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

No. M103/2025

BETWEEN:

MINISTER FOR PLANNING
Appellant

and

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

and

SHEPPARTON PTY LTD (ACN 620 846 184)
Second Respondent

and

GREATER SHEPPARTON CITY COUNCIL
Third Respondent

and

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

and

LASCORP INVESTMENT GROUP PTY LTD
Fifth Respondent

SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)

Filed on behalf of the Attorney-General for the State of Queensland

5 March 2026

PART I: Internet publication

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

PART II: Basis of intervention

2. Pursuant to s 78A of the *Judiciary Act 1903* (Cth), the Attorney-General for the State of Queensland (**Queensland**) intervenes in these proceedings in support of the appellant.

PART III: Reasons why leave to intervene should be granted

3. Not applicable.

PART IV: Submissions

SUMMARY OF ARGUMENT

4. Queensland adopts the submissions of the appellant regarding the proper construction of s 39 of the *Planning and Environment Act 1987* (Vic) **(PE Act**).

5. In addition, Queensland contends that even if the appellant's construction is not accepted, s 39(8) of the PE Act would still be effective to prevent the first and second respondents from seeking relief other than remedies in the nature of prohibition, mandamus, and certiorari for jurisdictional error. That is because the principle in ***Kirk*** *v Industrial Court (NSW)* does not entrench a State Supreme Court's power to grant declaratory or injunctive relief.

STATEMENT OF ARGUMENT

Declaratory relief is not part of entrenched supervisory jurisdiction

6. In *Kirk*, this Court identified the entrenched supervisory jurisdiction of State Supreme Courts by reference to their defining characteristics as follows:[1]

> A defining characteristic of State Supreme Courts is the power to confine inferior courts and tribunals within the limits of their authority to decide by granting relief in the nature of prohibition and mandamus, and … also certiorari, directed to inferior courts and tribunals on grounds of jurisdictional error.

[1] *Kirk* (2010) 239 CLR 531, 566 [55] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) (emphasis added). See also at 580-1 [98]-[99].

7. At the time of federation, there was a rule of statutory construction that privative clauses were to be read strictly as not preventing colonial Supreme Courts from granting certiorari where the decision was infected by 'manifest defect of jurisdiction' or 'manifest fraud'.[2] That rule of construction supplied the scope of the Supreme Courts' supervisory jurisdiction as a defining characteristic.

8. Accordingly, the privative clause at issue in *Kirk* could not validly preclude the grant of orders in the nature of prohibition, certiorari or mandamus by the Supreme Court directed to the Industrial Court for jurisdictional error.

9. The privative clause at issue in *Kirk* also extended to declaratory and injunctive relief.[3] Despite that fact, this Court was careful to identify the Supreme Court's entrenched supervisory jurisdiction by reference only to the prerogative writs. That was because, as at federation, the supervisory jurisdiction of colonial Supreme Courts was exercised 'through the grant of prohibition, certiorari and mandamus (and habeas corpus)'.[4]

10. There is no warrant to now expand the *Kirk* implication to embrace declaratory relief. Such an implication would not be 'securely based' in the text or structure of the *Constitution*.[5] That is so for two reasons.

11. *First*, the textual basis for the *Kirk* implication is that 'Chapter III of the *Constitution* requires that there be a body fitting the description "the Supreme Court of a State".'[6] To illuminate the meaning of 'Supreme Court', the Court looked to the defining characteristics of a State Supreme Court at federation. That is because, as Edelman J later pointed out, '[l]egal history is relevant to understand the essential content of a

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2 *Kirk* (2010) 239 CLR 531, 580 [97], quoting *Colonial Bank of Australasia v Willan* (1874) LR 5 PC 417, 442. Cf *Re Biel* (1892) 18 VLR 456, 458-60 (Higinbotham CJ, a'Beckett and Hood JJ agreeing); *Clancy v Butchers' Shop Employees Union* (1904) 1 CLR 181, 196-7 (Griffith CJ), 203-4 (Barton J), 204-5 (O'Connor J); *Baxter v New South Wales Clickers' Association* (1909) 10 CLR 114, 140 (Barton J), 146 (O'Connor J), 161 (Isaacs J); Oscar Roos, 'Accepted Doctrine at the Time of Federation and *Kirk v Industrial Court of New South Wales*' (2013) 35 *Sydney Law Review* 781.

3 *Kirk* (2010) 239 CLR 531, 579 [92].

4 *Kirk* (2010) 239 CLR 531, 580-1 [98].

5 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 134 (Mason CJ); *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 453 [389] (Hayne J); *McCloy v New South Wales* (2015) 257 CLR 178, 283 [318] (Gordon J); *Babet v Commonwealth* (2025) 99 ALJR 883, 910 [122] (Gordon J).

6 *Kirk* (2010) 239 CLR 531, 566 [55], citing *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 76 [63] (Gummow, Hayne and Crennan JJ).

constitutional implication'.[7]

12. As this Court noted in *Kirk*,[8] at federation each of the colonial Supreme Courts had been conferred with the same jurisdiction that the Court of Queen's Bench had in England.[9] It was by this route that they had power to issue the prerogative writs. Separately, the Supreme Courts had also been conferred with the same equitable jurisdiction that the Chancellor had in England.[10] It was by this route that the Supreme Courts acquired the power to issue declarations.

13. However, at federation, the use of declarations in a public law context was still an emerging phenomenon. In England, it was not until 1911 that the 'modern' approach to declaratory relief against public authorities began to take shape.[11]

14. Indeed, at federation the colonial Supreme Courts appear to have lacked the power to issue a bare declaration in any context, let alone a public law context. Originally, the Court of Chancery had no power to issue a bare declaration.[12] An amendment in England in 1852 attempted to broaden the power to issue declarations,[13] but the power was read narrowly as applying only where a plaintiff claimed or could claim principal equitable relief.[14] With the fusion of equity and common law in England with the

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7 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1, 37 [79] (Edelman J, albeit in partial dissent).

8 *Kirk* (2010) 239 CLR 531, 580 [97].

9 *Australian Courts Act 1828* (Imp) s 3 (in relation to the Supreme Courts of New South Wales and Van Diemen's Land); *Supreme Court Act 1890* (Vic) s 18; *Supreme Court Act 1867* (Qld) ss 21, 34; *Supreme Court Act 1855-56* (SA) s 7; *Supreme Court Act 1880* (WA) s 5, picking up *Supreme Court Ordinance 1861* (WA) s 4.

10 *Australian Courts Act 1828* (Imp) s 11 (in relation to the Supreme Courts of New South Wales and Van Diemen's Land); *Supreme Court Act 1890* (Vic) s 19; *Supreme Court Act 1867* (Qld) ss 22, 38; *Supreme Court Act 1855-56* (SA) s 8; *Supreme Court Act 1880* (WA) s 5, picking up *Supreme Court Ordinance 1861* (WA) s 5. These appear to have been interpreted as not picking up specific powers conferred on the Chancellor by statute in England: see, eg, *Re Hunter*, *The Argus* (Melbourne) 7 September 1859, Supplement, 1 and 8 September 1859, 7.

11 *Dyson v Attorney-General* [1911] 1 KB 410. See also W Friedmann, 'Declaratory judgment and injunction as public law remedies' (1949) 22(10) *Australian Law Journal* 446, 447 ('The modern use of the declaratory action against public authorities is generally dated back to *Dyson v Attorney-General*'); Lord Woolf and Jeremy Woolf, *Zamir and Woolf's The Declaratory Judgment* (Sweet & Maxwell, 4th ed, 2011) 16 [2-17] ('from 1910, the balance shifted in favour of its liberal exercise'); *Kaldas* (2017) 107 NSWLR 341, 423 [355] (Basten JA) ('The turning point heralding a new willingness to grant bare declarations was *Dyson v Attorney-General*, decided in 1911').

12 JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 5th ed, 2015) 610-611 [19-010].

13 *Chancery Procedure Act 1852* (UK) 15 & 16 Vict c 86, s 50.

14 *Rooke v Lord Kensington* (1856) 2 K & J 753, 760-2; 69 ER 986, 989-90 (Sir William Page Wood VC).

Judicature Act reforms,[15] the High Court of Justice inherited the equitable jurisdiction of the Court of Chancery and also acquired a new power to issue bare declarations.[16] However, that did not automatically translate to the Australian colonies. The colonies replicated the 1852 amendment,[17] but the new power to issue declarations received the same narrow reading it had in England prior to the *Judicature Act* reforms, even for those colonies that had already implemented the *Judicature Act* reforms.[18] After federation, New South Wales made further attempts to broaden the declaration power without implementing the *Judicature Act* reforms, but those attempts continued to be read restrictively.[19] In fact, it was not until 1965 that New South Wales finally conferred on its Supreme Court a 'general power to declare the existence or non-existence of a legal right or obligation'.[20]

15. Moreover, at federation, there was no rule of statutory construction that a privative clause was to be read down to preserve the power to issue declaratory relief.[21] To the

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15 *Supreme Court of Judicature Act 1873* (UK) 36 & 37 Vict c 66; *Supreme Court of Judicature Act 1875* (UK) 38 & 39 Vict c 77.

16 *Supreme Court Rules 1883*, Order XXV, r 5, made pursuant to *Supreme Court of Judicature Act 1875* (UK) 38 & 39 Vict c 77, s 17. See explanation of how the rule broadened the power to issue declaratory relief in *Barraclough v Brown* [1897] AC 615, 623-4 (Lord Davey); *Schnelle v Dent* (1925) 35 CLR 494, 524-6 (Isaacs J, albeit in dissent in the result). Later, it was queried whether the initial attempts had been sufficient all along: *Guaranty Trust Co of New York v Hannay & Co* [1915] 2 KB 536, 557-8 (Pickford LJ).

17 Eg *Equity Practice Act 1853* (NSW) s 39 (later replicated in *Equity Act 1880* (NSW) s 50 and then *Equity Act 1901* (NSW) s 10); *Equity Procedure Act 1853* (SA) s 62; *Equity Procedure Act 1858* (Tas) s 96; *Equity Act 1867* (Qld) s 73; *Judicature Act 1883* (Vic) s 9(5b).

18 In Victoria, see: *Gemmell v Gemmell* (1892) 18 VLR 382, 385 (Hood J). In Queensland, see: *Leahy v Lemel* (1897) 8 QLJ 19, 20 (Griffith CJ, Cooper and Real JJ agreeing). In New South Wales, where the *Judicature Act* reforms were not implemented until the 1970s, see: *JC Williamson Ltd v Durno Ltd* (1915) 15 SR (NSW) 442, 453 (Harvey J); *Walsh v Alexander* (1913) 16 CLR 293, 304-5 (Isaacs J).

19 Eg *Equity Act 1901* (NSW) s 10, as amended by *Administration of Justice Act 1924* (NSW) s 18, which received a narrow construction in *Tooth & Co Ltd v Coombes* (1925) 42 WN (NSW) 93, 94-5 (Harvey CJ in Eq); *David Jones Ltd v Leventhal* (1927) 40 CLR 357, 368 (Knox CJ), 379-81 (Isaacs J), 381-3 (Gavan Duffy J); *Langman v Handover* (1929) 43 CLR 334, 342 (Knox CJ), 343-4 (Isaacs J), 357 (Rich and Dixon JJ); *Harvey v Walker* (1945) 46 SR (NSW) 180, 181 (Starke J), 182 (Dixon J), 183 (McTiernan J), 183-4 (Williams J).

20 *Hobart International Airport Pty Ltd v Clarence City Council* (2022) 276 CLR 519, 548 [61] (Gageler and Gleeson JJ). This power was conferred by *Equity Act 1901* (NSW) s 10, as amended by *Law Reform (Miscellaneous Provisions) Act 1965* (NSW) s 15(d). That s 10 now conferred a power to make a bare declaration was finally confirmed in *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421, 433-5 (Gibbs J, Walsh, Stephen and Mason JJ agreeing).

21 The rule of statutory construction was expressed in both the UK and Australia as applying to certiorari or other prerogative writs without any reference to declaratory relief in, eg: *R v Justices of the West Riding of Yorkshire* (1794) 5 TR 629, 633; ER 352, 353 (Grose J); *R v Wood* (1855) 5 EL & BL 49, 56-7; 119 ER 400, 402-3; *Re M'Mullen* (1859) 3 QSCR 205, 208-9 (Lutwyche J); *Hunter v Sherwin* (1869) 6 W W & A'B (L) 26, 32 (Stawell CJ); *Colonial Bank of Australasia v Willan* (1874) LR 5 PC 417, 442 (Sir James Colville for the Privy Council); *Ex parte Sempill; Re Wilkinson* (1875) 14 NSWSCR (L) 164, 170-1 (Hargrave, albeit in dissent in the result); *Ex parte Bradlaugh* (1878) 3 QBD 509, 512-13 (Cockburn CJ),

contrary, in the years leading up to federation, the courts were more concerned to constrain than preserve the power to issue a declaration.[22] In the 1897 case of ***Barraclough*** *v Brown*, the House of Lords held that even though the High Court of Justice had been conferred a power to issue a bare declaration, that power was impliedly taken away where Parliament had entrusted a particular matter to an inferior tribunal.[23] Otherwise, the 'very mischievous' result would be that the High Court could be called on to declare the rights and obligations in any legal dispute that should be decided in a lower court.[24] It took a further sixty years for the House of Lords to distinguish *Barraclough* and read provisions so as to preserve the availability of declaratory relief.[25] Comparing *Barraclough* with that later decision reveals 'the development of judicial acceptance of this remedy',[26] but conversely it also reveals the comparative reluctance of the courts to guard the availability of declaratory relief at the time of federation.

16. In ***Kaldas*** *v Barbour*, the New South Wales Court of Appeal reviewed aspects of the above history and concluded that the Supreme Court's entrenched supervisory jurisdiction did not extend to granting a bare declaration.[27] There was no 'principled

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513 (Mellor J); *R v Bindon; Ex parte Cairns* (1879) 5 VLR (L) 93, 96 (Stawell CJ), 97 (Barry J); *R v Cope; Ex parte Mayor etc of Essendon & Flemington* (1881) 7 VLR (L) 337, 346 (Stawell CJ), 347 (Higinbotham J); *R v Quinlan; Ex parte Sampson* (1884) 10 VLR (L) 102, 106 (Higinbotham J, Holroyd J agreeing); *Ellis v Butler* (1887) 21 SALR 136, 137-8 (Way CJ, Boucaut and Bundey JJ agreeing); *Ex parte Browne* (1888) 9 NSWLR (L) 102, 115 (Innes J); *Re Bell; Ex parte Marine Board of Victoria* (1892) 18 VLR 432, 440 (Hodges J, Holroyd J agreeing); *Ex parte South Australian Brewing Co Ltd* (1908) 8 SR (NSW) 361, 380-1 (Cohen J), 393, 395 (Sly J).

22 Lord Woolf and Jeremy Woolf, *Zamir and Woolf's The Declaratory Judgment* (Sweet & Maxwell, 4th ed, 2011) 10 [2-03]-[2-04]: 'The reluctance of the courts during these years [speaking of 1845 to 1915] to exercise their declaratory power reflected a deep suspicion of the declaratory right … [U]ntil the beginning of the twentieth century the courts exercised their powers to obstruct, rather than promote, the development of declaratory relief'.

23 *Barraclough v Brown* [1897] AC 615, 620 (Lord Herschell), 622 (Lord Watson), 623-4 (Lord Davey), followed in Australia in, eg, *Wylie v McDermott* [1933] St R Qd 1, 5-6 (EA Gouglas J, Macrossan SPJ and Henchman J agreeing). In 1932, W Ivor Jennings took from this case and others that 'even where no consequential relief could be claimed the court can make a declaration provided that … the jurisdiction of the court has not been excluded'. Even if not excluded, declaratory relief would only be granted 'with extreme caution': 'Declaratory Judgments against Public Authorities in England' (1932) 41 *Yale Law Journal* 407, 424.

24 *Barraclough v Brown* [1897] AC 615, 620 (Lord Herschell).

25 *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1960] AC 260, 285-7 (Viscount Simonds), 289-90 (Lord Goddard, Lord Oaksey agreeing), 302-4 (Lord Jenkins, Lord Keith agreeing).

26 *Sutherland Shire Council v Leyendekkers* [1970] 1 NSWR 356, 366 (Street J).

27 *Kaldas* (2017) 107 NSWLR 341, 385-7 [187]-[196] (Bathurst CJ), 425 [361] (Basten JA, Macfarlan JA agreeing). See also *New South Wales v Ashton* [2025] NSWCA 199, [48] (Kirk JA, Ball JA agreeing).

basis' for extending *Kirk* to declaratory relief in light of that history.[28]

17. Although the focus in *Kaldas* was on bare declarations,[29] the reasoning in that case applies equally to declarations sought as ancillary relief. In particular, in New South Wales and Tasmania where the *Judicature Act* reforms had not been implemented by the time of federation, it was still the case that declarations could only be sought if they were ancillary to other equitable relief. In other words, declarations in those jurisdictions could not be granted as a remedy ancillary to non-equitable relief such as the prerogative writs. That being so, history strongly suggests that the power to make a declaration—whether bare or ancillary—is not a defining characteristic of State Supreme Courts. As the analysis in *Kaldas* demonstrates, a 'Supreme Court' required to exist by Ch III of the *Constitution* will not cease to exist merely because a privative clause prevents it from granting declaratory relief.

18. *Second*, the structural basis for the *Kirk* implication is that if State Supreme Courts could be prevented from reviewing decisions for jurisdictional error, then the decisions would be removed from appellate review by this Court under s 73 of the *Constitution*, undermining the integrated judicial system established by Ch III.[30] That would 'create islands of power immune from supervision and restraint'.[31]

19. That rationale has no application to cases such as the present. The ousting of jurisdiction to review by s 39(8) comes part and parcel with the conferral of jurisdiction to review by the Victorian Civil and Administrative Tribunal in s 39(1), which in turn is subject to the superintendence of the Supreme Court. Specifically, under s 39(4), the Tribunal may 'make any declaration that it considers appropriate'. There is no supervisory lacuna.

20. More generally, a concern to avoid 'islands of power immune from supervision and restraint' simply does not require entrenching the Supreme Court's power to grant declaratory relief for jurisdictional error. The power of the Supreme Court to grant

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28 *Kaldas* (2017) 107 NSWLR 341, 425 [361] (Basten JA, Macfarlan JA agreeing). Though it should be noted that Basten JA (with whom Macfarlan JA agreed) also read the privative clause in that case as expanding jurisdiction, such that any error was within jurisdiction in any event: at 424-5 [358]-[360].

29 Mr Kaldas had also sought injunctive relief, but the Court of Appeal did not need to consider whether the power to issue injunctive relief was separately entrenched as the injunctions sought were ancillary to the declarations sought: at 379 [150] (Bathurst CJ). The same applies in this case to the extent the injunctive relief that is sought is ancillary to the declaratory relief sought. In any event, injunctive relief is not separately entrenched for the reasons set out in [21] below.

30 *Kirk* (2010) 239 CLR 531, 581 [98]-[99].

31 *Kirk* (2010) 239 CLR 531, 581 [99].

orders in the nature of the prerogative writs for jurisdictional error would be sufficient to prevent islands of power. Extending *Kirk* to entrench the Supreme Court's power to grant declaratory relief would not be 'logically or practically necessary' for the preservation of the constitutional structure.[32]

Nor is injunctive relief part of entrenched supervisory jurisdiction

21. Likewise, extending *Kirk* to entrench injunctive relief would also be unnecessary to preserve the ability of State Supreme Courts to review decisions for jurisdictional error. That is because the writ of prohibition (or relief in that nature) already achieves that result.[33] In the past, prohibition was confined to review of judicial or quasi-judicial bodies, whereas injunctive relief was not.[34] However, that distinction no longer holds true.[35] Accordingly, there is no logical or practical need to entrench the Supreme Courts' power to grant injunctive relief for jurisdictional error in addition to its power to grant relief in the nature of prohibition.

Correct construction of s 39(8) of the PE Act if it needs to be read down[36]

22. In the appeal below, the Victorian Court of Appeal simply proceeded on the assumption

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32 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 135 (Mason CJ); *McGinty v Western Australia* (1996) 186 CLR 140, 169 (Brennan CJ); *Burns v Corbett* (2018) 265 CLR 304, 383 [175] (Gordon J, albeit in dissent in the result).

33 Perry Herzfeld, 'Injunctions in Public Law' in John Griffiths and James Stellios (eds), *Issues in Australian Constitutional Law: Tributes to Professor Leslie Zines Volume 2* (Federation Press, 2024) 136, 167. Herzfeld raises the query of whether injunctive relief is already protected by *Kirk* because it is relief 'in the nature of prohibition': at 166. However, *Kirk* only requires that the Supreme Court retain at least *some* form of power to order relief in the nature of prohibition. It does not require the Supreme Court to have *every possible* form of power to order similar relief.

34 *Official Records of the Debates of the Australasian Federal Convention*, Melbourne, 11 March 1898, vol 2, 2279-80 (O'Connor).

35 Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (7th ed, 2022) 922-37 [15.160]-[15.190]. The key distinction that remains is that prohibition is only available for jurisdictional error whereas injunctive relief is not. However, that is not relevant in this context given that the limit on State legislative power identified in *Kirk* is marked by the boundary of jurisdictional error: *Kirk* (2010) 239 CLR 531, 581 [100].

36 This construction only arises if s 39(8) of the PE Act must be read down to save its validity. As set out in [4] above, Queensland's primary position is that s 39(8) does not need to be read down for the reasons given by the appellant. That means that, in the statutory setting of the PE Act, s 39(8) is to be read as effectively expanding the jurisdiction of the decision-maker in the way outlined by Dixon J in *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598, 614-5. *Kirk* does not foreclose the possibility of reading a privative clause in that way in a particular statutory setting: see *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1, 26 [45] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ), 54 [120] (Edelman J, albeit in partial dissent); *Plaintiff S157/2002* (2003) 211 CLR 476, 488 [19] (Gleeson CJ), 504 [69] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); Stephen Gageler, 'Deference' (2015) 22 *Australian Journal of Administrative Law* 151, 155.

that declaratory and injunctive relief falls within the ambit of *Kirk*.[37] The Court then reasoned that s 39(8) of the PE Act had to be read down to avoid infringing that understanding of the *Kirk* implication.[38]

23. For the reasons outlined above, the Court of Appeal selected a defective major premise.[39] *Kirk* does not in fact require the availability of declaratory and injunctive relief for jurisdictional error. Accordingly, *Kirk* would not invalidate s 39(8) to the extent it removes the availability of those remedies. Instead, *Kirk* would only invalidate s 39(8) to the extent it removes the availability of the prerogative writs (and relief in that nature) for jurisdictional error.

24. Section 6(1) of the *Interpretation of Legislation Act 1984* (Vic) only requires s 39(8) of the PE Act to be read down or disapplied[40] so as not to infringe that limit on legislative power. That is, the word 'action' is to be read down or disapplied 'so as to have no application within [the] area in which legislative power is subject to [the] clear constitutional limitation' of the *Kirk* implication.[41] *Kirk* and the presumption of constitutionality do not require s 39(8) to be read down or disapplied to any greater extent.[42]

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37 *IGA Retail Services Pty Ltd v Minister for Planning* (2025) 264 LGERA 154, 174 [75] (see also at 179 [96]), citing *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, 257-8 [24]-[26] (Gaudron, Gummow and Kirby JJ); *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591. Neither of those cases address whether the power to grant declaratory relief or injunctive relief was a defining characteristic as at the time of federation, nor say anything about whether such a power now falls within a State Supreme Court's entrenched supervisory jurisdiction. As Gageler and Gleeson JJ said recently in *Hobart International Airport Pty Ltd v Clarence City Council* (2022) 276 CLR 519 at 548 [61] 'The relatively recent observation that a superior court has "inherent power" to make a declaratory order cannot be taken to contradict the historical fact that the power to declare the existence or non-existence of a legal right or obligation is statutory in origin'.

38 *IGA Retail Services Pty Ltd v Minister for Planning* (2025) 264 LGERA 154, 179 [98], citing *Interpretation of Legislation Act 1984* (Vic) s 6(1).

39 See William Gummow and Aryan Mohseni, 'The selection of a defective major premise' (2023) 53 *Australian Bar Review* 11.

40 *Clubb v Edwards* (2019) 267 CLR 171, 317-8 [422]-[425], 321-2 [433] (Edelman J); *Director of Public Prosecutions (Vic) v Smith* (2024) 98 ALJR 1163, 1192 [135] (Edelman J).

41 *Tajjour v New South Wales* (2014) 254 CLR 508, 586 [171] (Gageler J). See also *Victoria v Commonwealth* (1996) 187 CLR 416, 502-3 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ) ('where a law is intended to operate in an area where Parliament's legislative power is subject to a clear limitation, it can be read as subject to that limitation'); *Clubb v Edwards* (2019) 267 CLR 171, 221 [148] (Gageler J), 290 [340] (Gordon J).

42 Just as there is no constitutional imperative to read in availability of other relief that is not protected by the *Kirk* implication: *Probuild Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1, 13 [29]-[30] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), 23 [59] (Gageler J), 34-5 [87]-[90] (Edelman J).

25. Accordingly, even if s 39(8) of the PE Act had to be read down, the Court of Appeal should have held that s 39(8) still prevented the first and second respondents from seeking the declaratory and injunctive relief sought in their originating motion.

PART V: Time estimate

26. It is estimated that Queensland will require 15 minutes for oral argument.

Dated 5 March 2026.

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ANNEXURE TO SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)

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	s 73, Ch III	In force at all relevant times	All relevant times
2.	*Planning and Environment Act 1987* (Vic)	Authorised Version 156	Pt 3 Divs 1-3, 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.	*Interpretation of Legislation Act 1984* (Vic)	Authorised Version No 133	s 6	Currently in force	All relevant times
4.	*Australian Courts Act 1828* (Imp)	As enacted	ss 3, 11	Illustrative purposes	1 January 1901
5.	*Supreme Court Act 1890* (Vic)	As amended on 18 October 1900 by the *Supreme Court Act 1900* (Vic)	ss 18, 19	Illustrative purposes	1 January 1901
6.	*Supreme Court Act 1867* (Qld)	As amended on 28 November 1899 by the *Supreme Court Act 1899* (Qld)	ss 21, 22, 34, 38	Illustrative purposes	1 January 1901
7.	*Supreme Court Act 1855-56* (SA)	As amended on 31 March 1879 by the *Supreme Court Act 1878* (SA)	ss 7, 8	Illustrative purposes	1 January 1901
8.	*Supreme Court Act 1880* (WA)	As amended on 18 March	s 5	Illustrative purposes	1 January 1901

No.	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
		1892 by the *Supreme Court Act 1892* (WA)			
9.	*Supreme Court Ordinance 1861* (WA)	As enacted	s 4 5	Illustrative purposes	As picked up in 1880 by the *Supreme Court Act 1880* (WA).
10.	*Chancery Procedure Act 1852* (UK) 15 & 16 Vict c 86	As enacted	s 50	Illustrative purposes	As at 1852
11.	*Supreme Court of Judicature Act 1873* (UK) 36 & 37 Vict c 66	As enacted		Illustrative purposes	As at 1873
12.	*Supreme Court of Judicature Act 1875* (UK) 38 & 39 Vict c 77	As enacted		Illustrative purposes	As at 1875
13.	*Supreme Court Rules 1883*	As enacted	Order XXV, r 5	Illustrative purposes Considered in *Barraclough v Brown* [1897] AC 615	As at 1897
14.	*Equity Practice Act 1853* (NSW)	As enacted	s 39	Illustrative purposes	1853 to 1880
15.	*Equity Act 1880* (NSW)	As enacted	s 50	Illustrative purposes	1880 to 1901
16.	*Equity Act 1901 (NSW)*	As enacted	s 10	Illustrative purposes	1901 to 1924
17.	*Administration of Justice Act 1924* (NSW)	As enacted	s 18	Illustrative purposes	1924 to 1965
18.	*Law Reform (Miscellaneous Provisions) Act 1965* (NSW)	As enacted	s 15(d)	Illustrative purposes	As at 1965
19.	*Equity Act 1853* (SA)	As enacted	s 62	Illustrative purposes	As at 1853

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20.	*Equity Procedure Act 1858* (Tas)	As enacted	s 96	Illustrative purposes	As at 1858
21.	*Equity Act 1867* (Qld)	As enacted	s 73	Illustrative purposes	As at 1867
22.	*Judicature Act 1883* (Vic)	As enacted	s 9(5b)	Illustrative purposes	As at 1883