



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:

No. M103/2025

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

**OUTLINE OF ORAL SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE
STATE OF SOUTH AUSTRALIA (INTERVENING)**

Part I: CERTIFICATION

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

Part II: OUTLINE OF ORAL SUBMISSION

2. South Australia agrees with the submissions advanced by the Appellant that the errors that are precluded from review by s 39(8) of the *Planning and Environment Act 1987* (Vic) (**PE Act**), (V1, T3) are non-jurisdictional, such that s 39(8) does not offend the principle enunciated by this Court in *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 (*Kirk*), (V4, T28).

3. If, however, contrary to that submission, the Court considers that the errors that are precluded from judicial review by s 39(8) are jurisdictional in nature, then South Australia submits that s 39(8) does not offend the *Kirk* principle in circumstances where s 39(1) confers an alternative avenue of review for jurisdictional error and supervision by the Supreme Court of Victoria.
4. This Court’s decision in *Kirk* established that legislation that purports to deny a State Supreme Court the power to grant relief in respect of jurisdictional error, to enforce the limits on the exercise of State executive and judicial power, is beyond State legislative power: *Kirk*, 581 [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Duncan v Independent Commission Against Corruption* (2015) 256 CLR 83 (V3, T20), 100 [35] (Gageler J).
5. However, the States retain a degree of legislative choice about how the supervisory jurisdiction of their Supreme Court may be exercised. In particular, South Australia submits that the *Kirk* principle will not be infringed where an alternative jurisdiction is conferred to correct jurisdictional error in circumstances where:
 - 5.1. that jurisdiction is no narrower (either by reference to the scope of the grounds of review or the relief that is available) than that which would have been available by grant of prerogative relief for jurisdictional error by the Supreme Court; and,
 - 5.2. the exercise of that alternative jurisdiction is itself subject to supervision by the Supreme Court.
6. Where these conditions are met the structural requirements that grounded the drawing of the *Kirk* principle will be satisfied: there will be no “islands of power” and all jurisdictional errors will be subject to the ultimate “superintendence of this Court” by virtue of s 73(ii) of the *Constitution*: *Kirk*, 581 [98]-[99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
7. This submission is not foreclosed by the decision in *Kirk*: cf *First and Second Respondents’ Submissions (RS)*, [23]-[24]. It finds support in extra curial writings (JJ Spigelman, “The Centrality of Jurisdictional Error” (2010) 21 *Public Law Review* 77, 91 (V9, T73)) and the South Australian Court of Appeal (*Marmota Ltd v Commissioner of State Taxation* [2025] SASCA 11 (V8, T59), [84]-[97] (Livesey P, S Doyle and Bleby JJ)).

8. Applying these principles to the present case, it is open to the Respondents in their referral to the Victorian Civil and Administrative Tribunal (**VCAT**) to:
- 8.1. seek review of any of the jurisdictional errors that they have alleged in the Supreme Court proceedings (the VCAT’s jurisdiction extends to review for error of law: s 39(1) of the PE Act; *Appellant’s Submissions*, [50]; cf *East Melbourne Group Inc v Minister for Planning* (2008) 23 VR 605 (V7, T54)); and,
- 8.2. obtain relief in the nature of certiorari (the VCAT is empowered to make a declaration of invalidity: s 39(4)(a) of the PE Act), prohibition (the VCAT is empowered to direct that the planning authority must not adopt an amendment or the Minister must not adopt an amendment: s 39(4)(b)(i) and (ii) of the PE Act) and mandamus (the VCAT can direct that the power to prohibit in s 39(4)(b)(i) and (ii) is contingent upon the panel, planning authority or Minister taking action consistent with statutory duties).
9. In the event that the VCAT falls into legal error on the referral, then the Respondents are entitled to appeal to the Supreme Court of Victoria and seek “an order that the [VCAT] could have made in the proceeding”: s 148(7)(b) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (**VCAT Act**) (V2, T8).
10. In these circumstances, even if the errors precluded from review by s 39(8) of the PE Act are jurisdictional, the supervisory jurisdiction of the Supreme Court of Victoria is preserved by virtue of the alternative jurisdiction conferred on the VCAT by s 39(1) of the PE Act, together with the right of appeal conferred by s 148 of the VCAT Act.

Dated: 6 May 2026

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