



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

File Number: M103/2025  
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#### Important Information

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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 OUTLINE OF ORAL SUBMISSIONS**

## **PART I: INTERNET PUBLICATION**

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1. This outline is in a form suitable for publication on the internet.

## **PART II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT**

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2. **Question 1.** The Court of Appeal erred in answering Question 1: “No”. Section 39 of the *Planning and Environment Act 1987* (Vic) (**PE Act**) (**JBA 1 / 3**) is effective to prevent the IGA parties from seeking the relief sought in their originating motion (**OM**) because:
  - 2.1. the errors alleged in the OM are in respect of alleged failures to comply with Pt 3 Divs 2 and 3 of the PE Act;
  - 2.2. the alleged errors are not jurisdictional (that is, the alleged failures to comply do not result in invalidity); and
  - 2.3. section 39(8) is therefore effective on its terms to remove the jurisdiction of the Supreme Court to hear and determine an action in respect of the errors alleged. There is no need to read it down in light of the principle in *Kirk* (2010) 239 CLR 531 (**JBA 4 / 28**).

AS [11]; CA [1]–[2], [48], [93] (**CAB tab 2**); PE Act, s 39 (**JBA 1 / 3**); OM (**ABFM 5**).

3. **Statutory scheme.** Part 3 Divs 1–3 and Pt 8 establish a procedure for the making of planning scheme amendments, including, where appropriate, public notice, submissions and an expert panel process, leading to Ministerial approval of an amendment, subject to Parliamentary oversight and disallowance: AS [12]–[18]; CA [16]–[36] (**CAB tab 2**).
4. **A question of statutory construction.** Only by construing the statute is it possible to determine: (a) whether there has been a failure to comply with an express or implied condition on a statutory conferral of decision-making power; and (b) whether the condition is jurisdictional (ie, whether a failure to comply results in invalidity).

AS [24]–[25]; *Project Blue Sky* (1998) 194 CLR 355 at [91]–[93] (**JBA 5 / 40**); *LPDT* (2024) 280 CLR 321 at [4] (**JBA 4 / 29**).

5. In relation to the question in [4(b)] above (the **Project Blue Sky question**), Parliament may prescribe, expressly or impliedly, that a failure to comply is to result in: invalidity (ie, jurisdictional error); unlawfulness (but not invalidity) that may attract declaratory or injunctive relief; or administrative or political consequences.

*Project Blue Sky* at [100] (**JBA 5 / 40**); *Miller* (2024) 278 CLR 628 at [25] (**JBA 4 / 30**); *Casimaty* (2024) 98 ALJR 1139 at [32] (**JBA 7 / 47**).

6. If a failure to comply results in invalidity, *Kirk* holds that a State Parliament has no power to exclude the jurisdiction of the Supreme Court to grant relief. But *Kirk* does not limit a State Parliament’s power to legislate in respect of the anterior question of the effect that should be attributed to a failure to comply with a relevant condition on a statutory power.

*Kirk* at [100] (**JBA 4 / 28**); *Duncan* (2015) 256 CLR 83 at [29] (**JBA 3 / 20**).

7. **Proper construction of the PE Act.** A failure to comply with the procedures in Pt 3 Divs 1–3 and Pt 8 of the PE Act in taking a step anterior to the Minister’s decision to approve an amendment does not result in the invalidity of that step, or a subsequent step, irrespective of whether the relevant amendment has yet been approved: AS [26]–[46].

- 7.1. A planning scheme amendment is a form of delegated legislation, which gives effect to, and may contain, matters of a broad, policy-laden nature: AS [27].

PE Act, ss 1, 4, 6 (**JBA 1 / 3**); cf *Forrest & Forrest Pty Ltd v Wilson* (2017) 262 CLR 510 (**JBA 4 / 23**), which arises in a very different statutory context.

- 7.2. The statutory context indicates that the procedural requirements leading up to approval are not of such a kind where breach gives rise to invalidity: AS [28]–[31].

PE Act, ss 20, 166 (**JBA 1 / 3**).

- 7.3. Sections 38–39 establish a cohesive scheme with roles for the Tribunal and Parliament.

- (a) By s 39(1) and (8), Parliament directs allegations of a failure to comply with Pt 3 Divs 1–3 or Pt 8, before an amendment is approved, to the Tribunal and gives it power to correct error caused by such failure: AS [34]–[38].

- (b) Section 39(7) provides that an amendment which has been approved is not made invalid by a failure to comply with Pt 3 Divs 1–3 or Pt 8: AS [39]–[46].

*Futuris* (2008) 237 CLR 146 at [22]–[24], [45], [47] (**JBA 4 / 22**).

- (c) Instead, by s 38, Parliament is given power to revoke the approval of an amendment: AS [32]–[33].

- 7.4. The statutory purpose of ensuring the timely and cost-efficient review of errors in the amendment process is promoted by limiting avenues of review to the constrained exercise of power by a single body (ie, the Tribunal): AS [36]–[37].

- 7.5. There is no “island of power immune from supervision or restraint”: AS [38].

8. Accordingly, s 39(8) is effective on its terms to bar the IGA parties' action. There is no occasion to apply *Kirk* to read down s 39(8).
- 8.1. The Court should reject the IGA parties' submission (at RS [12]–[21]) that it is sufficient to answer Question 1 that the OM *alleges* jurisdictional error, and that the Court's answer to the *Project Blue Sky* question is therefore irrelevant.
- 8.2. An issue as to the Supreme Court's jurisdiction may be determined prior to trial by invoking appropriate procedures — such as referral of a separate question — in the exercise of the Court's jurisdiction. *Kirk* does not require that it be delayed until final hearing.
9. Contrary to CA [108]–[112], no public law remedies are available before approval of an amendment. Section 39(8) is effective to deny the Supreme Court jurisdiction to grant relief with respect to non-jurisdictional error: AS [54].
10. **Question 2.** Although it is not strictly necessary for this Court to answer Question 2, *East Melbourne Group* (2008) 23 VR 605 (**JBA 7 / 54**) should be disapproved: AS [50]–[51].
11. **Alternative submission.** If, contrary to the Minister's submission, the Court holds that a failure to comply results in invalidity, the Minister would adopt the written submissions of the Commonwealth at [25]–[28] and of South Australia.

**Dated:** 6 May 2026



**ALISTAIR POUND SC**  
*Solicitor-General for Victoria*

**CARYN VAN PROCTOR**

**EMRYS NEKVAPIL SC**

**JAMIE BLAKER**