageler and Keane JJ).

64 *Futuris* (2008) 237 CLR 146, [23].

65 *Futuris* (2008) 237 CLR 146, [23].

Honours held that, "[w]here s 175 applies, errors in the process of assessment do not go to jurisdiction and so do not attract the remedy of a constitutional writ".[66]

45. Following *Project Blue Sky*, the import of s 39(7) of the PE Act is akin to that of s 175 of the ITAA as construed by Gummow, Hayne, Heydon and Crennan JJ in *Futuris*.[67] Section 39(7) manifests a legislative policy that a failure to comply with the provisions of the PE Act involved in the exhibition and notice of, submissions about, and adoption of, an amendment, leading to an approval decision, is not intended to result in invalidity.[68] Although s 39(7) is directed in terms to the effect of an amendment post-approval, that effect is incongruous with an intention that — pre-approval — an antecedent step would be invalid, and subject to judicial review in the Supreme Court, for non-compliance with Pt 3 Divs 1-3 or Pt 8.

46. The same policy is manifest in s 39(8), and is consistent with the Parliament's "clear intention" in s 39 "to exclude the jurisdiction of the Court to the extent possible": J [118]. As Brooking J said in *Grollo Australia Pty Ltd v Minister for Planning and Urban Growth and Development*, "one can well understand its being thought necessary by Parliament notwithstanding prior defects … to place beyond question the validity of an instrument which may well by the time it comes to be attacked have been acted upon by many persons, in many ways and in many important matters".[69]

Section 39(8) bars the IGA parties' action

47. The effect of the above construction is that s 39(8) is effective, on its terms, to prevent the IGA parties from seeking judicial review in the Supreme Court of alleged failures to comply with those provisions.

48. The Court of Appeal correctly held that, on its terms, s 39(8) applied to the action in the Supreme Court and that, were effect given to it, on its terms, "none of" the IGA parties' grounds "would be competent": J [92], [94]. Section 39(8) was engaged, because the grounds for the relief claimed in the OM were in respect of a failure to comply with

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66 *Futuris* (2008) 237 CLR 146, [24]. See also at [47] ("[w]here s 175 of the Act operates there will be no affectation of the validity of any assessment").

67 See also *Harvey v Commissioner of State Revenue* [2015] QCA 258, [78] (McMurdo P, Phillippides JA and Burns J agreeing).

68 See also *Hume City Council v Minister for Planning* [2022] VSC 187, [29] (Richards J).

69 [1993] 1 VR 627, 644. See also *Hume City Council* [2022] VSC 187, [23], [29] (Richards J).

provisions in Pt 3 Divs 2 and 3 of the PE Act: J [93]. The claim for an injunction was also sought solely on the basis of alleged failures of compliance with Pt 3, Divs 2 and 3.[70]

49. As a matter of statutory construction, where a provision in clear terms withdraws jurisdiction from a court, Parliament will be taken to have so intended.[71] Section 39(8) is such a provision. The word "action" has a wide connotation encompassing "every sort of legal proceeding", including a proceeding in the Supreme Court.[72] Further, "[t]he primary sense of 'action' as a term of legal art is the invocation of the jurisdiction of a court by" filing an originating process (originally a writ).[73] Where engaged, s 39(8) is a direction to a court, in discharging its "first duty",[74] that it lacks jurisdiction.

50. In *East Melbourne*, the Court of Appeal treated the heading to s 39 — "Defects in procedure" — as a basis to read the words "failure[s] to comply with Division 1 or 2 or this Division or Part 8" in s 39(7) and (8), and the cognate phrase in s 39(1), as only denoting a subclass of failures to comply with Pt 3 Divs 1-3 and Pt 8: those fairly characterised as "defects in procedure".[75] *East Melbourne* should be disapproved. The heading did not form part of the Act,[76] and so "may not govern what follows in the provision".[77] To the extent that the heading may be relied upon like extrinsic materials,[78] it offers no assistance in determining the scope of s 39(8): "[f]ailures of any kind and

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70 OM, [39]-[41] (ABFM, 21).

71 See *Forestry Corporation (NSW) v South East Forest Rescue Inc* (2025) 99 ALJR 794, [12] (the Court); *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1, [34] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ); *Jamieson v The Queen* (1993) 177 CLR 574, 596 (Gaudron J), and the authorities cited there in footnote 73; *Darling Casino* (1997) 191 CLR 602, 633-634 (Gaudron and Gummow JJ).

72 *Minister for Youth and Community Services v Health and Research Employees' Association of Australia, NSW Branch* (1987) 10 NSWLR 543, 560 (McHugh JA). See also *Castle Constructions Pty Ltd v Sahab Holdings Pty Ltd* (2013) 247 CLR 149, [54] (Gageler J); *Daemar v Industrial Commission (NSW)* (1988) 12 NSWLR 45, 54 (Kirby P).

73 *In re Herbert Berry Associates Ltd* [1977] 1 WLR 1437, 1446 (Lord Simon).

74 *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 279 CLR 148, [27] (Kiefel CJ and Gageler J), [92] (Gordon J), [138] (Edelman J), [331] (Jagot J); *Re Nash [No 2]* (2017) 263 CLR 443, [16] (the Court).

75 *East Melbourne* (2008) 23 VR 605, [368] (Ashley and Redlich JJA).

76 *Interpretation of Legislation Act 1984* (Vic), s 36(3) (s 36(2A) has no application because the heading to s 39 predated 2001).

77 *R v A2* (2019) 269 CLR 507, [40] (Kiefel CJ and Keane J).

78 *R v A2* (2019) 269 CLR 507, [40] (Kiefel CJ and Keane J).

degree" to comply with the requirements of Pt 3 Div 1 could "be described as 'defects in procedure'".[79]

51. In any event, given that, properly construed, a failure to comply with the procedures in Pt 3 Divs 1-3 and Pt 8 does not result in invalidity, there is no basis to read down s 39(7) or (8) in the manner adopted by the Court of Appeal in *East Melbourne* or in the present proceeding. Section 39(8) does not purport to withdraw from the Supreme Court any part of its entrenched jurisdiction to review errors in the planning scheme amendment process for jurisdictional error. Accordingly, the principle in *Kirk* is not engaged.

52. To the extent there remains any doubt or ambiguity about the consequences of a breach of the provisions of Pt 3 Divs 1-3 and Pt 8, and therefore of the scope of s 39(8), the construction advanced above is further supported by the presumption that the legislature "intend[s] to enact legislation that is valid and not legislation that is invalid".[80] In circumstances where competing constructions are "reasonably open in the application of ordinary principles of statutory construction", the prospect of constitutional invalidity would bear on the choice between those constructions.[81] In such a case, s 6(1) of the *Interpretation of Legislation Act* requires that a construction of the anterior procedural provisions whereby non-compliance does not spell invalidity should be preferred because it would permit s 39(8) to operate to the full extent that its words permit without exceeding the constitutional limit identified in *Kirk*.[82]

No public law remedies are available before approval of amendments

53. In rejecting the Minister's contention that there is no reason to distinguish between the validity of anterior steps leading to an amendment and the validity of an approved amendment, the Court of Appeal reasoned that, even if a failure to comply with any anterior step did not render an approved amendment invalid, the remedies of certiorari, declaration and injunction may be available in relation to such a failure to comply:

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79 *Grollo* [1993] 1 VR 627, 644 (Brooking J) (s 39(2), considered in *Grollo*, became s 39(7)). Justice Morris disagreed in *East Melbourne* (2005) 12 VR 448, [92]. His Honour's reasoning was relied on by the majority on appeal. See also *Burchall v Shire of Sherbrooke* (1968) 118 CLR 562, 570 (Barwick CJ), construing the statutory phrase "informality, defect or error".

80 *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629, [28] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

81 *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, [79] (Gageler J).

82 *Victoria v The Commonwealth* (1975) 134 CLR 81, 179 (Stephen J); cf *Victoria v The Commonwealth* (1996) 187 CLR 416, 502-503 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

J [108]-[112]. However, as noted above, this reasoning proceeded on the incorrect assumption that the relevant failure to comply would be jurisdictional.

54. Once it is accepted that a failure to comply does not result in invalidity, s 39(8) is effective on its terms to deny the Supreme Court jurisdiction to grant the relevant remedies, notwithstanding that, in other statutory contexts, those remedies may be granted in exercise of the Supreme Court's entrenched supervisory jurisdiction. In any event, for reasons that follow, none of the remedies identified by the Court of Appeal are available in relation to an alleged failure to comply with a requirement of Pt 3 Divs 1-3 or Pt 8.

55. **Certiorari could not issue on the principle in *Hot Holdings*.** At J [108], the Court of Appeal said that certiorari may issue to quash "steps taken by a council or panel" on a principle, identified in *Hot Holdings* (albeit not referred to by the Court), that "[a] preliminary decision or recommendation, if it is one to which regard must be paid by the final decision-maker, will have the requisite legal effect upon rights to attract certiorari".[83]

56. However, as the failures to comply alleged in the OM would not constitute jurisdictional errors, the claim for certiorari to quash steps taken by the Council or panel was an "action in respect of a failure to comply" that is precluded by s 39(8). To the extent they alleged errors of law on the face of the record, the *Kirk* principle was not engaged: J [116]-[118]. Thus, s 39(8) is a complete answer to J [108].

57. For completeness, however, J [108] also errs in its application of the relevant principle. The common law grounds of judicial review apply differently as between administrative decision-making (as in *Hot Holdings*) and legislative decision-making.[84] A planning scheme amendment is of the latter kind. As the PE Act's diverse objectives (s 4) and procedure for parliamentary supervision (s 38) indicate,[85] the decision whether to approve an amendment is one of "opinion or policy" "reflect[ing] political considerations and priorities on which reasonable minds may differ widely".[86] In those circumstances, the contention that the Minister "erred in failing to take account" of matters would not be

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83 *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149, 165 (Brennan CJ, Gaudron and Gummow JJ).

84 See, eg, *Ferrier v Wilson* (1906) 4 CLR 785, 801-802 (Isaacs J); *Kioa v West* (1985) 159 CLR 550, 620 (Brennan J); *Austral Fisheries Pty Ltd v Minister for Primary Industries and Energy* (1992) 37 FCR 463, 477-478 (O'Loughlin J).

85 *Jia Legeng* (2001) 205 CLR 507, [102] (Gleeson and Gummow JJ, Hayne J agreeing at [176]), [246] (Callinan J).

86 *Clark* [2008] 1 Qd R 327, [45] (Keane JA, Williams JA agreeing at [6], Lyons J agreeing at [51]).

a "sound basis for scrutiny of the lawfulness of the decision".[87] But the principle in *Hot Holdings* referred to at J [108] presumes an obligation to consider the anterior matter.

58. In any event, the Court of Appeal's conclusion (at J [108]) that the panel report was a mandatory consideration for the Minister in deciding whether to approve is not supported by the statutory text. There is no such express requirement in s 35. Contra J [108], the express requirement in s 27(1) — that a planning authority consider a panel's report before deciding whether to adopt a proposed amendment — counts against an implication to the same effect in s 35.[88]

59. Further, the principle in *Hot Holdings* extends only to a "condition precedent to the exercise of power which will affect legal rights" in the manner that attracts an implication that the power is conditioned by the common law's requirements of fairness.[89] That is not the nature of a power such as in s 35 of the Act, which "provides, in relatively broad terms of general application, a coherent and integrated framework for land use within that area: it does not purport to make determinations of the land use rights of individual landowners".[90]

60. **No declaratory relief available**. The Court of Appeal also reasoned that "the supervisory jurisdiction of the Court may be engaged where the impugned decision or conduct affects interests short of legally enforceable interests", and that declaratory relief may be available: J [109]. So much may be true as a matter of principle. However, for the reasons given above, the nature of the steps in Pt 3 Divs 1-3 or Pt 8 does not give rise to any interest that may sustain a declaration.

61. **No injunction could issue on the ground identified in *Project Blue Sky***. The Court of Appeal reasoned that "a failure to comply with a requirement of pt 3 divs 1-3 or pt 8 could be the basis for an injunction to restrain the Minister from approving the amendment, even if that failure would not invalidate the amendment after approval":

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87 *Clark* [2008] 1 Qd R 327, [43]-[45] (Keane JA, Williams JA agreeing at [6], Lyons J agreeing at [51]). See also *Footscray Corporation v Maize Products Pty Ltd* (1943) 67 CLR 301, 308 (Rich J); *Re Mayor, City of Hawthorn; Ex parte Co-operative Brick Co Ltd* [1909] VLR 27, 50 (Cussen J).

88 Although reg 9 of the *Planning and Environment Regulations 2015* (Vic) requires, for the purpose of s 31, that a panel report, and any reasons why a panel's recommendations were not adopted by the planning authority, be submitted to the Minister.

89 *Hot Holdings* (1996) 185 CLR 149, 162 (Brennan CJ, Gaudron and Gummow JJ).

90 *Clark* [2008] 1 Qd R 327, [40] (Keane JA, Williams JA agreeing at [6], Lyons J agreeing at [51]).

J [112], a circumstance which their Honours said was expressly contemplated by the High Court in *Project Blue Sky*.

62. What *Project Blue Sky* contemplated was an injunction to restrain an act that was unlawful but not invalid. Such unlawfulness is not jurisdictional error, and therefore does not engage *Kirk*.[91] Accordingly, once it is accepted that s 39(8) has effect according to its terms, and need not be read down, proceedings for an injunction to restrain the Minister would be "an action in respect of a failure to comply with Division 1 or 2 or this Division or Part 8" and would therefore be precluded by s 39(8).

63. The observation in *Project Blue Sky* at [100] does not mean that a breach of a condition regulating the exercise of a statutory power which does not result in invalidity but which nevertheless results in an unlawful act *must* be capable of being restrained by injunction. For reasons set out above, the anterior procedures in Pt 3 Divs 1-3 and Pt 8 of the PE Act come within a category of conditions that "give rise only to political, administrative or other non-legal consequences".[92]

Part VII: Orders sought

64. The Minister seeks the orders set out in its notice of appeal: CAB 51.

Part VIII: Estimated time

65. The Minister estimates that she will require 2.5 hours to present oral argument.

Dated: 19 February 2026

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91 There is no State entrenchment of injunctive relief equivalent to s 75(v) of the Constitution.

92 *Casimaty* (2024) 98 ALJR 1139, [32] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ). See also *Miller* (2024) 278 CLR 628, [25] (Gageler CJ, Gordon, Edelman, Jagot and Beech-Jones JJ).

ANNEXURE TO APPELLANT'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates
1.	*Commonwealth Constitution*	Current	ss 73, 75(v)	In force at all relevant times	All relevant times
2.	*Planning and Environment Act 1987* (Vic)	Authorised Version 156	Pts 1-2, Pt 3 Divs 1-3, and Pt 8	Act as in force at the time of filing of the Originating Motion on 11 June 2024	5 June 2024 to 25 March 2025
3.	*Planning and Environment Regulations 2015* (Vic)	Current	reg 9	Currently in force	All relevant times
4.	*Victorian Civil and Administrative Tribunal Act 1998* (Vic)	Current	s 148	Currently in force	All relevant times
5.	*Interpretation of Legislation Act 1984* (Vic)	Current	ss 6, 36(3)	Currently in force	All relevant times
6.	*Income Taxation Assessment Act 1936* (Cth)	Compilation prepared on 12 November 2004	ss 175, 175A, 177A-D, 177F, 178	Act as it was applied in *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146	12 November 2004, being the day on which the notice of assessment concerned in *Futuris* issued
7.	*Taxation Administration Act 1953* (Cth)	Compilation prepared on 9 August 2004	ss 14ZZ, 14ZZK and 14ZZO	Act as it was referred to in *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146	12 November 2004, being the day on which the notice of assessment concerned in *Futuris* issued
8.	*Migration Act 1958* (Cth)	Current	ss 76E, 198AHAA, 501(5)	Illustrative purposes	All relevant times