HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	M103/2025
File Title:	Minister for Planning v. IGA Retail Services Pty Ltd (ACN 00
Registry:	Melbourne
Document filed:	Form 27C - Intervener's Submissions (A-G of NSW)
Filing party:	Interveners
Date filed:	05 Mar 2026

Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M103/2025

BETWEEN:

MINISTER FOR PLANNING
Appellant

and

IGA RETAIL SERVICES PTY LTD (ACN 002 454 686)
First Respondent
SHEPPARTON PTY LTD (ACN 620 846 184)
Second Respondent
GREATER SHEPPARTON CITY COUNCIL
Third Respondent
KATHY MITCHELL AM AND PETER MARSHALL
(AS MEMBERS OF A PANEL APPOINTED BY THE
MINISTER FOR PLANNING UNDER SECTION 153 OF THE
PLANNING AND ENVIRONMENT ACT 1987)
Fourth Respondent
LASCORP INVESTMENT GROUP PTY LTD
Fifth Respondent

SUBMISSIONS OF THE ATTORNEY GENERAL FOR NEW SOUTH WALES, INTERVENING

Part I: Form of submissions

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

Part II: Basis of intervention

2. The Attorney General for New South Wales (**NSW Attorney**) intervenes in these proceedings pursuant to s 78A of the Judiciary Act 1903 (Cth) in support of the Minister for Planning (Vic) (**Appellant**).

Part III: Why leave to intervene should be granted

3. Leave to intervene is not required.

Part IV: Argument

Summary of argument

4. The NSW Attorney adopts the submissions of the Appellant and makes the following supplementary submissions:

   a. First, it is within the legislative power of a State Parliament to determine the scope of statutory decision-making authority. Whether an instance of non-compliance with a statutory decision-making process exceeds that scope, resulting in jurisdictional error, is a question of statutory construction: Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355 (**Project Blue Sky**) at [91].

   b. Secondly, the constitutional limitation recognised in Kirk v Industrial Relations Commission (NSW) (2010) 239 CLR 531 (**Kirk**) is concomitant with Parliament's latitude to prescribe the scope of a decision-maker's jurisdiction: Kirk at [100]. Whether a privative clause infringes the Kirk limitation falls to be determined only after the scope of a decision-maker's authority has been determined according to the orthodox process of statutory construction in light of text, context and purpose: LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (2024) 280 CLR 321 (**LPDT**) at [2]–[4].

   c. Thirdly, when assessing the scope of a decision-maker's jurisdiction according to the statutory text, context and purpose, a no invalidity clause ordinarily has a *transformative effect* upon errors that might otherwise appear to be jurisdictional: Federal Commissioner of Taxation v Futuris Corporation Ltd (2008) 237 CLR 146 (**Futuris**) at [23]; Stanley v Director of Public Prosecutions (NSW) (2023) 278 CLR 1 (**Stanley**) at [89]–[95].

Whether error is jurisdictional is a question of statutory construction

5. It was noted, at [71] of Kirk, that "[i]t is neither necessary, nor possible, to attempt to mark the metes and bounds of jurisdictional error". Much like "jurisdiction", "jurisdictional error" may be described as a "verbal coat of too many colours": United States v L A Tucker Truck Lines Inc 344 US 33 at 39 (1952) (Frankfurter J).

6. At [73] of Kirk, the plurality re-affirmed that, in Craig v South Australia (1995) 184 CLR 163 (**Craig**) at 177–178, this Court did not set forth a "rigid taxonomy of jurisdictional error". That is because to do so would undermine the principle that whether an error is *jurisdictional* is a question of statutory construction according to text, context and purpose: see, generally, LPDT at [4]–[5]; Hossain v Minister for Immigration and Border Protection (2018) 264 CLR 124 (**Hossain**) at [24] (Kiefel CJ, Gageler and Keane JJ); Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton (2023) 276 CLR 136 (**Thornton**) at [53].

7. That point does not render illusory the concept of jurisdictional error. It is a concept rooted in the well established and orthodox process of statutory construction: see, for example, Project Blue Sky at [41], [78], [91]; Stanley at [19] (Gageler J). The statutory formulation of the authority conferred by Parliament upon a particular decision-maker is the touchstone of whether that decision-maker commits jurisdictional error by a particular instance of non-compliance with the underlying statute. In Re Refugee Review Tribunal; Ex parte Aala (2000) 204 CLR 82 at [163], quoted in Kirk at [66], Hayne J stated that "[t]here is a jurisdictional error if the decision maker makes a decision outside the limits of the functions and powers conferred on him or her, or does something which he or she lacks power to do. By contrast, incorrectly deciding something which the decision maker is authorised to do is an error within jurisdiction" (see, also, Hossain at [25]).

8. The decisions of this Court, both pre-dating and post-dating Kirk, are replete with statements and re-statements of the principle that where the dividing line between jurisdictional and non-jurisdictional error falls is a question of statutory construction to be undertaken on a case-by-case basis. Thus, the metes and bounds of jurisdictional error are to be marked separately for each statutory decision-making process: LPDT at [5]; Kirk at [71]; Hossain at [42]; MZAPC v Minister for Immigration and Border Protection (2021) 273 CLR 506 at [101]; Nathanson v Minister for Home Affairs (2022)

276 CLR 80 at [78]. The consistency of that line of authority, unaffected by the limitation identified in Kirk, is telling.

9. That the "jurisdictional" character of error is to be gleaned by way of statutory construction — and not simply by labelling an asserted error in accordance with the taxonomy arising from Craig — was most recently and authoritatively made clear by six members of this Court in LPDT at [4]:

> A statute which contains an express or implied condition of a conferral of decision-making authority is not always to be interpreted as denying legal force and effect to every decision that might be made in breach of that condition: Project Blue Sky at [91]. Only by construing the statute so as to understand the limits of the statutory conferral of decision-making authority is it possible to determine, first, whether an error has occurred (that is, whether there has been a breach of an express or implied condition of the statutory conferral of decision-making authority) and, second, whether any such error is jurisdictional (that is, whether the error has resulted in the decision made lacking legal force): Hossain at [24], [27], [72]; Minister for Immigration and Border Protection v SZMTA (2019) 264 CLR 421 at [81]; Thornton at [53].

See, also, Stanley at [55]; Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd (2018) 264 CLR 1 (**Probuild**) at [34]; Tu'uta Katoa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (2022) 276 CLR 579 at [31].

10. This principle applies irrespective of whether the decision-maker is exercising administrative power or judicial power: Stanley at [15], citing Citta Hobart Pty Ltd v Cawthorn (2022) 276 CLR 216 at [27].

11. It is a defining characteristic of a jurisdictional error that it invalidates the decision that was in fact made, rendering it void *ab initio*. A decision affected by jurisdictional error is and was, from the moment of its making, lacking in legal validity. It is "not an order at all": Stanley at [15]; Parisienne Basket Shoes Pty Ltd v Whyte (1938) 59 CLR 369 at 375. It follows that, in construing a statute conferring decision-making authority, a provision in the nature of a no invalidity clause is a clear textual (or contextual, as the case may be) indication of Parliament's intention that a specific instance, or instances, of non-compliance with the statute underlying the decision-making process will not amount to jurisdictional error: see, for example, Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme (2003) 216 CLR 212 at [44]–[46] (Gleeson CJ, Gummow and Heydon JJ); Futuris at [23]–[24], [54]–[55] (Gummow, Hayne, Heydon and Crennan JJ); R v AA [2017] NSWCCA 84 at [44] (Beech-Jones J, Leeming JA and R A Hulme J agreeing).

12. There is no reason to treat the construction of a no invalidity clause any different to the construction of a step or condition of a decision-making process more broadly: Attorney General (Tas) v Casimaty (2024) 99 ALJR 1139 at [32] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ).

13. Section 39(7) of the Planning and Environment Act 1987 (Vic) (**PE Act**) provides a clear textual indication of the Victorian Parliament's intention that any failure to comply with Divisions 1–3 of Part 3 or Part 8 of that Act does not constitute jurisdictional error in the amendment of a planning scheme.

The Kirk limitation and the Project Blue Sky interpretive principle operate harmoniously

14. The decision in Kirk provides no basis upon which to imply that it was intended to detract from the principle, arising from Project Blue Sky at [91], that whether error is jurisdictional is a question of statutory construction. Instead, the limitation identified in Kirk operates in harmony with Project Blue Sky.

15. It is true that no reference is made in Kirk to Project Blue Sky. That is because, first, the jurisdictional errors were readily identifiable and material on the face of the statutes conferring and governing the Industrial Court's powers and functions: Stanley at [164] (Jagot J), summarising Kirk at [74]–[76]. They involved "misconceptions [of] the core of the offence-creating provision" and "a departure from the applicable rules of evidence which was impermissible even with the defendant's consent": Stanley at [163].

16. Secondly, and more importantly, Project Blue Sky (and the authorities applying it in the judicial review context) and Kirk are directed to different issues or steps in the process of assessing a decision for jurisdictional error and the effect of a privative clause thereupon. That process may be reduced to its essence as comprising the following issues or inquiries (see, for example, LPDT at [4] and [9]; Hossain at [31], quoting Wei v Minister for Immigration and Border Protection (2015) 257 CLR 22 at [23] (Gageler and Keane JJ)):

    a. Has the decision-maker, as a matter of fact, failed to comply with a particular aspect of the statutory decision-making process?

    b. If the answer to a. is *yes*, does that aspect of the decision-making process expressly or impliedly condition the decision-maker's authority to decide, with

the consequence that non-compliance constitutes jurisdictional error and, thus, the decision is and always was invalid?

c. If the answer to b. is *yes*, is that error material, in the sense that the decision could realistically have been different had there been no error?

d. If the answers to b. and c. are both *yes*, is a privative clause in the underlying statute required to be read down so as to preserve the constitutionally entrenched minimum standard of judicial review for jurisdictional error, being an essential characteristic of a State Supreme Court?

17. The interpretive principle arising from Project Blue Sky and affirmed in LPDT applies to the second inquiry, which is an orthodox question of statutory construction. Kirk only operates upon the final inquiry, by protecting the minimum standard of judicial review for jurisdictional error. But that protective effect, arising by way of implication from Ch III of the Constitution, is premised upon the antecedent determination of what is or is not jurisdictional error for the purposes of the underlying statutory decision-making process. In a similar vein, Project Blue Sky preserves a State Parliament's latitude to specify what falls within the bounds of a decision-maker's statutory authority to decide, which need not be constrained by the traditional (but necessarily flexible and fluid) taxonomy of jurisdictional error described in Craig at 177–178: see, for example, Graham v Minister for Immigration and Border Protection (2017) 263 CLR 1 at [120] (Edelman J, dissenting).

18. Kirk is properly engaged to preserve the review of errors beyond those jurisdictional bounds. It recognised a constitutional limitation on a State Parliament's ouster of judicial review for jurisdictional error. As was stated subsequently by French CJ in Public Service Association of South Australia Inc v Industrial Relations Commission (SA) (2012) 249 CLR 398 at [30] (citing Kirk at [100]), "it is the boundary between jurisdictional error and non-jurisdictional error that marks the limits upon State legislative power to abrogate the supervisory jurisdiction of a State Supreme Court".

19. The reasons of the plurality in Kirk provide no imprimatur to imply, from the constitutional limitation, an interpretive principle that requires the reading down of privative and/or no invalidity clauses on the basis that they encroach upon general conceptions of what constitutes jurisdictional error. In other words, Kirk "did not deny the competence of State legislatures to alter the substantive law to be applied by …

courts": Duncan v Independent Commission Against Corruption (2015) 256 CLR 83 at [29] (French CJ, Kiefel, Bell and Keane JJ). This includes the competence to specify that particular instances of non-compliance by a decision-maker are not jurisdictional. To apply Kirk as encroaching upon that competence, as the Court of Appeal did at [96]–[98] of IGA Retail Services Pty Ltd v Minister for Planning (2025) 264 LGERA 154 (**VSCA judgment**), would, in effect, freeze in place a "rigid classification of the errors that constitute jurisdictional errors", notwithstanding what was said in Kirk at [73]: see, also, LPDT at [5].

20. To paraphrase and adapt the words of Gageler J at [60] of Probuild, the approach most consonant with the nature and scope of judicial review for jurisdictional error, in light of Kirk, is that the question of whether recourse to a State Supreme Court to obtain an order in the nature of certiorari has been removed by a privative clause (limited to error of law on the face of the record) should be answered through the application of ordinary statutory and common law principles of interpretation unencumbered by any presumption that it has not been so removed.

21. Although Probuild was not concerned with jurisdictional error, the summary provided by Gageler J is instructive for two reasons. First, it proceeded on an acceptance that in relation to jurisdictional error, "there is now no doubt that recourse to the Supreme Court cannot be taken away by statute even by the clearest of words": Probuild at [59], citing Kirk at [100]. Secondly, it implicitly recognised that the limitation arising from Kirk is separate from the construction of the underlying statute to determine whether an asserted error would be *jurisdictional*.

22. In that regard, Kirk does not encumber the process of interpretation mandated by Project Blue Sky at [91] (and, inter alia, Stanley at [12], [19], [55], [170]–[171]; and LPDT at [2]–[5]) by effectively presuming that particular errors must be jurisdictional. Kirk gave effect to a constitutional limitation upon the legislative power of a State Parliament. It did not enliven a principle of statutory interpretation. This much is clear from [100] of Kirk, where French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ held that the constitutional limitation:

> … is not to say that there can be no legislation affecting the availability of judicial review in the State Supreme Courts. It is not to say that no privative provision is valid. Rather, the observations made about the constitutional significance of the supervisory jurisdiction of the State Supreme Courts point to the continued need for, and the utility of, the distinction between jurisdictional and non-jurisdictional error in the Australian

> constitutional context. The distinction marks the relevant limit on State legislative power. Legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power. Legislation which denies the availability of relief for non-jurisdictional error of law appearing on the face of the record is not beyond power.

23. The harmony between Kirk and Project Blue Sky is necessarily implicit in the recognition that the distinction between jurisdictional and non-jurisdictional error marks the relevant limit on State legislative power. As submitted above, and recognised consistently by this Court, that distinction is determined by construction of the underlying statute. Thus, [100] of Kirk recognises that State Parliaments retain considerable latitude to specify what is or is not jurisdictional error. A no invalidity clause, of the kind found in s 39(7) of the PE Act, falls within that latitude.

24. The Court of Appeal erred by applying Kirk to read down the privative clause in s 39(8) of the PE Act and holding that the errors asserted by the First and Second Respondents would be jurisdictional, without regard to the relevant statutory context, most notably s 39(7) of the Act: see VSCA judgment at [96]–[99], [108]. That error involved inversion of the proper analysis, by applying Kirk to determine the scope of the decision-maker's authority, without prior application of the principle in Project Blue Sky at [91]. On the proper application of that principle, the errors alleged in the Originating Motion are not jurisdictional. It follows that s 39(8) of the Act does not detract from the Supreme Court of Victoria's constitutionally-entrenched minimum standard of judicial review for jurisdictional error.

25. The foregoing is not to argue that Kirk cannot mandate the reading down of privative clauses. That is the practical essence of the constitutional limitation. It is to observe, however, that Ch III of the Constitution does no more than implicitly limit a State Parliament's power to legislate to oust judicial review for jurisdictional error. As is clear from Kirk at [100], that does not necessitate a limitation upon a State Parliament's power to set the scope of a decision-maker's statutory jurisdiction.

The transformative effect of a no invalidity clause

26. In accordance with the approach adopted by Gummow, Hayne, Heydon and Crennan JJ in Futuris at [23] (see Appellant's Submissions at [44]–[45]), a no invalidity clause ordinarily has a *transformative effect* upon steps in the course of a statutory decision-making process that might otherwise appear to condition the decision-maker's jurisdiction: see, for example, Harvey v Commissioner of State Revenue [2015] QCA

258 at [77]–[79]. That is the effect properly to be ascribed to s 39(7) of the PE Act, as a matter of legislative intention, when applying the privative clause in s 39(8) of the Act.

27. In other words, a no invalidity clause will ordinarily render *non-jurisdictional* an error that would, but for the inclusion of that clause, invalidate a decision on the proper construction of the underlying statute. The inclusion of the word *ordinarily* in this submission is to acknowledge that, in accordance with the principles arising from Project Blue Sky, statutory interpretation does not deal in absolutes. The scope of a no invalidity clause could therefore be narrowed by express or implied provision to the contrary: see Futuris at [54]–[55], concerning the exercise of an administrative power in bad faith.

28. More recently, in Stanley, the transformative effect of no invalidity clauses was acknowledged by the majority (Gordon, Edelman, Steward and Gleeson JJ), Gageler J and Jagot J respectively.

29. Stanley provides a helpful illustration of the proper approach generally to be taken when considering the effect of a privative clause upon an application for judicial review. Although the Court split 4:3 on the issue of whether non-compliance with s 66(2) of the Crimes (Sentencing Procedure) Act 1999 (NSW) (**CSP Act**) amounted to jurisdictional error, that split turned upon the *application* of the salient principles, rather than the *formulation* thereof.

30. Section 176 of the District Court Act 1976 (NSW) limits judicial review of appellate decisions of that Court, under the Crimes (Appeal and Review) Act 2001 (NSW), to review of jurisdictional error in accordance with Kirk. Whether the error of law in Stanley was jurisdictional depended on "the proper construction of the relevant statute": [55] (Gordon, Edelman, Steward and Gleeson JJ), citing, inter alia, Project Blue Sky at [91]; see, also, [9] (Kiefel CJ), [19] (Gageler J), [171]–[172] (Jagot J).

31. The construction of the CSP Act involved the evaluation and balancing of various textual, contextual and purposive factors. One such factor was the presence of no invalidity clauses (or "saving provisions") throughout the CSP Act. At [44], Gageler J (dissenting in the result) considered that to construe the assessment prescribed by s 66(2) as a condition upon a judge's jurisdiction to make an intensive correction order (**ICO**) under s 7 of the CSP Act would be "incongruous in light of the clear indication

of legislative intention in s 5(4)". Section 5(4) provides that "[a] sentence of imprisonment is not invalidated by a failure to comply with [s 5(1)]", which requires a court to consider all possible alternatives in order to be satisfied that no penalty other than imprisonment is appropriate. In that regard, his Honour relied upon the fact that an ICO can only be imposed upon an offender who has been sentenced to imprisonment: CSP Act, s 7(1). Justice Jagot (also dissenting in the result) reasoned to similar effect at [189]–[190], [193]–[194].

32. The majority instead held that the "absence of a 'saving' provision" in s 7 or s 66 of the CSP Act supported the construction of the assessment in s 66(2) as a condition upon the jurisdiction of the sentencing court to make or refuse to make an ICO. At [95], their Honours summarised a survey of the history of the CSP Act as revealing:

> a pattern of deliberate inclusion by the New South Wales legislature of saving provisions in the [CSP Act] purporting to identify when non-compliance with the Act does not invalidate a sentence imposed by a sentencing court, including an ICO [c.f. Futuris at [55]-[56]]. Section 5(4) stands in contradistinction to the absence of an analogous provision in s 66 in the exercise of the discretion in s 5(1). Section 5(4) illustrates a choice by the legislature to save from invalidity a sentence affected by an error that otherwise might be regarded as a jurisdictional error. Section 5 supports a conclusion that s 66(2) operates as a limit upon the power of the sentencing court to make or refuse to make an ICO. (emphasis added)

The emphasised sentence of [95] amounts to an express acknowledgement, by a majority of this Court, of the *transformative effect* ordinarily ascribed to a no invalidity clause as a matter of statutory construction.

33. That acknowledgement is entirely in accordance with the principle, described above at [5]–[13], that whether an error achieves a jurisdictional character, in order to attract the operation of the limitation arising from Kirk, turns upon the construction of the underlying statute according to its text, context and purpose: Project Blue Sky at [91]. For the reasons given at [14]–[25] of these submissions, Kirk does not mandate the circumvention of legislative intent, expressed by way of a no invalidity clause, in order to preserve the jurisdictional character of particular categories of error.

34. As Jagot J observed at [194] of Stanley, s 5(4) of the CSP Act "is a statement of legislative intention and is to be construed in accordance with the principles of statutory construction, which will impose limits on the scope of the section". This applies with equal force to s 39(7) of the PE Act.

Conclusion

35. The appeal should be allowed and orders made as set out in the notice of appeal: Core Appeal Book at 51.

Part V: Estimate of time

36. It is estimated that oral argument on behalf of the NSW Attorney will take 15 minutes.

Dated 5 March 2026

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ANNEXURE TO INTERVENER'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
1	*Commonwealth Constitution*	Current	Ch III	In force at all relevant times	All relevant times
2	*Planning and Environment Act 1987* (Vic)	Authorised Version 156	s 4(2), Pt 3 Divs 1–3 and Pt 8	Act as in force at the time of filing of the Originating Motion on 11 June 2024	5 June 2024 to 25 March 2025
3	*Crimes (Sentencing Procedure) Act 1999* (NSW)	Compilation prepared on 27 March 2021	ss 5(4), 7, 66	Act as it was applied in *Stanley v Director of Public Prosecutions (NSW)* (2023) 278 CLR 1	28 May 2021, being the day on which the appeal in the District Court of New South Wales under consideration in *Stanley* was heard
4	*District Court Act 1976* (NSW)	Compilation prepared on 1 March 2021	s 176	Act as it was applied in *Stanley v Director of Public Prosecutions (NSW)* (2023) 278 CLR 1	28 May 2021, being the day on which the appeal in the District Court of New South Wales under consideration in *Stanley* was heard
5	*Income Tax Assessment Act 1936* (Cth)	Compilation prepared on 12 November 2004	s 175, Pt IVC	Act as it was applied in *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146	12 November 2004, being the day on which the notice of assessment concerned in *Futuris* issued