HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

ON APPEAL FROM THE COURT OF APPEAL OF THE SUPREME COURT OF VICTORIA

BETWEEN:

MINISTER FOR PLANNING (VIC)
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

SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

PART I — CERTIFICATION

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

PARTS II AND III — INTERVENTION

2. The Attorney-General of the **Commonwealth** intervenes in this proceeding pursuant to s 78A of the *Judiciary Act 1903* (Cth), in support of the appellant.

PART IV — ARGUMENT

3. The Commonwealth makes no submission in respect of the construction of ss 39(7)-(8) of the *Planning and Environment Act 1987* (Vic). As to principles which may be applicable to the assessment of the constitutional validity of those provisions, the Commonwealth advances the following propositions:

3.1 The Commonwealth and State Parliaments have broad legislative competence to create and define the duties, powers and jurisdiction of executive decision-makers, as well as to regulate the exercise of jurisdiction by Ch III courts, subject to constitutional limits. In respect of State Parliaments, the presently relevant constitutional limit on that broad legislative competence derives from ***Kirk*** *v Industrial Court (NSW)*:[1] legislation which would deny a State Supreme Court the power to grant relief in respect of jurisdictional error is beyond State legislative power.

3.2 The critical question in determining whether an exercise of power in breach of a condition of a conferral of decision-making authority is vitiated by jurisdictional error is whether there can be discerned a legislative purpose to invalidate such an exercise. Ordinary principles of statutory construction apply when answering that question. One consideration to be given significant weight in the assessment is any statement by Parliament that such an exercise of power is not to be rendered void by reason of non-compliance with the condition.

3.3 If, properly construed, non-compliance with a particular condition goes to jurisdiction, then consistently with *Kirk*, such a decision must be subject to the supervisory jurisdiction of a State Supreme Court. If the consequence of non-compliance is not jurisdictional, then *Kirk* imposes no limitation on State

[1] (2010) 239 CLR 531.

legislative competence. Further, *Kirk* imposes no limitation on State legislative competence where the decision under review, by its nature, is not susceptible to the grant of relief in the nature of certiorari, prohibition or mandamus.

3.4 There is no reason, at the level of principle, why the supervisory jurisdiction of a State Supreme Court could not be capable of being exercised through the mechanism of an appeal to the Court. The question as to compliance with the *Kirk* limitation will in any case be whether, as a matter of substance, the Court can grant relief for jurisdictional error in the exercise of its supervisory jurisdiction so as to secure the effective control of decision-makers (even if relief in the nature of certiorari, prohibition or mandamus has been excluded by legislation).

(a) Construing the limits of statutory powers

4. **The breadth of Parliament's legislative choice**. Within the limits of their legislative capacities, "which are themselves set by the Constitution", the Commonwealth and State Parliaments have broad legislative competence to "create … and define" the duties, powers and jurisdiction of executive decision-makers, and to "determine the content of the law to be obeyed".[2] The Commonwealth and State Parliaments also have broad power to regulate the exercise of jurisdiction by Ch III courts, including through regulating the procedure to be followed in the exercise of their jurisdiction, specifying how courts are to undertake their fact-finding task and, in some circumstances, "limiting [the] admission of relevant evidence".[3] That broad legislative competence reflects the position that each Parliament has, "within the ambit of its authority, sovereign power".[4] Provided that a law is within power, "the justice and wisdom of the

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2 ***Plaintiff S157/2002*** *v Commonwealth* (2003) 211 CLR 476 at [5], see also at [6] (Gleeson CJ), quoted with approval in ***Graham*** *v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at [44] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

3 See *Graham* (2017) 263 CLR 1 at [47], and see also [31] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ) and the cases referred to therein. See also *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at [39] (Gummow, Hayne, Heydon and Kiefel JJ); *X7 v Australian Crime Commission* (2013) 248 CLR 92 at [48] (French CJ and Crennan J); *Kuczborski v Queensland* (2014) 254 CLR 51 at [240]-[241] (Crennan, Kiefel, Gageler and Keane JJ).

4 Borrowing the language of *D'Emden v Pedder* (1904) 1 CLR 91 at 110 (Griffith CJ, delivering the judgment of the Court). See, to similar effect in respect of the Commonwealth Parliament, *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at [12] (Brennan CJ and McHugh J) and, in respect of State Parliaments, *Union Steamship Co of Australia v King* (1988) 166 CLR 1 at 10 (the Court).

law, and the degree to which the means it adopts are necessary or desirable, are matters of legislative choice".[5]

5. Though the breadth of legislative choice available to the Commonwealth and State Parliaments is significant, it remains subject to constitutional limits.

6. **The Commonwealth constitutional limit**. In respect of the Commonwealth Parliament, the presently relevant constitutional limit derives from Ch III of the Constitution. By reason of Ch III, the Commonwealth Parliament is incapable of investing non-Ch III decision-makers, including executive decision-makers, with the power to determine authoritatively and conclusively the limits of their own jurisdiction. To purport to invest a non-Ch III decision-maker with such a power would be to purport to confer upon them the ability to exercise the judicial power of the Commonwealth, that exclusively being the province of Ch III courts.[6] And of course, the jurisdiction of this Court to enforce the law as enacted is relevantly secured by s 75(v) of the Constitution, which confers jurisdiction in all matters "[i]n which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth". That constitutional "jurisdiction of the Court to require officers of the Commonwealth to act within the law cannot be taken away by Parliament".[7]

7. **State constitutional limits**. In respect of State Parliaments, the presently relevant constitutional limit is that articulated in *Kirk*. As there explained, State Supreme Courts, to answer their constitutional description, must remain capable of determining and enforcing the limits "on the exercise of State executive and judicial power by persons and bodies other than the Supreme Court".[8] For State Parliaments to legislate otherwise "would be to create islands of power immune from supervision and restraint",[9] in derogation of both the established supervisory jurisdiction of State Supreme Courts at

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5 *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479 at [16] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ), cited eg in *Spence v Queensland* (2019) 268 CLR 355 at [57] (Kiefel CJ, Bell, Gageler and Keane JJ) and *Ravbar v Commonwealth* (2025) 99 ALJR 1000 at [90] (Gordon J), [206] (Edelman J). See also *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 262 (Fullagar J).

6 *Plaintiff S157/2002* (2003) 211 CLR 476 at [9] (Gleeson CJ) and [75] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). See more generally *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 26-7 (Brennan, Deane and Dawson JJ); *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at [50] (McHugh J); *Private R v Cowen* (2020) 271 CLR 316 at [43] (Kiefel CJ, Bell and Keane JJ); ***YBFZ*** *v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at [6], [13] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

7 *Plaintiff S157/2002* (2003) 211 CLR 476 at [5], see also at [6] (Gleeson CJ).

8 *Kirk* (2010) 239 CLR 531 at [98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

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

Federation and the federal judicial structure contemplated by the Constitution.[10] To recognise that position "is not to say that no privative provision is valid".[11] Rather, it is to focus attention on the distinction between "jurisdictional and non-jurisdictional error in the Australian constitutional context", that distinction "mark[ing] the relevant limit on State legislative power" (see Appellant's Submissions (**AS**) at [22]).[12] Legislation which would deny a State Supreme Court "power to grant relief on account of jurisdictional error is beyond State legislative power"; legislation denying relief in respect of non-jurisdictional error is not.[13]

8. **Determining what constitutes jurisdictional error**. In the present context, "jurisdictional error" refers to "breach of an express or implied condition of a statutory conferral of decision-making authority which results in a decision made in the purported exercise of that authority lacking the legal force attributed to exercise of that authority by statute" (see also **AS [22]-[23]**).[14] In order to assess whether non-compliance with a particular condition goes to jurisdiction, one must "constru[e] the statute so as to understand the limits of the statutory conferral of decision-making authority".[15] This means applying the ordinary principles of statutory construction.[16] It is now trite law that 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" will all be relevant to ascertaining the legislative intention as to the consequence of non-compliance with a particular statutory condition.[17]

9. Consistently with **AS [24]**, the ultimate purpose of the constructional exercise described above is to determine "whether there can be discerned a legislative purpose to invalidate

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10 *Kirk* (2010) 239 CLR 531 at [96]-[100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
11 *Kirk* (2010) 239 CLR 531 at [100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
12 *Kirk* (2010) 239 CLR 531 at [100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
13 *Kirk* (2010) 239 CLR 531 at [100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
14 ***LPDT*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 280 CLR 321 at [2] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ).
15 *LPDT* (2024) 280 CLR 321 at [4] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ). See also *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at [27] (Kiefel CJ, Gageler and Keane JJ) and *Minister for Immigration, Citizenship and Multicultural Affairs v* ***Miller*** (2024) 278 CLR 628 at [9] (the Court); *Plaintiff S157/2002* (2003) 211 CLR 476 at [26] (Gleeson CJ); *Federal Commissioner of Taxation v* ***Futuris*** *Corporation Ltd* (2008) 237 CLR 146 at [23]-[24] (Gummow, Hayne, Heydon and Crennan JJ).
16 As to which see, eg, *Palmanova Pty Ltd v Commonwealth* (2025) 99 ALJR 1362 at [4]-[5] (Gageler CJ, Gordon, Jagot and Beech-Jones JJ) and the cases there cited.
17 ***Project Blue Sky*** *Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [91] (McHugh, Gummow, Kirby and Hayne JJ), reproduced in *Miller* (2024) 278 CLR 628 at [24] (the Court).

any act that fails to comply with the condition".[18] That is in contradistinction, for example, to where a condition regulating the "exercise of a statutory power [is] to be construed as no more than an aspiration or exhortation"[19] or where a failure to comply gives rise only to "political, administrative or other non-legal consequences" in the event of non-compliance.[20]

10. While each statutory requirement will therefore need to be carefully and separately construed,[21] one matter which will likely be significant, if not decisive, is any express statement by Parliament that a decision is not to be rendered void by reason of non-compliance with an express or implied condition of the conferral of decision-making authority — what is sometimes referred to as a "no invalidity" clause.[22]

11. As explained by Gageler J in *Alexander*, the identification of the purpose of a law, being an exercise "in attributing an objective intention to the outcome of a legislative process", bears similarities to the process of "construing a law by attributing meaning to legislated text".[23] In the context of ascertaining legislative purpose, "the constitutional relationship between the judiciary and the legislature is such that a statement of legislative purpose must be treated by a court as a solemn and presumptively accurate declaration of why a law is enacted".[24] So too, by analogy, a "no invalidity" clause should be treated as a solemn and presumptively accurate indication that particular types of non-compliance are to be treated as non-jurisdictional

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18 *Project Blue Sky* (1998) 194 CLR 355 at [91] (McHugh, Gummow, Kirby and Hayne JJ), reproduced in *Miller* (2024) 278 CLR 628 at [24] (the Court). See also *Stanley v Director of Public Prosecutions (NSW)* (2023) 278 CLR 1 at [19] (Gageler J).

19 *Miller* (2024) 278 CLR 628 at [25] (the Court), referring to *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at [9] (Bell, Gageler and Keane JJ).

20 *Attorney-General (Tas) v* ***Casimaty*** (2024) 98 ALJR 1139 at [32] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ); see also *Miller* (2024) 278 CLR 628 at [25] (the Court), referring to *Australian Broadcasting Commission v Redmore Pty Ltd* (1989) 166 CLR 454 at 459-460. And see **AS [25]**. See also *Re East; Ex parte Nguyen* (1998) 196 CLR 354. In that case, an "elaborate and special scheme" in Pt III of the *Racial Discrimination Act 1975* (Cth) required racial discrimination claims be pursued in the Human Rights and Equal Opportunity Commission (at [26], and more generally at [24]-[25] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ)). The plurality found that the allegation of racial discrimination did not "establish any right, duty or liability" of any party "because the Act provides its own, exclusive regime for remedying contraventions" and because "[t]he only right that the Act creates is a right to engage the processes prescribed by it and the duties or liabilities that are created are correlative to that right" (at [32]).

21 *Project Blue Sky* (1998) 194 CLR 355 at [91] (McHugh, Gummow, Kirby and Hayne JJ), reproduced in *Miller* (2024) 278 CLR 628 at [24] (the Court). See also *Miller* (2024) 278 CLR 628 at [28].

22 See, eg, s 175 of the *Income Tax Assessment Act 1936* (Cth) and its consideration in *Futuris* (2008) 237 CLR 146 at [24] (Gummow, Hayne, Heydon and Crennan JJ).

23 ***Alexander*** *v Minister for Home Affairs* (2022) 276 CLR 336 at [114].

24 *Alexander* (2022) 276 CLR 336 at [118] (Gageler J).

such that, absent strong reason for concluding otherwise, that designation "must be accepted and respected".[25]

12. The approach outlined above is consistent with how this Court has previously approached the interpretation of "no invalidity" clauses. In *Futuris*, the Court gave effect, on its terms, to s 175 of the *Income Tax Assessment Act 1936* (Cth), which provided that "[t]he validity of any [taxation] assessment shall not be affected by reason that any of the provisions of this Act have not been complied with". It reached that construction by reading s 175 together with s 175A, which provided that a taxpayer dissatisfied with an assessment could object against the decision in the manner set out in Pt IVC of the *Taxation Administration Act 1953* (Cth), and s 177(1), a conclusive evidence provision.[26] Having regard to the combined effect of those provisions, the Court found the result to be that "the validity of an assessment is not affected by failure to comply with any provision of the Act".[27] As such, where s 175 applied, "errors in the process of assessment [did] not go to jurisdiction and so [did] not attract the remedy of a constitutional writ under s 75(v) of the Constitution".[28]

13. A number of authorities have identified, without answering, a possible question as to whether there are certain species of jurisdictional error in respect of which a "no invalidity" clause could have no operation.[29] However, given the nature of the errors alleged in this appeal (**AS [8]**; **CAB 20 [48]**), that question does not arise and so (on the ordinary prudential approach) should not be answered.[30] In particular, both reasonableness and procedural fairness (which are raised by the first respondent) are capable of being excluded as conditions of validity, if that is done clearly and

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25 *Alexander* (2022) 276 CLR 336 at [119] (Gageler J).

26 *Futuris* (2008) 237 CLR 146 at [24] (Gummow, Hayne, Heydon and Crennan JJ). Each of the relevant provisions was reproduced at [22] (Gummow, Hayne, Heydon and Crennan JJ). Part IVC of the *Taxation Administration Act 1953* (Cth) contained a detailed scheme "for the making of taxation objections and their disposition by the Commissioner, for review by the Administrative Appeals Tribunal … and for 'appeals' to the Federal Court against decisions by the Commissioner upon certain taxation objections": see *Futuris* (2008) 237 CLR 146 at [6], and more generally at [21] (Gummow, Hayne, Heydon and Crennan JJ).

27 *Futuris* (2008) 237 CLR 146 at [24] (Gummow, Hayne, Heydon and Crennan JJ).

28 *Futuris* (2008) 237 CLR 146 at [24] (Gummow, Hayne, Heydon and Crennan JJ).

29 See, eg, *Plaintiff S157/2002* (2003) 211 CLR 476 at [82] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at [28] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ); *Futuris* (2008) 237 CLR 146 at [25], [53]-[57], [66] (Gummow, Hayne, Heydon and Crennan JJ).

30 See *YBFZ* (2024) 99 ALJR 1 at [47] (Gageler CJ, Gordon, Gleeson and Jagot JJ) and the cases there referred to.

expressly.[31] Where such clear and express exclusion has occurred, there is no constitutional impediment to non-compliance with those conditions being designated as non-jurisdictional.

(b) Legislative prescription of review of statutory decision-making

14. **Review of jurisdictional error: the *Kirk* limitation.** If, properly construed, non-compliance with an express or implied condition of a conferral of decision-making authority goes to jurisdiction, then consistently with *Kirk*, such a decision must be subject to the supervisory jurisdiction of a State Supreme Court.

15. Further to paragraph 7 above, the limitation articulated in *Kirk* is that "State legislative power does not extend to depriving a State Supreme Court of its supervisory jurisdiction in respect of jurisdictional error by the executive government of the State, its Ministers or authorities".[32] State legislative power does not so extend because State Supreme Courts must be able to meet their constitutional description as such,[33] and the exercise of a "supervisory jurisdiction enforcing the limits on the exercise of State executive and judicial power" is a "defining characteristic" of a State Supreme Court.[34]

16. Against that background, what *Kirk* requires is that, where non-compliance with an express or implied condition of a conferral of decision-making authority constitutes jurisdictional error, a State Supreme Court be capable of exercising a supervisory jurisdiction "to grant relief on account of [that] jurisdictional error".[35]

17. ***Kirk* provides no limitation where review is of non-jurisdictional error**. Consistently with the principles set out in *Kirk* as described above, and with **AS [51]**, if non-compliance with an express or implied condition of a conferral of

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31 See, in relation to procedural fairness, *Re Refugee Review Tribunal; Ex parte **Aala*** (2000) 204 CLR 82 at [41] (Gaudron and Gummow JJ); *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at [99]-[100] (Gummow, Hayne, Crennan and Bell JJ); *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180 at [75] (French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ). See, in relation to unreasonableness, *Minister for Immigration v Li* (2013) 249 CLR 332 at [92] (Gageler J); *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at [53] (Gageler J).

32 As distilled in *South Australia v Totani* (2010) 242 CLR 1 at [26] (French CJ). See also *Kirk* (2010) 239 CLR 531 at [55(f)], [99]-[100], [102] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

33 See s 73(ii) of the Constitution, and *Kirk* (2010) 239 CLR 531 at [96] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). See more generally *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at [57], [63] (Gummow, Hayne and Crennan JJ).

34 *Kirk* (2010) 239 CLR 531 at [55(f)], [98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). Though not relevant for present purposes, *Kirk* also entrenches the State Supreme Courts' supervisory jurisdiction exercised through the grant of habeas corpus: at [98].

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

decision-making authority does not go to jurisdiction, then *Kirk* imposes no limitation on State legislative competence. Rather, State Parliaments retain their broad legislative competence to prescribe how, by whom, and the extent to which, such a decision is reviewable. As such, even legislation which "denies the availability of relief for non-jurisdictional error of law appearing on the face of the record" is within power.[36]

18. ***Kirk* provides no limitation where, because of the nature of the decision under review, certiorari, prohibition or mandamus would not otherwise be available**. A further circumstance in which the *Kirk* limitation has no role to play is where the decision under review is of a kind that would not be susceptible to the issue of certiorari, prohibition or mandamus (or orders in the nature of those writs).

19. The writs of certiorari, prohibition and mandamus formed part of the supervisory jurisdiction of State Supreme Courts at Federation.[37] Against that historical background, *Kirk* explained the supervisory jurisdiction that was entrenched in the State Supreme Courts by reference to the grant of those prerogative writs "or orders in the nature of that relief" to correct jurisdictional error.[38] As explained below, this does not dictate that the supervisory control take the *form* of prerogative writs. But it does underline that where, because of the nature of the decision under review, those writs would be incapable of issuing, the *Kirk* limitation is not engaged.

20. One example of a situation in which those prerogative writs may be incapable of issuing is where an exercise of statutory power could not affect legal rights, interests, or liabilities, or where there is no statutory duty to be performed. As will be explained, in respect of each of certiorari and prohibition, a legal right or interest must be capable of being affected; in respect of mandamus, there must be a statutory duty in respect of which compliance is to be secured.[39] *Kirk* does not affect those general requirements. As a constitutional limitation, *Kirk* does not operate as a source of substantive rights, and so does not confer any power to issue those writs.[40]

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36 *Kirk* (2010) 239 CLR 531 at [100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
37 *Kirk* (2010) 239 CLR 531 at [96]-[98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
38 *Kirk* (2010) 239 CLR 531 at [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
39 See generally *Plaintiff S157/2002* (2003) 211 CLR 476 at [5] (Gleeson CJ), quoted in *Graham* (2017) 263 CLR 1 at [44] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).
40 See, by way of analogy, the position in respect of s 75(v) of the Constitution, as discussed in *Aala* (2000) 204 CLR 82 at [156] (Hayne J), *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 178 (Mason CJ) and the cases referred to therein.

21. Certiorari and prohibition. For a court to be able to issue relief in the nature of certiorari or prohibition, a legal right or interest must be capable of being affected.[41] As explained in *Ainsworth*, and referred to with approval in *Hot Holdings*, "[t]he function of certiorari is to quash the legal effect or the legal consequences of the decision or order under review".[42] Accordingly, "for certiorari to issue, it must be possible to identify a decision which has a discernible or apparent legal effect upon rights"; "[i]t is that legal effect which may be removed for quashing".[43] If a decision has no such effect, certiorari cannot issue.[44] Further, where the impugned decision represents a step in a particular process which is anterior to a final decision, the inquiry as to whether certiorari can issue will turn upon whether the decision is a "step in [the] process capable of altering rights, interests or liabilities".[45] In those circumstances, if the relevant decision has no legal effect, or no capacity to alter rights, interests or liabilities from an exercise of statutory power, certiorari cannot issue.

22. So too with prohibition, which lies to correct an excess of jurisdiction by a body which is about to act or has acted.[46] In practice, prohibition will only issue where an exercise of power is capable of "affecting existing rights", or may otherwise prejudice a person's interests,[47] as well as where a decision "made without jurisdiction remains in force so as to impose liabilities upon an individual".[48] As such, the position resembles that with respect to certiorari.

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41 See ***Hot Holdings*** *Pty Ltd v Creasy* (1996) 185 CLR 149 at 158-9 (Brennan CJ, Gaudron and Gummow JJ), discussing the dictum of Atkin LJ in *R v Electricity Commissioners; Ex parte London Electricity Joint Committee Co (1920) Ltd* [1924] 1 KB 171 at 205. As to the relationship between the existence of rights, duties and liabilities, standing to seek that relief and the "matter" requirement, see *Unions NSW v New South Wales* (2023) 277 CLR 627 at [15] (Kiefel CJ, Gageler, Gordon, Gleeson and Jagot JJ); *Hobart International Airport Pty Ltd v Clarence City Council* (2022) 276 CLR 519 at [49] (Gageler and Gleeson JJ); *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at [48]-[49] (Gaudron J).

42 *Hot Holdings* (1996) 185 CLR 149 at 159 (Brennan CJ, Gaudron and Gummow JJ), citing ***Ainsworth*** *v Criminal Justice Commission* (1992) 175 CLR 564 at 580 (Mason CJ, Dawson, Toohey and Gaudron JJ).

43 *Hot Holdings* (1996) 185 CLR 149 at 159 (Brennan CJ, Gaudron and Gummow JJ); *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1 at [28] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

44 See *Ainsworth* (1992) 175 CLR 564 at 580-1 (Mason CJ, Dawson, Toohey and Gaudron JJ) and 595 (Brennan J), as discussed in *Hot Holdings* (1996) 185 CLR 149 at 159 (Brennan CJ, Gaudron and Gummow JJ).

45 *Hot Holdings* (1996) 185 CLR 149 at 162 (Brennan CJ, Gaudron and Gummow JJ), referring to *Ainsworth* (1992) 175 CLR 564 at 580 (Mason CJ, Dawson, Toohey and Gaudron JJ).

46 *R v* ***Wright****; Ex parte Waterside Workers' Federation of Australia* (1955) 93 CLR 528 at 541-2 (the Court).

47 See *Wright* (1955) 93 CLR 528 at 542 (the Court).

48 *R v Hibble; Ex parte Broken Hill Proprietary Company Ltd* (1920) 28 CLR 456 at 463, see also at 464 (Knox CJ and Gavan Duffy J).

23. Mandamus. Similarly, where a legislative provision does not establish any legal duty, a State Supreme Court has no jurisdiction to issue mandamus: mandamus issues "to compel performance of [such a] duty".[49] In the absence of such a duty, the *Kirk* limitation can have no operation; there is nothing in respect of which the Supreme Court could exercise its supervisory jurisdiction through the grant of mandamus.

24. *Kaldas v Barbour*. The position outlined above is broadly reflected in the conclusion reached in *Kaldas v Barbour*.[50] There, following an investigation, the New South Wales Ombudsman had included in one of its reports certain adverse findings against a former Deputy Commissioner of Police.[51] The Deputy Commissioner sought relief in relation to those findings, including declaratory relief, an order restraining the Ombudsman from making any further findings or report in respect of the Deputy Commissioner in connection with the relevant investigation, and an order directing the Ombudsman to remove the report from its website and/or to republish the report without the impugned statements.[52] However, s 35A of the *Ombudsman Act 1974* (NSW) provided that the Ombudsman was not "liable, whether on the ground of want of jurisdiction or on any other ground, to any civil or criminal proceedings in respect of any act, matter or thing done or omitted to be done for the purpose of executing this or any other Act" unless that act, matter or thing involved bad faith. The fact that a recommendation or report by the Ombudsman was incapable of imposing legal liability on any member of the public, or public service employee, formed part of the Court of Appeal's reasoning in holding that the *Kirk* limitation was not transgressed by s 35A(1) of the Act.[53] As Bathurst CJ observed, "if the report of the Ombudsman is not susceptible to review by any of the prerogative writs, then s 35A does not affect the power of the court to grant such relief".[54]

25. **The supervisory jurisdiction of State Supreme Courts may be capable of being exercised by an appeal**. Even where non-compliance with a condition of a conferral of decision-making authority goes to jurisdiction, such that *Kirk* requires that a State Supreme Court be able to exercise its supervisory jurisdiction over the decision, State

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49 *Plaintiff S157/2002* (2003) 211 CLR 476 at [5] (Gleeson CJ), quoted in *Graham* (2017) 263 CLR 1 at [44] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

50 ***Kaldas*** *v Barbour* (2017) 107 NSWLR 341.

51 *Kaldas* (2017) 107 NSWLR 341 at [1], [4] (Bathurst CJ).

52 *Kaldas* (2017) 107 NSWLR 341 at [8] (Bathurst CJ).

53 *Kaldas* (2017) 107 NSWLR 341 at [156], [195]-[196] (Bathurst CJ), [353], [360]-[361] (Basten JA; Macfarlan JA agreeing at [380]).

54 *Kaldas* (2017) 107 NSWLR 341 at [156] (Bathurst CJ).

Parliaments retain a degree of choice as to the manner in which that supervisory jurisdiction is to be exercised.

26. As noted above, various statements in *Kirk* refer to the need for Supreme Courts to be able to correct jurisdictional error through the grant of relief in the nature of prohibition, certiorari and mandamus.[55] That is unsurprising, as *Kirk* itself concerned the availability of certiorari. Additionally, the reasoning in *Kirk* reflects the position that a defining characteristic of the State Supreme Courts at the time of Federation was that they exercised a supervisory role through the grant of those three prerogative writs.[56] However, *Kirk* does not constrain the precise form which a Supreme Court's supervisory control must take.[57] Rather, what is essential is that there be "supervisory jurisdiction enforcing the limits on the exercise of State executive and judicial power" so as to avoid "islands of power immune from supervision and restraint".[58] So, if legislation curtails access, in terms, to those three prerogative writs, the *Kirk* limitation will still be complied with provided that there is a substantively equivalent "power to grant relief on account of jurisdictional error".[59]

27. Such an understanding of *Kirk* coheres with the now well-accepted notion that whether a law transgresses a constitutional limitation is a question of "substance, and therefore of degree".[60] At the federal level, in connection with s 75(v) of the Constitution, the inquiry has been said to turn upon "an examination not only of the legal operation of the law but also of the practical impact of the law on the ability of a court, through the application of judicial process, to discern and declare whether or not the conditions of and constraints on the lawful exercise of the power conferred on an officer have been observed in a particular case".[61] Having regard to the nature of the *Kirk* limitation, one can similarly test the compatibility of a State legislative provision with that limitation by asking whether, as a matter of substance, a State Supreme Court remains capable of supervising the limits of executive and judicial power through the issue of relief which

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55 *Kirk* (2010) 239 CLR 531 at [55(f)], [55(i)], [55(j)], [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
56 *Kirk* (2010) 239 CLR 531 at [96]-[98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
57 See, eg, the reference to "the grant of prerogative relief *or orders in the nature of that relief*" in *Kirk* (2010) 239 CLR 531 at [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), emphasis added.
58 *Kirk* (2010) 239 CLR 531 at [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
59 *Kirk* (2010) 239 CLR 531 at [100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
60 *Graham* (2017) 263 CLR 1 at [48] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).
61 *Graham* (2017) 263 CLR 1 at [48] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

would secure, in a substantive and practical way, the kinds of protection that may otherwise have been secured through writs of certiorari, prohibition or mandamus.

28. Applying that test, there is no reason, at the level of principle, why the supervisory jurisdiction of a State Supreme Court could not be capable of being exercised through the mechanism of an appeal to that Court.[62] As long as an appeal, in its scope and incidents, provides an effective means by which the Supreme Court can grant relief for want or excess of jurisdiction as might have been secured through relief in the nature of certiorari, prohibition or mandamus, then the *Kirk* limitation may be satisfied.[63] That may be so even if an appeal only lies (in whole or in part) with the permission of the Supreme Court: indeed, the supervisory jurisdiction of State Supreme Courts was traditionally exercised in accordance with an order nisi procedure which bears some similarities to modern leave requirements.[64]

PART V — ESTIMATE OF TIME

29. It is estimated that up to 20 minutes will be required to present the Commonwealth's oral argument.

Dated: 5 March 2026

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62 The Commonwealth advances no submission as to whether or not the mechanism for appeal on a question of law provided by s 148 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) would constitute an effective means by which the Supreme Court could grant relief on account of jurisdictional error (see **AS [38]**).

63 See, eg, *R v Marks; Ex parte Australian Building Construction Employees and Builders Labourers' Federation* (1981) 147 CLR 471 at 484 (Mason J).

64 See, eg, *Aala* (2000) 204 CLR 82 at [49] (Gaudron and Gummow JJ), referring to *R v Kensington Income Tax Commissioners; Ex parte Princess Edmond de Polignac* [1917] 1 KB 486; *Symons v City of Perth* (1922) 30 CLR 433 at 435 (Knox CJ). See more generally *Ah Yick v Lehmert* (1905) 2 CLR 593 at 602 (Griffith CJ); *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 298 at [594] (French J).

ANNEXURE TO THE SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH

Pursuant to *Practice Direction No 1 of 2024*, the Commonwealth sets out below a list of the particular constitutional provisions, statutes and statutory instruments referred to in its submissions.

No	Description	Version	Provision(s)	Reasons	Applicable date(s)
Constitutional provisions					
1.	*Constitution* (Cth)	Current	Ch III	Currently in force	All relevant dates
Legislative provisions					
2.	*Income Tax Assessment Act 1936* (Cth)	20 September 2004 to 31 December 2004	Sections 175, 175A, 177(1)	Act as in force in *Futuris* (2008) 237 CLR 146	12 November 2004
3.	*Judiciary Act 1903* (Cth)	Compilation No 51 (11 December 2024 to present)	Section 78A	Currently in force	All relevant dates
4.	*Ombudsman Act 1974* (NSW)	Version No 68 (14 November 2016 to 12 January 2017)	Section 35A	Act as in force in *Kaldas* (2017) 107 NSWLR 341	20 December 2016
5.	*Planning and Environment Act 1987* (Vic)	Version No 156 (5 June 2024 to 25 March 2025)	Section 39	Act as in force at the time of filing of the Originating Motion	11 June 2024
6.	*Racial Discrimination Act 1975* (Cth)	13 October 1995 to 24 October 1996	Part III	Act as in force in *Re East; Ex parte Nguyen* (1998) 196 CLR 354	18 September 1996

No	Description	Version	Provision(s)	Reasons	Applicable date(s)
7.	*Taxation Administration Act 1953* (Cth)	1 July 2004 to 12 December 2004	Part IVC	Act as in force in *Futuris* (2008) 237 CLR 146	12 November 2004
8.	*Victorian Civil and Administrative Tribunal Act 1998* (Vic)	Version 142 (15 October 2025 to present)	Section 148	Currently in force	All relevant times