



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

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IN THE HIGH COURT OF AUSTRALIA  
MELBOURNE REGISTRY

M103/2025

BETWEEN:

MINISTER FOR PLANNING  
Appellant

and

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

SHEPPARTON PTY LTD  
(ACN 620 846 184)  
Second Respondent

GREATER SHEPPARTON CITY COUNCIL  
Third Respondent

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

LASCORP INVESTMENT GROUP PTY LTD  
Fifth Respondent

**APPELLANT'S REPLY**

## Part I: Certification

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

## Part II: Reply

2. **The IGA parties' submission that s 39(8) can only be applied "at trial":** The IGA parties contend (at RS [8], [12]-[21]) that, in light of *Plaintiff S157* and *Kirk*, s 39(8) of the PE Act cannot validly prevent a party from commencing an "action in the Supreme Court that *alleges* jurisdictional error" because, so construed, the provision would "prohibit[] the Court from determining whether jurisdictional error has occurred ... through the application of judicial process": RS [20.3]-[20.4] (italics in original). They submit that the Minister is "entitled to adopt" her position as to the effect of s 39(8), but the correctness of that position can only be determined "at trial": RS [20.3].
3. That submission should be rejected. Contrary to RS [20.4], the Minister's position is *not* that the question of whether the errors alleged in the originating motion amount to jurisdictional error is "to be ascertained *otherwise* than by the Supreme Court". Rather, that question is to be determined by the Supreme Court in the course of deciding, consistently with its "first duty" "to consider its jurisdiction",<sup>1</sup> whether s 39(8) ousts the Court's authority to decide those claims.
4. When put in issue,<sup>2</sup> as it has been here, jurisdiction is "properly examined and determined at the outset"<sup>3</sup> — ie "at the threshold"<sup>4</sup> and "when a question" of jurisdiction is raised<sup>5</sup> — "if only to avoid putting the parties to unnecessary risk and expense".<sup>6</sup> Contrary to RS [13]-[18], *Kirk* did not diminish the Supreme Court's "authority to decide whether a claim ... is within its jurisdiction" at the outset, subject to review "by the process of

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<sup>1</sup> *Queensland v Stradford* (2025) 99 ALJR 396, [239] (Edelman J); *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 279 CLR 148, [27] (Kiefel CJ and Gageler J), [138] (Gordon J); *Citta Hobart Pty Ltd v Cawthorn* (2022) 276 CLR 216, [62] (Edelman J).

<sup>2</sup> *The Federated Amalgamated Government Railway and Tramway Service Association v The New South Wales Railway Traffic Employees Association* (1906) 4 CLR 488 at 495 (Griffith CJ, Barton J agreeing).

<sup>3</sup> *Workers' Compensation (Dust Diseases) Board v Veksans* (1993) 32 NSWLR 221, 238 (Handley JA, Sheller JA agreeing).

<sup>4</sup> *Hazeldell Ltd v The Commonwealth* (1924) 34 CLR 442, 446 (Isaacs ACJ); *Federal Commissioner of Taxation v Tomaras* (2018) 265 CLR 434, [132] (Edelman J).

<sup>5</sup> *Old UGC Inc v Industrial Relations Commission (NSW)* (2006) 225 CLR 274, [51] (Kirby J, dissenting on other grounds).

<sup>6</sup> *Federated Engine-Drivers and Firemen's Association of Australasia v Broken Hill Pty Co Ltd* (1911) 12 CLR 398, 415 (Griffith CJ), quoted in *R v Blakeley; Ex parte Association of Architects, Engineers, Surveyors and Draughtsmen of Australia* (1950) 82 CLR 54, 70 (Latham CJ), 90-91 (Fullagar J).

appeal”.<sup>7</sup> The determination of the Court’s jurisdiction “is not antecedent to the performance of the curial function, but part of that function”.<sup>8</sup>

5. The determination of a jurisdictional issue may be delayed until trial. But it may also be determined at an earlier point by invoking appropriate procedures of the Supreme Court in the exercise of its jurisdiction. A defendant may, for example, seek summary judgment on the basis that the plaintiff’s claim has no real prospect of success (ie for want of jurisdiction).<sup>9</sup> Alternatively, the Court may reserve the question of jurisdiction for the consideration of the Court of Appeal.<sup>10</sup> That is what has occurred here.
6. As the Court of Appeal noted at J [48], “[i]t was common ground that [Question 1] should be answered by reference to the grounds of review set out in the [IGA parties’] originating motion”. The Court found (and the IGA parties do not contest) that, on its face, “the proceeding brought by the applicants in the Supreme Court is an action within the terms of s 39(8)” (J [92]) and “[e]ach of the grounds in the originating motion is anchored to an alleged failure to comply with one or more of the provisions in pt 3 divs 1–3 or pt 8 of the PE Act”: J [93]. Question 1 thus required the Court of Appeal to decide (cf J [100]-[115]), as a question of statutory construction, whether or not the conditions relied on in the IGA parties’ grounds give rise to invalidity if breached.
7. As the Minister contends, this is to be resolved by reference to “the *Project Blue Sky* question”<sup>11</sup> as to whether a failure to comply with Pt 3 Divs 1-3 and Pt 8 results in jurisdictional error: AS [23]-[25]. On the Minister’s construction, the category of errors alleged in the originating motion are, as a matter of construction, not capable of constituting jurisdictional errors. The consequence is that as s 39(8) is effective to prevent a person from bringing an action in respect of such an error in relation to an amendment not yet approved, Question 1 should be answered “Yes”.

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<sup>7</sup> *New South Wales v Kable* (2013) 252 CLR 118, [31] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

<sup>8</sup> *QYFM* (2023) 279 CLR 148, [28] (Kiefel CJ and Gageler J).

<sup>9</sup> Cf *Civil Procedure Act 2010* (Vic), ss 62, 63. See, eg, *Australian Conservation Foundation v The Commonwealth* (1979-80) 146 CLR 493, 496, 512 (Aickin J); aff’d 532-3 (Gibbs J), 546 (Stephen J), 522 (Mason J), where the action was dismissed for want of standing (now understood as going to jurisdiction: *Forestry Corporation of NSW v South East Forest Rescue Inc* (2025) 99 ALJR 794, [11] (the Court)).

<sup>10</sup> J [1]; *Supreme Court Act 1986* (Vic), s 17B. The order answering the question will not, of course, dispose of the proceeding, but may (as the Minister would contend here if Question 1 is answered “Yes”) dictate how the proceeding is then to be disposed of by the Trial Division.

<sup>11</sup> *Miller* (2024) 278 CLR 628, [29]-[30] (the Court).

8. Nothing in *Plaintiff S157* calls for a different approach. There, the case stated attached a draft order nisi, setting out the plaintiff’s ground of review: a breach of natural justice. The Commonwealth argued that s 474 of the *Migration Act 1958* (Cth) made any natural justice condition non-jurisdictional.<sup>12</sup> The Court disagreed, holding that, as a matter of *construction*, the Refugee Review Tribunal’s power under the *Migration Act* to make the relevant decision was subject to a natural justice condition, which was jurisdictional.<sup>13</sup> The plurality acknowledged that consideration of the effect of s 474 “require[s] an examination of limitations and restraints found in the Act”, and whether the impugned decision “does or does not involve jurisdictional error”.<sup>14</sup> It was only because this Court itself concluded at the outset, as a matter of construction, that natural justice was a condition on validity, that s 474 did not preclude the plaintiff from commencing and proceeding to final hearing on the natural justice ground. But the decision did not deny a court’s authority to decide such matters other than at a trial.<sup>15</sup> A preliminary decision of a Court’s jurisdiction — as much as a decision of that matter following a trial — would be a decision made “in th[e] proceedings” in the sense contemplated in *Plaintiff S157*.<sup>16</sup>
9. The IGA parties’ focus on whether s 39(8) curtails a plaintiff’s ability to *bring* any actions *alleging* jurisdictional error fails to engage with the core issue of statutory construction. It is not enough to avoid the constitutionally valid operation of s 39(8) of the PE Act to allege that a failure to comply with Pt 3 Divs 1-3 or Pt 8 of the PE Act *would* (RS [28]) amount to jurisdictional error, if on the proper construction of the statute, as determined by the Court, it *would not*.
10. In any event, insofar as the IGA parties submit (at RS [21]) that this Court’s opinion as to whether a failure to comply with provisions of the PE Act referred to by s 39(8) is non-jurisdictional is “irrelevant” to the resolution of Question 1, that is not the basis on which the Court of Appeal decided the question. The IGA parties ought not to be permitted to advance the argument in absence of a notice of contention.<sup>17</sup>

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<sup>12</sup> *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 211 CLR 441, 446-447 (D Bennett QC); see *Plaintiff S157* (2003) 211 CLR 476, 479.

<sup>13</sup> *Plaintiff S157* (2003) 211 CLR 476, [26]-[37] (Gleeson CJ), [69], [78] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

<sup>14</sup> *Plaintiff S157* (2003) 211 CLR 476, [78] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

<sup>15</sup> Cf *Futuris* (2008) 237 CLR 146, [24] (Gummow, Hayne, Heydon and Crennan JJ).

<sup>16</sup> Leeming, *Authority to Decide: The Law of Jurisdiction in Australia*, 2nd ed (2020) 36; *Cheney v Spooner* (1929) 41 CLR 532, 536-7 (Isaacs and Gavan Duffy JJ), 538-9 (Starke J).

<sup>17</sup> *Daly v Thiering* (2013) 249 CLR 381, [42] (the Court); *High Court Rules 2004* (Cth), r 42.08.5.

11. **The IGA parties’ submission that steps anterior to an approval are jurisdictional:** The IGA parties submit (at RS [39]-[40], [46]) that s 39(7) of the PE Act only applies to an amendment, once approved, and so could not reflect the Parliament’s intention as to the legal consequences of non-compliances with provisions *before* an amendment is approved. The submission is inconsistent with the well established approach that the question of whether a particular error constitutes jurisdictional error or not is to be determined by reference to the statute as a whole.<sup>18</sup> It is also inconsistent with this Court’s approach to s 175 of the ITAA, which has been to treat that provision for the non-invalidity of a final decision as evincing an intention that the stipulations of anterior procedures “do not go to jurisdiction”:<sup>19</sup> see AS [42]-[46]. The IGA parties (at RS [42]) seek to distinguish these authorities on the supposition that they were “not [directed] to any anterior steps”. But that supposition is wrong. Like *Richard Walter, Futuris* also concerned challenges “not directed to the final, mechanical stage of assessing ... but to the antecedent determinations” of tax benefits “under s 177F”.<sup>20</sup>
12. As the IGA parties note at RS [40], s 39(7) and (8) are different in their text and effect. But that is insufficient, of itself, to evince an intention that, where an amendment has not been approved, non-compliance with anterior steps *is* to result in invalidity. Section 39(8) must be read with s 39(1); together they evince an intention that non-compliance be taken up with the Tribunal, as part of an administrative continuum, itself subject to the Supreme Court’s supervisory jurisdiction and to appeal on a question of law: AS [38]. Further, the implication which the IGA parties seek to draw from the difference between s 39(7) and (8) is contradicted by other features of the statutory scheme.<sup>21</sup>
13. The IGA parties contend (at RS [41], [43]) that Pt 3 Divs 1-3 and Pt 8 of the PE Act should be construed consistently with *Forrest & Forrest Pty Ltd v Wilson*.<sup>22</sup> However, the Court’s construction of the *Mining Act 1978* (WA) in *Forrest* was informed by the “settled approach to statutory construction”<sup>23</sup> that “no effective grant of rights to exploit the mineral resources of the State may be made, except upon compliance with the

<sup>18</sup> *Project Blue Sky* (1998) 194 CLR 355, [93] (McHugh, Gummow, Kirby and Hayne JJ); *Plaintiff S157* (2003) 211 CLR 476, [26] (Gleeson CJ), [65] (Gaurdon, McHugh, Gummow, Kirby and Hayne JJ).

<sup>19</sup> *Futuris* (2008) 237 CLR 146, [24] (Gummow, Hayne, Heydon and Crennan JJ).

<sup>20</sup> *Richard Walter* (1995) 183 CLR 168, 202 (Brennan J); See *Futuris* (2008) 237 CLR 146, 147.

<sup>21</sup> See generally AS [26]-[52]; see also s 166 of the PE Act (J [36]).

<sup>22</sup> (2017) 262 CLR 510.

<sup>23</sup> *Forrest* (2017) 262 CLR 510, [66] (Kiefel CJ, Bell, Gageler and Keane JJ).

statutory regime which provides for the making of the grant”.<sup>24</sup> The PE Act is not a statutory regime of that kind and so does not engage the historical or policy considerations discussed in *Forrest* at [64]-[65]. Additionally, there are further features of the PE Act that make any analogy with the *Mining Act* inapt. For example, “any inconvenience suffered by treating the requirements of” Pts 3 Divs 1-3 and Pt 8 of the PE Act “as conditions precedent to the exercise of the Minister’s power” will not be confined to “those with some responsibility for the non-observance”,<sup>25</sup> but would rather affect the public more broadly.<sup>26</sup> The PE Act also contains material provisions with no analogues in the *Mining Act*, including the PE Act’s provision for the Tribunal’s function in ss 39(1)-(5), and s 39(8).

14. RS [45] is a submission that the Parliamentary supervision provided for in s 38 of the PE Act “is not a substitute for the supervisory jurisdiction of a court”. The submission repeats the Court of Appeal’s error, which is to depart from an inquiry into the significance of the material provisions in the manner required by *Project Blue Sky*,<sup>27</sup> and to resort instead to extraneous views regarding when judicial review ought not be “substitute[d]” for other forms of review.<sup>28</sup> RS [47]-[48] ascribe intentions to the Parliament that undermine the evident object of the correlative grant and withdrawal of jurisdiction, by ss 39(1) and 39(8): see AS [34]-[38].

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<sup>24</sup> *Forrest* (2017) 262 CLR 510, [7] (Kiefel CJ, Bell, Gageler and Keane JJ); see also [64]-[66].

<sup>25</sup> *Forrest* (2017) 262 CLR 510, [63] (Kiefel CJ, Bell, Gageler and Keane JJ).

<sup>26</sup> See further AS [36]-[37].

<sup>27</sup> *Futuris* (2008) 237 CLR 146, [23] (Gummow, Hayne, Heydon and Crennan JJ).

<sup>28</sup> Cf J [104], [111].