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

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

FIRST AND SECOND RESPONDENTS' SUBMISSIONS

PART I: CERTIFICATION

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

PART II: ISSUES

2 On 11 June 2024, the first and second respondents (**IGA parties**) commenced a proceeding in the Supreme Court of Victoria by originating motion: **AFM 5**. The IGA parties sought *inter alia* orders in the nature of certiorari quashing: a report of the fourth respondent (**Panel**) to the third respondent (**Council**) under s 25 of the ***Planning*** *and Environment* ***Act*** *1987* (Vic) with respect to a proposed amendment of the Greater Shepparton Planning Scheme, and a decision of the Council under s 29 of that Act to adopt the amendment with changes recommended by the Panel. The IGA parties sought that relief, relevantly, on the basis that both purported exercises of power were invalid. The IGA parties also sought an injunction restraining the appellant (**Minister**) from approving the amendment under s 35; the Minister has not yet approved the amendment.

3 On 29 October 2024, by order of the Trial Division of the Supreme Court (Quigley J) made under s 17B of the *Supreme Court Act 1986* (Vic), two questions were reserved for the consideration of the Court of Appeal: **CAB 5**. Only the first question remains relevant: "Does s 39 of the [Planning Act] prevent the plaintiffs from *seeking* the relief sought in the originating motion filed in this proceeding (S ECI 2024 02935)?" (emphasis added). By order made on 7 August 2025, the Court of Appeal answered that question "no".

4 The Minister has appealed from that order. Ultimately, therefore, the only issue is the correctness of the answer given by the Court of Appeal. As the Court of Appeal correctly stated (at *J* [99], see also [120] **CAB 32, 36**), s 39(8) of the Planning Act would be constitutionally invalid insofar as it purported to prohibit a person from bringing an action that *alleges* jurisdictional error and *seeks* relief in that respect.[1] That conclusion is sufficient to dispose of this appeal.

[1] So long, perhaps, as such action is not merely colourable. No such suggestion has been made, or could reasonably be made, by the Minister with respect to the originating motion in this matter.

5 The central contention of the Minister,[2] supported by intervenors,[3] to this effect:

5.1 premise 1: the complaints made by the IGA parties are properly characterised as complaints of "a failure to comply with Division 1, 2 or [3] [of Part 3] or Part 8" within the meaning of s 39(8) of the Planning Act;

5.2 premise 2: on the proper construction of the Planning Act, compliance with such provisions is not a condition on the valid exercise of power by the Panel (under s 25) or the Council (under s 29); and

5.3 conclusion: "*therefore*" the IGA parties are prohibited by s 39(8) of the Planning Act from bringing the action in the Supreme Court,

10 must be rejected. It collides with this Court's decision in ***Kirk*** *v Industrial Court of New South Wales*,[4] and basal constitutional principle as to the function of the judicial branch of government (see Part V.A [13]-[21] below).

6 An alternative contention, advanced principally by South Australia,[5] that s 39(8) of the Planning Act is saved from any need to be read down to avoid invalidity because matters may be referred to the Victorian Civil and Administrative **Tribunal** under s 39(1), and because an order of the Tribunal can be "appealed" under s 148 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (**VCAT Act**) or be the subject of an application for judicial review must also be rejected (see Part V.B [22]-[26] below).

7 Further contentions by the Minister and Queensland to the effect that the relief sought

[2] See, in particular, the "[o]verview" of the Minister's submissions at [11], where the asserted premise is that the errors alleged by the IGA parties in the originating motion "do not result in invalidity", and the asserted conclusion flowing from that premise is that "[s]ection 39(8) is *therefore* effective in its terms to preclude an action being brought in the Supreme Court in respect of such non-compliance" (emphasis added). See also, for example, Minister [26]-[46] (under the heading "Non-compliance with anterior steps is not jurisdictional error"), followed by [47]-[52] (under the heading "Section 39(8) bars the IGA parties' action") including the assertion at [47]: "[t]he 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".

[3] See South Australia [5] (agreeing with the Minister's submissions); New South Wales [4] (adopting the Minister's submissions); Queensland [4] (adopting the Minister's submissions regarding the proper construction of s 39 of the Planning Act). See also Commonwealth [17].

[4] (2010) 239 CLR 531.

[5] South Australia [6]-[34]; see also Minister [38]; Queensland [19]. Cf. Commonwealth [25]-[28]. While the Commonwealth submits that there is "no reason, at the level of principle, why the supervisory jurisdiction of a State Supreme Court could not be exercised through the mechanism of an appeal to that Court" ([28]), it nevertheless "advances no submission as to whether or not the mechanism for appeal on a question of law provided by s 148 of the [VCAT Act] would constitute an effective means by which the Supreme Court could grant relief on account of jurisdictional error" (fn 62).

by the IGA parties is not available,[6] or that its availability is not constitutionally-entrenched,[7] are wrong and in any event do not support the proposition that the originating motion seeking relief is incompetent (see Part V.C [27]-[34] below).

8 Thus, whether jurisdictional error has been committed by the Panel or the Council, and whether any of the relief sought by the IGA parties should issue, is a matter for trial. In particular, the correctness of "premise 2" need not be and should not be decided. But, if that be wrong, the IGA parties would submit that "premise 2" reflected is wrong (see Part V.D [35]-[48] below).

9 The correctness of the Court of Appeal's decision in 2008 in ***East Melbourne*** *Group*
10 *Inc v Minister for Planning*[8] also need not be and should not be decided: that decision concerned the proper construction of s 39(7) of the Planning Act, which is not applicable here because no approval decision has been made. But, if that be wrong, the IGA parties would submit that *East Melbourne* should not be overturned (see Part V.E [49]-[52] below).

PART III: SECTION 78B NOTICE

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

PART IV: MATERIAL FACTS

11 The IGA parties largely agree with the facts set out in the Minister's submissions at [6]-[10].

20 12 However, the Minister's submissions at [10] may be inaccurate, insofar as it suggests that the "subject matter" of the Supreme Court proceeding (on the one hand) and a referral made by the second respondent to the Tribunal under s 39(1) of the Planning Act (on the other) is the same. The two proceedings involve different complaints and seek different relief, reflecting the different functions and jurisdictions of the Court and the Tribunal, respectively.

6 Minister [54]-[63]. Cf. Commonwealth [18]-[24].
7 Queensland [5]-[21].
8 (2008) 23 VR 605 at [368]-[370] (Ashley and Redlich JJA).

PART V: ARGUMENT

A SECTION 39(8) MUST BE READ DOWN TO AVOID INVALIDITY

Constitutional limits on privative clauses

13 In ***Plaintiff S157****/2002 v The Commonwealth*,[9] the Court considered the constitutional validity and effect of s 474 of the ***Migration Act*** *1958* (Cth), which relevantly provided that a "privative clause decision" must not be challenged, appealed against, reviewed, quashed or called in question in any court. The Court accepted that s 474 could not oust the jurisdiction of the High Court under s 75(v) of the Constitution,[10] which confers jurisdiction on the Court in all matters where a constitutional writ is *sought* against an officer of the Commonwealth.[11] The Court explained (emphasis added):[12]

> The reservation to this Court by the Constitution of the jurisdiction in all matters in which the named constitutional writs or an injunction are *sought* against an officer of the Commonwealth is a means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them. The centrality, and protective purpose, of the jurisdiction of this Court in that regard places significant barriers in the way of legislative attempts (by privative clauses or otherwise) to impair judicial review of administrative action. Such jurisdiction exists to maintain the federal compact by ensuring that propounded laws are constitutionally valid and ministerial or other official action lawful and within jurisdiction. In any written constitution, where there are disputes over such matters, there must be an authoritative decision-maker. Under the Constitution of the Commonwealth the ultimate decision-maker in all matters where there is a contest, in this Court. The Court must be obedient to its constitutional function. In the end, pursuant to s 75 of the Constitution, this limits the powers of the Parliament or of the Executive to avoid, or confine, judicial review.

14 The Court reconciled s 474 with constitutional limits by construing "privative clause decisions" as referring only to decisions "which involve neither a failure to exercise jurisdiction nor an excess of the jurisdiction conferred by the Act".[13] The effect of s 474 was that, if a plaintiff brought a proceeding alleging that a purported privative clause decision involved jurisdictional error, the court would "determine", as a result of a necessary "reconciliation process", whether that contention was made out.[14] That

9 (2003) 211 CLR 476.

10 Or derivative statutory jurisdiction of the Federal Court of Australia or the (then) Federal Magistrates Court of Australia: see (2003) 211 CLR 476 at [93]-[95].

11 (2003) 211 CLR 476 at [52]-[53] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). See also [73], where the plurality held that "[q]uite apart from s 75(v), there are other constitutional requirements that are necessarily to be borne in mind in construing a provision such as s 474 of the Act", including that a privative clause "cannot confer on a non-judicial body the power to determine conclusively the limits of its own jurisdiction".

12 (2003) 211 CLR 476 at [104] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

13 (2003) 211 CLR 476 at [76] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). See also [92].

14 (2003) 211 CLR 476 at [78] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). See also [96].

process of determination by a court would involve authoritatively (subject to appeal) all questions of law (including statutory construction) and fact necessary to determine whether the *allegation* of jurisdictional error had been established.

15 Plainly, therefore, a provision like s 39(8) if enacted as Commonwealth legislation would not be effective to prohibit a plaintiff from commencing a proceeding in the High Court to *seek* judicial review of a purported exercise of power on a ground of jurisdictional error. Yet the Minister's position, if correct, would entail that the position with respect to State legislative power is substantially different: a plaintiff *could* be prevented by a law of a State Parliament from commencing a proceeding in a Supreme Court to *seek* judicial review of a purported exercise of power under State legislation on a ground of jurisdictional error. The Minister's position is incorrect, both as a matter of authority and principle.

16 In *Kirk*,[15] this Court considered the constitutional validity and effect of s 179(1) of the ***Industrial Relations Act*** *1996* (NSW) which relevantly provided that a decision of the Industrial Court may not be appealed against, reviewed, quashed or called into question by any court. The Court held that it was necessary to take account of the requirement of Ch III of the Constitution that there be a body fitting the description "the Supreme Court of a State" and the constitutional corollary that "it is beyond the legislative power of a State so to alter the constitution or character of its Supreme Court that it ceases to meet the constitutional description".[16] Critically, then, the Court held (emphasis added):[17]

> The supervisory jurisdiction of the Supreme Courts was at federation, and remains, the mechanism *for the determination* and the enforcement of the limits on the exercise of State executive and judicial power by persons and bodies other than the Supreme Court. That supervisory role of the Supreme Courts exercised through the grant of prohibition, certiorari and mandamus (and habeas corpus) was, and is, a defining characteristic of those courts. And because, "with such exceptions and subject to such regulations as the Parliament prescribes, s 73 of the *Constitution* gives this Court appellate jurisdiction to hear and determine appeals from all judgments, decrees, orders and sentences of the Supreme Courts, the exercise of that supervisory jurisdiction is ultimately subject to the superintendence of this Court as the "Federal Supreme Court" in which s 71 of the *Constitution* vests the judicial power of the Commonwealth.

17 Accordingly, the Court construed s 179(1) of the Industrial Relations Act in a manner that took account of the limits on State legislative power consistently with the approach

[15] (2010) 239 CLR 531.
[16] (2010) 239 CLR 531 at [96] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). See also [55], [93].
[17] (2010) 239 CLR 531 at [98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

adopted in *Plaintiff S157* to the construction of s 474 of the Migration Act.[18]

18 In functional terms, therefore, while the precise textual source of the relevant constitutional limit on the legislative power of the Commonwealth (principally but not only s 75 of the Constitution) and the States (principally but not only the need in Ch III for a body fitting the description "the Supreme Court of a State") respectively differs, the effect of the constitutional limit is the same.[19]

Minister's case collides with constitutional principles

19 The Minister's case that s 39(8) of the Planning Act is valid on its terms, based on her premise that non-compliance with relevant provisions of the Planning Act is non-jurisdictional, cannot be accepted. It collides with the *Kirk* principle, as well as the basal constitutional proposition that it is the function of the judicial branch of government to authoritatively to "declare and enforce the law that limits its own power and the power of other branches of government *through the application of judicial process* and through the grant, where appropriate, of judicial remedies" (emphasis added).[20]

20 The point can be explained in this way.

20.1 By their originating motion, the IGA parties contend that purported exercises of statutory power by the Panel and the Council exceed jurisdictional limits on identified grounds.

20.2 It is apparent from the Minister's submissions that her position is that: (a) the IGA parties' complaints are properly characterised as complaints of "a failure to comply" with provisions of the Planning Act referred to in s 39(8); and (b) any such non-compliance by the Panel and the Council does not result in the respective exercises of statutory power by the Panel and the Council being invalid ("premise 2").

20.3 The Minister is entitled to adopt that position at trial. But her position is not somehow self-evidently correct. Indeed, at trial, the IGA parties would resist the

[18] (2010) 239 CLR 531 at [101]-[105] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[19] See *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at [20] (Kiefel CJ, Gageler and Keane JJ); ***Citta*** *Hobart Pty Ltd v Cawthorn* (2022) 276 CLR 216 at [20] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

[20] *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at [39] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ), applied in the context of State power in *Citta* (2022) 276 CLR 216 at [18] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

correctness of the Minister's construction reflected in "premise 2": see [35]-[48] below. The controversy between the parties bearing on whether the Panel and the Council have committed jurisdictional error, including the controversy on the correctness of the Minister's construction reflected in "premise 2", is to be *determined* by the Trial Division of the Supreme Court in the *exercise* of its constitutionally-entrenched jurisdiction (i.e., through "the application of judicial process"). If the Court is not satisfied that a jurisdictional error is established, then relief cannot issue. If the Court is so satisfied, then appropriate relief can issue.

20.4 But what cannot be countenanced is the notion that the IGA parties are prohibited by a valid law of the Victorian Parliament from bringing the action in the Supreme Court that *alleges* jurisdictional error, thereby prohibiting the Court from determining whether jurisdictional error has occurred as alleged through the application of judicial process, because the Minister's position is that the complaints do not sound in jurisdictional error, with the correctness of her position (somehow) to be ascertained *otherwise* than by the Supreme Court in the exercise of its jurisdiction.[21]

21 Accordingly, any opinion of this Court on the resolution of the underlying dispute between the parties as to whether jurisdictional error has occurred — including, in particular, whether any non-compliance with the provisions of the Planning Act referred to in s 39(8) is non-jurisdictional as the Minister contends — is *irrelevant* to the competency of the originating motion, being the only question before this Court. The resolution of the underlying controversy, including the extent of jurisdictional limits on the exercise of relevant statutory powers can, and should, be authoritatively determined

[21] By whom, it might indeed be asked? The Minister? An officer in the Registry of the Supreme Court, upon their review of the originating motion? A judicial officer of the Court, but *otherwise* than through the exercise and application of judicial process? None of these answers is tenable. There is no good answer. NSW's suggestion at [17] that the "protective effect" of the *Kirk* limitation "is premised on the antecedent determination of what is or is not jurisdictional error for the purposes of the underlying statutory decision-making process" exposes the absurdity of the position: there can be no temporally "antecedent determination" of any question of statutory construction bearing on jurisdictional limits of statutory power prior to the *exercise*, by the Court, of its constitutionally-entrenched jurisdiction to make that very *determination* where it arises in a proceeding. It is NSW's position (reflecting the Minister's) that "effectively presumes" that errors alleged by the IGA parties are non-jurisdictional, so as to justify the conclusion that s 39(8) renders the proceeding incompetent: cf. [22]. It is NSW's position (reflecting the Minister's) that "involves inversion of the proper analysis": cf. [24].

by the Trial Division of the Supreme Court (subject to any appeal).[22]

B *KIRK* IS NOT OUTFLANKED BY INDIRECT PATHWAY TO COURT

22 The alternative submission — principally advanced by South Australia — that s 39(8) of the Planning Act raises no constitutional difficulty because matters may be referred to the Tribunal under s 39(1) of the Planning Act, and because an order of the Tribunal can be "appealed" under s 148 of the VCAT Act or be the subject of an application for judicial review, must also be rejected.

23 First, the submission is irreconcilable with *Kirk*, and yet no application to re-open *Kirk* has been made. We have already summarised the effect of s 179(1) of the Industrial Relations Act above (at [16]). Notably for present purposes, s 179 was subject to the exercise of a right of appeal to a Full Bench of the Industrial Court (s 179(6)),[23] and the Court of Appeal retained its supervisory jurisdiction over the Full Bench of the Industrial Court.[24] Accordingly, contrary to South Australia's submission,[25] s 179 of the Industrial Relations Act *did* provide an indirect statutory pathway to the Supreme Court for correction of error relevantly similar to the pathway posited here as an answer to invalidity of s 39(8) of the Planning Act (subject to being read down to ensure validity).

24 Yet nonetheless, in *Kirk*, the High Court held that s 179 "does not (and could not validly) exclude the jurisdiction of the Supreme Court of New South Wales to grant relief in the nature of prohibition, certiorari or mandamus directed to the Industrial Court for the purposes of enforcing the limits on that Court's statutory authority".[26] The Court held that an order in the nature of certiorari could, and should, have been directed to the

[22] See, e.g., *Kirk* (2010) 239 CLR 531 at [68] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), referring with approval to the holding in *Craig v South Australia* (1995) 184 CLR 163 at 179 that "the ordinary jurisdiction of a court of law encompasses authority to decide questions of law, as well as questions of fact, involved in matters which it has jurisdiction to determine". See also, e.g., *Maxcon Constructions Pty Ltd v Vadasz (No 2)* (2017) 127 SASR 193 at [274] (Hinton J): "[W]here an administrative decision-maker is invested with power by statute … the limits of the decision-maker's powers are to be found in the statute. Further, whether any breach of such limit results in the purported exercise of power being one without jurisdiction is also to be discerned from the statute. The task reflects the purpose of the constitutionally entrenched supervisory jurisdiction of this Court, namely, the 'determination and the enforcement of the limits on the exercise of State executive and judicial power by persons and bodies other than the Supreme Court'."

[23] The terms of s 179(6) are set out in *Kirk* (2010) 239 CLR 531 at [55] fn 161 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[24] (2010) 239 CLR 531 at [44], [48] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[25] South Australia [14].

[26] (2010) 239 CLR 531 at [55] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

Industrial Court in respect of its decisions at first instance for jurisdictional error.[27]

25 Secondly, and contrary to another submission of South Australia,[28] the capacity of the Tribunal to determine a matter referred to it under s 39(1) of the Planning Act is *not* "materially equivalent" to the availability of judicial review for jurisdictional error in the exercise of the Supreme Court's supervisory jurisdiction.

25.1 The Tribunal on referral under s 39(1) of the Planning Act is not required to be constituted by a judicial member, let alone a judge of the Supreme Court.[29] Accordingly, while any proceeding that is conducted by the Tribunal under s 39(1) may be relatively "inexpensive",[30] it is also not of the same nature or quality as the exercise of supervisory jurisdiction by the Supreme Court.

25.2 The Tribunal on referral under s 39(1) may make an order as described in s 39(4): to make a declaration, and/or to direct that the planning authority must not adopt the amendment or the Minister must not approve the amendment unless the Minister, planning authority or a panel takes action specified by the Tribunal. However, the Tribunal may not (for example) make an order equivalent to certiorari, which retrospectively annihilates the legal consequences (or purported legal consequences) of an exercise of statutory power.[31] Even if it be the case that, "in practical terms", the Minister may be precluded from approving an amendment until a specific action directed by order made under s 39(4) is taken, that is not a substitute for the Supreme Court's supervisory jurisdiction. As the Supreme Court has recently held, the jurisdiction of the Tribunal under s 39 of the Planning Act is "limited"[32] and "is not the same as the Supreme Court's jurisdiction to supervise the legality of decisions made by lower courts and tribunals".[33]

[27] (2010) 239 CLR 531 at [108] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[28] South Australia [6].

[29] Cf. VCAT Act, Pt 2. Insofar as a referral under s 39(1) of the Planning Act raises a question of law, that must be decided by "a judicial member or a member who is an Australian lawyer": see VCAT Act s 107(1). *If* the Tribunal is constituted by a judicial member (which is *not* required), that judicial member might be a County Court judge: "judicial member" is defined in s 3 as the President or a Vice-President. The President must be a judge of the Supreme Court (s 10), but a Vice President must be a judge of the County Court (s 11).

[30] Cf. Minister [35].

[31] See, e.g., *Australian Education Union v General Manager, Fair Work Australia* (2012) 246 CLR 117 at [46] (French CJ, Crennan and Kiefel JJ), [113] (Heydon J); *Minister for Immigration and Citizenship, Migrant Services and Multicultural Affairs v Moorcroft* (2021) 273 CLR 21 at [7] (Kiefel CJ, Keane, Gordon, Steward and Gleeson JJ).

[32] ***Rockford*** *Constant Velocity Pty Ltd* [2024] VSC 343 at [66] (Quigley J).

[33] *Rockford* [2024] VSC 343 at [88] (Quigley J).

25.3 A so-called "appeal" from an order of the Tribunal under s 148(1) of the VCAT Act is, in reality, in the nature of judicial review of the Tribunal's order.[34] The "appeal" does not involve a substitutionary jurisdiction; nor is the "appeal" *de novo* or by way of rehearing. Section 148(7) does not alter or enlarge the nature of the (judicial review) jurisdiction conferred on the Court by s 148(1).[35] Accordingly, any appeal to the Supreme Court is essentially confined to identifying legal error in the exercise of the Tribunal's limited statutory function, which (as explained at [25.1] and [25.2] above) is not equivalent to the Court's supervisory jurisdiction. It also follows that any discretion exercised by the Tribunal under s 39 could not simply be re-exercised, and in that sense "corrected", by the Court on the "appeal" to it under s 148 of the VCAT Act.

25.4 An application made to the Supreme Court for judicial review from a Tribunal decision is similarly concerned with identifying legal error in the exercise of the Tribunal's limited statutory function. For that reason, the Supreme Court has held that the existence of the statutory appeal mechanism in s 148(1) of the VCAT Act is an important discretionary reason for refusing relief on an application for judicial review.[36]

26 This Court need not resolve any question about the "precise form" of order that must be available to a Supreme Court in order for it to be able to exercise its constitutionally-entrenched supervisory jurisdiction.[37] Plainly, orders of the kind that Order 56 of the *Supreme Court (General Civil Procedure) Rules 2025* (Vic) contemplates (an order "in the nature of" certiorari etc.) involve no functional difference to the historic writs. Perhaps other statutory conferrals of power on a Supreme Court, such as those discussed in *Marmota Ltd v Commissioner of State Taxation*[38] and referred to by South Australia,[39] are functionally equivalent. However, the indirect pathway via s 39(1) of the Planning Act and s 148(1) of the VCAT Act is *not* equivalent to supervisory jurisdiction exercised

[34] ***Osland*** *v Secretary to the Department of Justice* (2010) 241 CLR 320 at [18] (French CJ, Gummow and Bell JJ). Recently, in *Secretary to the Department of Health v Davis* [2025] VSCA 40 at [42]-[44], the Court of Appeal (Niall CJ, Emerton P and Kaye JA) emphasised the "restricted nature of the appeal" under s 148.

[35] *Osland* (2010) 241 CLR 320 at [19] (French CJ, Gummow and Bell JJ).

[36] See, e.g., *McKechnie v Victorian Civil and Administrative Tribunal* [2020] VSC 454 at [71] (Cavanough J).

[37] Cf. Commonwealth [26], referring to *Kirk* (2010) 239 CLR 531 at [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ): "the grant of prerogative relief or orders in the nature of that relief".

[38] [2025] SASCA 11.

[39] South Australia [18]-[20].

"through" the issue of writs (*Kirk* at [98]) "by" the Supreme Court (*Kirk* at [99]).

C RELIEF SOUGHT NOT AVAILABLE OR ENTRENCHED?

27 The Minister submits that neither an order in the nature of certiorari, nor a declaration, is "available", with respect to purported exercises of power by the Panel or the Council on the basis of her contention that the IGA parties' complaints do not sound in jurisdictional error.[40] Insofar as this submission is intended to support the notion that the originating motion was incompetent — i.e., that the IGA parties are prohibited from bringing the action *alleging* jurisdictional error in the Supreme Court — being the only question before this Court, then it is wrong for the same reasons explained in Part V.A.

10 28 The Minister also appears to submit that s 39(8) of the Planning Act precludes the IGA parties from seeking an injunction to restrain the Minister from approving the amendment under s 35. This argument also collapses. The IGA parties expressly contend that the Minister *would* jurisdictionally err if she purported to approve an amendment in circumstances where the Council adoption decision is invalid,[41] and seek an injunction (or potentially prohibition[42]) to restrain the purported exercise of power that is not available. That being so, for same reasons explained in Part V.A, the originating motion is competent: it is a matter for the Trial Division whether the contention that the Minister would jurisdictionally err if she purported to approve the amendment is made out.

20 29 Furthermore, or alternatively, for the reasons already explained, the IGA parties cannot be prohibited from bringing an action *alleging* that the Panel's report and the Council's adoption decisions are invalid and (for example) seeking an order in the nature of certiorari to quash those exercises of power, and s 39(8) does *not* in terms preclude the IGA parties from seeking ancillary relief, including an injunction restraining the Minister from approving an amendment, which the IGA parties contend would be unlawful as a consequence *even if* not invalid.[43]

[40] Minister [54]-[56] (regarding an order in the nature of certiorari) and [60] (regarding declaratory relief).

[41] See originating motion [39] and [41] (**AFM 21-22**), which expressly contend that the Minister "has no power" to approve the amendment, if the Council adoption decision is invalid.

[42] If the Supreme Court deems that alternative form of order to be fit: cf. prayer 6 in the originating motion (**AFM 7**).

[43] Cf. *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [100] (McHugh, Gummow, Kirby and Hayne JJ); *Miller v Minister for Immigration, Citizenship and Multicultural Affairs*

30 The Minister also criticises[44] the Court of Appeal for error in the application of principle at *J* [108]-[112] **CAB 34-35**. The Court of Appeal observed that while steps taken by a planning authority or panel do not have final legal or operative effect, "[t]hat does not mean that they lack legal significance or that, putting s 39(8) to one side, they could not be subject to judicial review". The Court of Appeal identified numerous examples.

31 There is no error in the Court of Appeal's analysis. Putting aside amendments prepared by the Minister, the adoption and submission of an amendment by a planning authority is a precondition to the Minister approving an amendment: s 35(1)(a). The Minister's submissions appear to suggest that she could simply ignore the adopted amendment (Minister [57]), but without an adopted amendment that has been submitted to her, the Minister has nothing to approve. The panel's report, in turn, is a mandatory consideration for the planning authority before it can decide whether or not to adopt an amendment: s 27(1).[45] Thus, both the panel report and the adoption of an amendment by the planning authority are preconditions or essential steps in the process leading to the approval of an amendment under s 35 and, applying the reasoning in *Hot Holdings Pty Ltd v Creasy*,[46] are decisions in respect of which certiorari may issue.

32 The Minister also submits, relying on the Queensland Court of Appeal's decision in ***Clark*** *v Cook Shire Council*,[47] that an approval of an amendment under s 35 of the Planning Act does not affect legal rights.[48] *Clark* was not about the availability of certiorari but rather the construction of s 16(2) of the *Integrated Planning Act 1997* (Qld) and the circumstances in which a modified planning scheme is "significantly different" from a notified planning scheme. An amendment under s 35 of the Planning Act would adjust the rights of parties to use or develop land,[49] and consequently the preconditions to the exercise of that power must be regarded as having "a discernible or apparent legal effect upon rights".[50] This is supported by decisions of the Queensland

(2024) 278 CLR 628 at [25] (Gageler CJ, Gordon, Edelman, Jagot and Beech-Jones JJ); *Attorney-General (Tas) v Casimaty* (2024) 98 ALJR 1139 at [32] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ).

44 Minister [57]-[59].

45 Cf. Minister [58], which misstates the Court of Appeal's reasoning.

46 (1996) 185 CLR 149.

47 [2008] 1 Qd R 327.

48 Minister [59].

49 Here, the Panel recommended, and the Council adopted, an amendment to the Scheme which (if approved) would change existing rights by allowing for the IGA parties' commercial competitor — the fifth respondent — to use land in the relevant zone for a supermarket "as of right" without obtaining a permit.

50 *Hot Holdings* (1996) 185 CLR 149 at 159 (Brennan CJ, Gaudron and Gummow JJ).

Court of Appeal[51] and courts in other jurisdictions[52] which have recognised that the steps in the process leading to a planning scheme amendment are amenable to judicial review.

33 Queensland's submissions that neither declaratory[53] nor injunctive[54] relief are constitutionally entrenched in the context of the exercise of a Supreme Court's supervisory jurisdiction are doubtful. As this Court held in *Kirk*, "[l]egislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power":[55] that is apt to include declaratory and injunctive relief where appropriate. That is especially so, given that this Court has held that a Supreme Court has "inherent power" to grant declaratory relief[56] and that, in the context of s 75(v) of the Constitution, injunctive relief is "a means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them".[57] As for Queensland's reliance[58] on *Kaldas v Barbour*,[59] that was a case involving a bare declaration, and indeed the Attorney General for New South Wales emphasised in submissions that the correct question was whether the power to grant a bare declaration, rather than as ancillary relief in the context of an application for prerogative relief (as in the case of the IGA parties' application), should properly be seen as part of the court's supervisory jurisdiction.[60]

34 In any event, the short answer to Queensland's submissions is that s 39(8) does not

[51] *Resort Management Services Ltd v Noosa Shire Council* [1995] 1 Qd R 311 at 318 (Fitzgerald P, Pincus JA and Moynihan J).

[52] *Mackenzie v Head, Transport for Victoria* [2020] VSC 328 at [144], [147] (Richards J); *R v Resource Planning & Development Commission; Ex parte Dorney (No 2)* (2003) 12 Tas R 69 at [7] (Blow J); *Carcione Nominees Pty Ltd v Planning Commission (WA)* (2005) 30 WAR 97 at [68] (Murray, Steytler and McKechnie JJ); *Re MacTiernan; Ex parte Coogee Coastal Action Coalition Inc* (2005) 30 WAR 138 at [49] (McLure JA, Wheeler and Pullin JJA agreeing).

[53] Queensland [6]-[20].

[54] Queensland [21].

[55] *Kirk* (2010) 239 CLR 531 at [100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). See also *Public Service Association of South Australia v Industrial Relations Commission (SA)* (2012) 249 CLR 398 at [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ): "Provisions such as s 206 of the Fair Work Act are to be read in a manner that takes into account the incapacity of State legislatures to take from the Supreme Courts their ability to grant relief for jurisdictional error."

[56] *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581 (Mason CJ, Dawson, Toohey and Gaudron JJ).

[57] *Plaintiff S157* (2003) 211 CLR 476 at [104] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

[58] Queensland [16]-[17].

[59] (2017) 107 NSWLR 341.

[60] (2017) 107 NSWLR 341 at [114] (Bathurst CJ).

purport to circumscribe the forms of *relief* that may be issued by the Supreme Court in the exercise of its constitutionally-entrenched jurisdiction. While it may be, as the Court of Appeal contemplated (*J* [97] **CAB 31-32**), that Parliament did not anticipate the *Kirk* constitutional limit when s 39(8) (or its predecessors) were enacted, and intended that all complaints about failures to comply with relevant provisions of the Act must be funnelled through the Tribunal under s 39(1), s 39(8) must now be read down in light of *Kirk*, and thereby as not precluding review for jurisdictional error. Read down in that way, s 39(8) should be understood as taking the Supreme Court as it finds it, with all of the ordinary incidents of power (inherent and statutory) available to give effect to its disposition on judicial review for jurisdictional error as appropriate,[61] including the power to grant declaratory and injunctive relief. If recourse to this principle of construction is necessary, it is also noted that a "basic rule" applying to privative clauses is that they are "strictly construed", because it is presumed that the Parliament does not intend to cut down the jurisdiction or power of the courts save to the extent that the legislation in question expressly so states or necessarily implies.[62]

D PREMISE 2 IS WRONG

35 If it be necessary to decide (and the IGA parties say that it is not), the IGA parties would submit that "premise 2" reflected in [5.2] is wrong.

36 The Court of Appeal construed s 39 of the Planning Act having regard to its text, context and purpose and, applying that orthodox approach, correctly concluded that s 39(7) did not have the effect of rendering a failure to comply with Part 3 Divisions 1 to 3 or Part 8 non-jurisdictional prior to the approval of a planning scheme amendment under s 35 (*J* [101]-[113] **CAB 32-35**; cf Minister [20]-[21]).

37 As noted, s 39(7) — on which much attention has been focused by the Minister and intervenors — has no application here (given that the amendment has not been approved by the Minister), although it forms part of the statutory context in which s 39(8) is to be

[61] See, e.g., *Electric Light & Power Supply Corp Ltd v Electricity Commission of New South Wales* (1956) 94 CLR 554 at 559-560 (the Court); *Houssein v Under Secretary. Department of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88 at 95-96 (the Court); *Mansfield v Director of Public Prosecutions (WA)* (2006) 226 CLR 486 at [7] (Gleeson CJ, Gummow, Kirby, Hayne and Crennan JJ); *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police (WA)* (2008) 234 CLR 532 at [19] (Gummow, Hayne, Heydon and Kiefel JJ).

[62] *Plaintiff S157/2002* (2003) 211 CLR 476 at [72] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). See also *Public Service Association (SA) v Federated Clerks' Union (South Australian Branch)* (1991) 173 CLR 132 at 160 (Dawson and Gaudron JJ); *Darling Casino Ltd v New South Wales Casino Control Authority* (1997) 191 CLR 602 at 633 (Gaudron and Gummow JJ).

construed. As the Court of Appeal found, however, s 39(7) (despite its contextual relevance) ultimately has limited bearing on the proper construction of s 39(8).[63]

38 The crux of the Minister's submissions is set out at [45]:

38.1 s 39(7) manifests a legislative policy that a failure to comply with relevant provisions of the Act is not intended to result in invalidity (although invalidity of precisely *what* exercise of power is not identified); and

38.2 that "[a]lthough 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".

10 39 As the Court of Appeal observed, the Minister's submission does not grapple with the statutory text (*J* [102]-[103] **CAB 32**). Section 39(7) states that "an amendment which has been approved" is not made invalid by a failure to comply with Part 3 Divisions 1 to 3 or Part 8. "[T]he protection it purports to afford"[64] is to an amendment, once *approved*. It does not purport to provide any protection to the steps anterior to an approval decision by the Minister under s 35 (such as a report of a panel under s 25, and a decision by a planning authority to adopt an amendment under s 29). As the Court of Appeal stated, "[h]ad it been Parliament's intention to apply s 39(7) to specified anterior steps, or to all of them, it could easily have expressed that intention in the text of the provision" (*J* [103] **CAB 32**). There was no error in the Court of Appeal's approach of
20 asking if there was any warrant for extending the scope of s 39(7) beyond what its words say, or the Court's conclusion ("no").[65]

40 That construction of s 39(7) is supported by its statutory context and purpose. While s 39(7) addresses the consequences of a failure to comply with Part 3 Divisions 1 to 3 or Part 8 where an amendment *has* been approved, s 39(8) addresses the consequences of a failure to comply with those provisions where an amendment has *not* been approved. Section 39(8) does not say that non-compliance does not result in invalidity. The difference in statutory language between s 39(7) and s 39(8) suggests that where an amendment has not been approved, Parliament did not intend to protect anterior steps from invalidity for non-compliance with Part 3 Divisions 1 to 3 and Part 8.

63 Cf. New South Wales [26]-[34].
64 *Plaintiff S157* (2003) 211 CLR 476 at [70] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
65 Cf. Minister [40].

41 As the Minister acknowledges,[66] the procedures set out in Part 3 Divisions 1 to 3 and Pt 8 have a public importance. Many of those procedures are set out in imperative terms which, while not determinative,[67] form part of the relevant statutory context: a planning authority *must* consider submissions made to it (s 22(1)); a panel *must* consider all submissions referred to it (s 24); the planning authority *must* consider the panel's report before deciding whether or not to adopt the amendment (s 27(1)); and a planning authority may adopt an amendment *after* complying with Part 3 Divisions 1 to 2 (s 29(1)). What this statutory structure reveals is a series of steps which conduce to the express objectives of the planning framework of establishing a procedure for amending planning schemes "with appropriate public participation in decision making" and ensuring that those affected by changes in planning policy receive appropriate notice: s 4(2), and see the Court of Appeal's reasoning at *J* [105] **CAB 33**. Like the provisions of the *Mining Act 1978* (WA) considered in ***Forrest*** *& Forrest Pty Ltd v Wilson*,[68] the express terms and the structure of the provisions as "sequential steps in an integrated process leading to the possibility of" the approval of an amendment makes clear that the provisions are "essential preliminaries" to the exercise of the power conferred by s 35.

42 The Minister relies on *Deputy Commissioner of Taxation v* ***Richard Walter*** *Pty Ltd*[69] and *Federal Commissioner of Taxation v* ***Futuris*** *Corporation Ltd*[70] and submits that s 39(7) of the Planning Act is akin to s 175 of the *Income Tax Assessment Act 1936* (Cth) (**ITAA**) as considered in those decisions.[71] However, the analogy the Minister seeks to draw between s 39(7) of the Planning Act and s 175 of the ITAA is inapt. The statements in *Futuris* were directed to "the validity of an assessment",[72] not to any anterior steps (the procedures in Part 3 Divisions 1 to 3 and Part 8 of the Planning Act have no equivalent in the ITAA). And, as the reasoning in *Futuris* makes clear, s 175 was construed in its specific statutory context, including s 177(1). There is no equivalent to s 177(1) in the Planning Act.

43 The Minister places emphasis on the "supervening power" conferred upon her to decide

66 Minister [28].
67 *Miller* (2024) 278 CLR 628 at [28] (Gageler CJ, Gordon, Edelman, Jagot and Beech-Jones JJ).
68 (2017) 262 CLR 510 at [63] (Kiefel CJ, Bell, Gageler and Keane JJ).
69 (1995) 183 CLR 168.
70 (2008) 237 CLR 146.
71 Minister [41]-[45].
72 (2008) 237 CLR 146 at [24] (Gummow, Hayne, Heydon and Crennan JJ).

the matters with which the anterior procedures are concerned.[73] However, as the Court of Appeal explained, the Planning Act makes clear that each of the planning authority and the panel have a distinct and important role in the process established under the Act (*J* [104] **CAB 33**). As the Court of Appeal observed, the Minister's ultimate power in s 35 to approve an amendment "is not a foregone conclusion"; the statutory scheme contemplates that the exercise of the power in s 35 will, consistent with the objectives set out in s 4(2), be informed by the anterior steps set out in Part 3 Divisions 1 to 3 and Part 8 (*J* [105]-[107] **CAB 33**). The Court of Appeal's analysis in that respect was entirely consistent with the reasoning of the joint judgment in *Forrest* regarding s 71 of the *Mining Act 1978* (WA), which similarly conferred upon the Minister a "supervening power" conditioned on anterior procedural steps.[74]

44 That the Minister has a power under s 20(4) to disapply the procedures in Part 3 Divisions 1 to 2 and Part 8 says nothing about whether a failure to comply with the procedures may lead to invalidity in anterior steps.[75] The requirements of Part 3 Divisions 1 to 2 and Part 8 are, as the Minister accepts, obligatory unless displaced under s 20(4), and the statutory context set out above demonstrates that compliance with those requirements is integral to the scheme.

45 As to the fact that an amendment approved by the Minister may be revoked by Parliament (within 10 sitting days of notice of the approval being laid before Parliament) (Minister [27], [32]-[33]), that form of parliamentary accountability is not a substitute for the supervisory jurisdiction of a court. In *Disorganized Developments Pty Ltd v South Australia*,[76] the Court considered whether the power to make regulations declaring areas of land to be "prescribed places" for the purposes of the *Criminal Law Consolidation Act 1935* (SA) was impliedly conditioned on the observance of procedural fairness. The regulations were subject to scrutiny by the Statutory Review Committee and potential disallowance under the *Subordinate Legislation Act 1978* (SA). The joint judgment observed that "the general and limited oversight of the regulation-making power by a Parliamentary Committee and the availability of disallowance are not a source of an implication to exclude procedural fairness"; it could

[73] Minister [30].
[74] (2017) 262 CLR 510 at [5], [63] (Kiefel CJ, Bell, Gageler and Keane JJ).
[75] Cf. Minister [31].
[76] (2023) 280 CLR 515.

not be said that oversight of that kind would involve consideration of matters that might be raised if procedural fairness was afforded and that might avoid the arbitrary exercise of the regulation-making power.[77] By analogy, the general and limited oversight of planning scheme amendments by Parliament cannot be said to involve consideration of the matters that might be raised in a judicial review proceeding in the supervisory jurisdiction of the Supreme Court. The accountability provided by the disallowance of subordinate legislation by parliamentary oversight "admit[s] of the making of political value judgments" which "one way or the other, can be responsive to perceptions of public opinion concerning the desirability or otherwise of the subordinate legislation concerned".[78] In contrast, judicial review derives its legitimacy and constitutional importance from the rule of law, and "its purpose is to provide individuals with a mechanism to challenge the lawfulness of the exercise of official power".[79]

46 The "incongruity" relied upon by the Minister between the operation of s 39(7) and the notion that an anterior step may be invalid[80] does not arise. As the Court of Appeal explained (*J* [111] **CAB 34**), the policy reasons underpinning a provision that preserves the validity of an approved amendment do not apply to the anterior steps. It is an approved amendment that "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".[81] Those policy considerations do not apply where an amendment has *not* been approved.

47 The Minister emphasises that s 39(1) confers jurisdiction on the Tribunal to deal with any complaint of a failure to comply with Part 3 Divisions 1 to 3 or Part 8 prior to approval of an amendment, and submits that s 39(1) and s 39(8) manifest a legislative intention that any such complaints should fall exclusively within province of the Tribunal.[82] To the contrary, as the Court of Appeal observed, by providing for a form of review in the Tribunal, s 39(1) recognises that a failure to comply with Part 3 Divisions 1 to 3 or Part 8 may have a significant effect on interests (*J* [110] **CAB 34)**. The

[77] (2023) 280 CLR 515 at [42] (Kiefel CJ, Gageler, Gleeson and Jagot JJ); cf AS fn 38 citing the dissenting reasons of Steward J.

[78] *Seafish Tasmania Pelagic Pty Ltd v Minister for Sustainability, Environment, Water, Population and Communities (No 2)* (2014) 225 FCR 97 at [68] (Logan J).

[79] *MZPAC v Minister for Immigration and Border Protection* (2021) 273 CLR 506 at [99] (Gordon and Steward JJ).

[80] Minister [45].

[81] *Grollo Australia Pty Ltd v Minister for Planning and Urban Growth and Development* [1993] 1 VR 627 at 644 (Brooking J). See Minister [46].

[82] Minister [34]-[35].

Tribunal's powers in s 39(4), including to direct the Minister, planning authority or a panel to comply with a requirement of Part 3 Divisions 1 to 3 or Part 8 as a precondition to a planning authority adopting an amendment or the Minister approving an amendment reinforces that compliance with those provisions *is* an "essential preliminary".[83]

48 The Minister submits that the construction of s 39 adopted by the Court of Appeal would be contrary to the legislative intention of allowing planning matters to be decided quickly and inexpensively by a specialist tribunal, and would lead to public inconvenience.[84] However, the statutory objective of timely review of decisions must be balanced against the other objectives expressly recognised by the Planning Act, including ensuring appropriate public participation in decision-making: s 4(2)(h). There is no warrant for construing s 39 so as to pursue the objective of efficiency at all costs.[85] Indeed, as the Court of Appeal pointed out (*J* [113] **CAB 35**), the existence of a right of review by the Tribunal shows that the Planning Act does not prioritise speed and certainty over all other considerations.

E THE DECISION IN *EAST MELBOURNE*

49 As stated above, the Court of Appeal reached its conclusion without relying on the decision in *East Melbourne* regarding the scope of s 39(7).[86] This Court, likewise, does not need to consider the correctness of *East Melbourne*.[87]

50 However, if it be necessary, the IGA parties would submit that the construction in *East Melbourne* should not be overturned. As the majority in *East Melbourne* observed, the express textual limitation in s 39(7) to specified parts of the Planning Act, in conjunction with the heading to s 39, supports the conclusion that s 39(7) is concerned with defects in procedure.[88] While the heading to s 39 does not form part of the Act,[89] it is relevant extrinsic material.[90] This construction of s 39(7) is supported by the statutory context provided by s 39(8): the corollary of s 39(8) is to permit action where an amendment

83 Cf. Minister [34].
84 Minister [36]-[37].
85 See *Carr v Western Australia* (2007) 232 CLR 138 at [5] (Gleeson CJ).
86 (2008) 23 VR 605 at [379] (Ashley and Redlich JJA).
87 Minister [50]-[51].
88 (2008) 23 VR 605 at [368] (Ashley and Redlich JJA).
89 *Interpretation of Legislation Act 1984* (Vic) s 36(3). The heading "Defects in procedure" formed part of the Planning Act as originally enacted.
90 *R v A2* (2019) 269 CLR 507 at [40] (Kiefel CJ and Keane J); *Tran v Commonwealth* (2010) 187 FCR 54 at [9] (Lander J), [65] (Rares J), [202] (Besanko J).

has been approved, yet such action would be essentially pointless if s 39(7) was to be construed as precluding review for jurisdictional error.

51 The majority's judgment in *East Melbourne* has long been acted on by participants, the Minister, the Tribunal and the Court. Indeed, the construction in *East Melbourne* has, until recently, been positively endorsed by the Minister.[91] Overturning *East Melbourne* would (at least) call into doubt the validity of numerous Tribunal decisions made in adherence to the construction in *East Melbourne* (in particular, where the Tribunal has held that it has no jurisdiction to determine a contention of jurisdictional error).

52 Section 39 has also been amended on two occasions since *East Melbourne* was handed down.[92] On neither occasion was any amendment made to the text of ss 39(1), (7) or (8). Given the time that has elapsed since the majority's judgment in *East Melbourne*, and the well-established meaning given to s 39 in light of that judgment,[93] the Court should infer that there has been an "implicit legislative endorsement" of that construction.[94] This proposition is reinforced where, as here, s 39 appears in a specialised or technical statute which is subject to frequent amendment.[95]

PART VII: ESTIMATE

53 The first and second respondents will require 3 hours to present oral submissions.

Dated: 19 March 2026

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[91] See, e.g., *Dustday Investments Pty Ltd v Minister for Planning* (2015) 207 LGERA 188; *Coastal Estates Pty Ltd v Bass Coast Shire Council* (2010) 177 LGERA 390.

[92] Section 39(4)(b)(i) was amended by s 70(2) of the *Planning and Environment Amendment (General) Act 2013* (Vic), and s 39(9) was inserted by s 127 of the *Suburban Rail Loop Act 2021* (Vic).

[93] See *Rockford* [2024] VSC 343 at [96], [112]-[122] (Quigley J).

[94] *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137 at [20]-[21] (the Court). See also *Director of Public Prosecutions Reference No 1 of 2019* (2021) 274 CLR 177 at [16] (Kiefel CJ, Keane and Gleeson JJ).

[95] *Director of Public Prosecutions Reference No 1 of 2019* (2021) 274 CLR 177 at [16] (Kiefel CJ, Keane and Gleeson JJ).

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

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

ANNEXURE TO THE FIRST AND SECOND RESPONDENTS' SUBMISSIONS

No	Description	Provisions	Version	Reason for providing this version	Applicable date(s)
Commonwealth					
1.	*Constitution*	Ch III	Current	Currently in force	All relevant dates
State					
2.	*Interpretation of Legislation Act 1984* (Vic)	s 36	Current	Currently in force	All relevant dates
3.	*Planning and Environment Act 1987* (Vic)	s 4, Part 3 Divisions 1-3, Part 8	Authorised Version 156	Version in force at time of filing of Originating Motion	5 June 2024 to 25 March 2025
4.	*Victorian Civil and Administrative Tribunal Act 1998* (Vic)	ss 3, 8-14, 107, 148	Current	Currently in force	All relevant dates