



HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 05 May 2026 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number: M103/2025
File Title: Minister for Planning v. IGA Retail Services Pty Ltd (ACN 001
Registry: Melbourne
Document filed: Form 27F - Outline of oral submissions A-G of NSW
Filing party: Interveners
Date filed: 05 May 2026

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

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

**OUTLINE OF ORAL SUBMISSIONS OF THE ATTORNEY GENERAL FOR NEW
SOUTH WALES, INTERVENING**

Part I: Certification

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

Part II: Outline of oral submissions

2. The Attorney General for New South Wales (**NSW Attorney**) intervenes in these proceedings in support of the Appellant. The NSW Attorney adopts the submissions of the Appellant and advances supplementary oral submissions.

Whether error is jurisdictional is a question of statutory construction

3. The NSW Attorney submits that whether a particular condition upon an administrative decision-making process is jurisdictional in character must be determined before applying Kirk v Industrial Relations Commission (NSW) (2010) 239 CLR 531 (**Kirk**) to read down a privative clause: Kirk at [100] (**Joint Book of Authorities (JBA)**, vol 4, tab 28, 1124). The jurisdictional character of any such condition is a question of statutory construction according to text, context and purpose: Written Submissions of the NSW Attorney (**NWS**) at [8]; Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355 (**Project Blue Sky**) at [91] (**JBA**, vol 5, tab 40, 1725); LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (2024) 280 CLR 321 (**LPDT**) at [2]–[4] (**JBA**, vol 4, tab 29, 1190).
4. If a condition upon an administrative decision-making process is not jurisdictional, then a privative clause, such as s 39(8) of the Planning and Environment Act 1987 (Vic), does not offend the constitutional limitation arising from Kirk by precluding judicial review of compliance with the condition.
5. There is no “rigid taxonomy of jurisdictional error”: Craig v South Australia (1995) 184 CLR 163 (**Craig**) at 177–178 (**JBA**, vol 3, tab 14, 525); Kirk at [73]. Thus, the jurisdictional character of an alleged error must be determined by a process of statutory construction, and not simply by labelling an asserted error as “jurisdictional”. The metes and bounds of jurisdictional error are to be marked separately for each statutory decision-making process: **NWS** at [8]–[9]; LPDT at [5].

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

6. The constitutional limitation identified in Kirk does not bear upon the antecedent construction of the scope of a decision-maker’s jurisdiction in accordance with Project Blue Sky. The Kirk limitation is directed to a subsequent step in the process of assessing a decision for jurisdictional error, namely, whether a privative clause is

required to be read down in order to preserve the constitutionally entrenched minimum standard of judicial review: **NWS** at [16]–[18].

7. This Court, in Kirk, gave effect to a constitutional limit upon the legislative power of a State Parliament, and not a principle of statutory interpretation. The distinction between jurisdictional and non-jurisdictional error, being a question of statutory construction, marks the relevant limit on State legislative power: **NWS** at [22]–[23]; Kirk at [100].
8. The Court of Appeal erred by applying Kirk to read down s 39(8) of the Planning and Environment Act on the basis that the First and Second Respondents had alleged jurisdictional error, without having first construed the Act to determine the scope of the decision-makers’ respective authorities: **NWS** at [24]; c.f. Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476 at [45] (**JBA**, vol 5, tab 38, 1616).

The transformative effect of a no invalidity clause

9. A no invalidity clause, such as s 39(7) of the Planning and Environment Act, ordinarily has a transformative effect upon steps in the course of a statutory decision-making process that would otherwise appear to condition the decision-maker’s jurisdiction: **NWS** at [26]–[27]. Federal Commissioner of Taxation v Futuris Corporation Ltd (2008) 237 CLR 146 at [23] (**JBA**, vol 4, tab 22, 826); Stanley v Director of Public Prosecutions (NSW) (2023) 278 CLR 1 (**Stanley**) at [89]–[95] (**JBA**, vol 6, tab 46, 2075).
10. A no invalidity clause is a clear textual or contextual indication of legislative intent that a particular decision, or step in a decision-making process, should not be invalidated by a specified instance of non-compliance with the underlying statute: Stanley at [194].
11. Stanley provides a useful counterpoint to the approach taken by the Court of Appeal: **NWS** at [29]–[33]; Stanley at [55]. The effect of Kirk upon the privative clause under consideration in that case turned upon the identification of the dividing line between jurisdictional and non-jurisdictional error. That, in turn, depended on “the proper construction of the relevant statute”: **NWS** at [32]–[33]; Stanley at [55]; Project Blue Sky at [91].

Dated 4 May 2026

Handwritten signature in blue ink, appearing to read "M G Sexton".

M G Sexton SC SG

(02) 8688 5502

michael.sexton@justice.nsw.gov.au

Christian N Andreotti

(02) 8688 5504

christian.andreotti@justice.nsw.gov.au