HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

MINISTER FOR PLANNING
Appellant

and

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

SHEPPARTON PTY LTD (ACN 620 846 184)
Second Respondent

GREATER SHEPPARTON CITY COUNCIL
Third Respondent

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

LASCORP INVESTMENT GROUP PTY LTD
Fifth Respondent

OUTLINE OF ORAL SUBMISSIONS OF THE FIRST AND SECOND RESPONDENTS

PART I INTERNET PUBLICATION

This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Section 39(8) cannot preclude IGA parties from seeking relief for jurisdictional error

1 The Court of Appeal correctly held that s 39(8) would be constitutionally invalid insofar as it purported to prohibit a person from bringing an action that (non-colourably) alleges jurisdictional error and seeks relief in response: **RS [13]-[18]**.

2 The Minister's proposition that s 39(8) is valid because the Supreme Court can consider the scope of jurisdictional limits on the exercise of executive power in its "preliminary" jurisdiction to determine whether the Court has jurisdiction is contrary to authority and principle, and promotes no constitutional value or purpose: cf. **Minister's Reply [2]-[8]**.

- *Richard Walter* (1995) 183 CLR 168 at 204-205 (**JBA v 3, Tab 17**)
- *Plaintiff S157* (2003) 211 CLR 476 at [48], [53], [62]-[69], [76], [78], [104] (**JBA v 5, Tab 38**)
- *Graham* (2017) 263 CLR 1 at [38]-[44] (**JBA v 4, Tab 24**)
- *Kirk* (2010) 239 CLR 531 at [98] (**JBA v 4, Tab 28**)
- *Citta* (2022) 276 CLR 216 at [18], [20], [22], [31], [33], [38], [39]-[42] (**JBA v 3, Tab 13**)
- *Petrotimor Companhia de Petroleos SARL v Commonwealth* (2003) 128 FCR 407 at [11] (**JBA v 8, Tab 60**)

Jurisdiction of Tribunal, with "appeal" to Court, does not avoid invalidity

3 Direct supervisory jurisdiction of the Supreme Court is constitutionally entrenched. The invalidity of s 39(8) cannot be avoided by reason of any indirect pathway to the Court, via reference to the Tribunal under s 39(1) and availability of "appeal" from the Tribunal to the Court under s 148 of the VCAT Act: **RS [22]-[24]**.

- *Kirk* (2010) 239 CLR 531 at [44], [48], [55], [98], [99], [108] (**JBA v 4, Tab 28**)

4 In any event, even if an indirect pathway to the Court *could*, if it availed equivalent supervision, satisfy the constitutional requirement, that is not the case here under s 39(1) of the Planning Act and s 148 of the VCAT Act: **RS [25]-[26]**.

- VCAT Act ss 3, 10-11, 107, 148 (**JBA v 2, Tab 8**)
- *Osland* (2010) 241 CLR 320 at [18] (**JBA v 5, Tab 36**)

5 The points in [1] to [4] above are sufficient to dispose of the appeal.

The relief sought by IGA parties is available

6 Certiorari is available to quash the report of the panel and the adoption decision of the Council: **RS [30]-[31]**. Decisions anterior to the approval of an amendment are of an administrative character and have a discernible or apparent legal effect upon rights: **RS [32]**.

- *Hot Holdings v Creasy* (1996) 185 CLR 149 at 159-160 (**JBA v 4, Tab 27**)
- *Resort Management Services* [1995] 1 Qd R 311 at 318 (**JBA v 8, Tab 61**)
- *Mackenzie* [2020] VSC 328 at [144], [147] (**JBA v 7, Tab 58**)
- *R v Resource Planning & Development Commission* (2003) 12 Tas R 69 at [7] (**JBA v 8, Tab 63**)
- *Carcione Nominees* (2005) 30 WAR 97 at [68] (**JBA v 7, Tab 49**)

7 It is unnecessary for the Court to decide whether declaratory or injunctive relief are constitutionally entrenched: cf **Qld [6]-[21]**. Section 39(8) does not purport to circumscribe the forms of relief that may be issued by the Court in the exercise of its entrenched supervisory jurisdiction: **RS [34]**.

Minister's *Project Blue Sky* contention is wrong

8 Section 39(7) does not apply to the IGA parties' action. Section 39(8) is different to s 39(7) in its text and effect. Unlike s 39(7), s 39(8) does not say that non-compliance with the provisions referred to does not result in invalidity: **RS [36]-[40]**.

9 Nor does s 39(1) indicate that such non-compliance is protected from invalidity: **RS [47]**.

10 The procedures set out in Part 3 Divisions 1 to 3 and Part 8 of the Planning Act are set out in imperative language and have a public importance: **RS [41]**.

- *Forrest & Forrest* (2017) 262 CLR 510 at [63], [66] (**JBA v 4, Tab 23**)

11 Decisions about s 175 of the *Income Tax Assessment Act 1936* (Cth) do not assist the Minister's constructional argument: **RS [42]**.

- *Richard Walter* (1995) 183 CLR 168 at 177 (**JBA v 3, Tab 17**)
- *Futuris* (2008) 237 CLR 146 at [24], [55], [70] (**JBA v 4, Tab 22**)

12 Nor do any of the following matters assist the Minister's constructional argument: (a) that the Minister has a "supervening power" to approve an amendment; (b) that the Minister has a power under s 20(4) to disapply the procedures in Part 3 Divisions 1 to 2 and Part 8; (c) that an approved amendment may be disallowed by Parliament; and (d) considerations of public inconvenience: **RS [43]-[46], [48]**.

- *Disorganized Developments* (2023) 280 CLR 515 at [42] (**JBA v 3, Tab 19**)

East Melbourne

13 The Court of Appeal reached its conclusion on the construction of s 39 without relying on the decision in *East Melbourne* (2008) 23 VR 605 (**JBA v 7, Tab 54**). This Court likewise need not, and should not, consider its correctness: **RS [49]**.

14 In any event, the construction in *East Melbourne* has been implicitly endorsed by Parliament, and should not be overturned almost 20 years after the event.

- *NZYQ* (2023) 280 CLR 137 at [20]-[21] (**JBA v 5, Tab 35**)
- *DPP Reference No 1 of 2019* (2021) 274 CLR 177 at [16] (**JBA v 3, Tab 18**)

Nick Wood **Roshan Chaile** **Julia Wang**

6 May 2026