HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

MINISTER FOR PLANNING APPELLANT

AND

IGA RETAIL SERVICES PTY LTD & ORS RESPONDENTS

Minister for Planning v IGA Retail Services Pty Ltd
[2026] HCA 43
Dates of Hearing: 6 & 7 May 2026
Date of Judgment: 11 November 2026
M103/2025

ORDER

Appeal dismissed.

On appeal from the Supreme Court of Victoria

Representation

A D Pound SC, Solicitor-General for the State of Victoria, and E M Nekvapil SC with C van Proctor and J R G Blaker for the appellant (instructed by Victorian Government Solicitor)

N M Wood SC with R Chaile and J R Wang for the first and second respondents (instructed by MinterEllison)

T M Begbie KC with S Zeleznikow and P Banerjee for the Attorney-General of the Commonwealth of Australia, intervening (instructed by Australian Government Solicitor)

M G Sexton SC, Solicitor-General for the State of New South Wales, with C N Andreotti for the Attorney-General for the State of New South Wales, intervening (instructed by Crown Solicitor for NSW)

M J Wait SC, Solicitor-General for the State of South Australia, with Z A Underwood for the Attorney-General for the State of South Australia, intervening (instructed by Crown Solicitor's Office (SA))

G J D del Villar KC, Solicitor-General of the State of Queensland, with K J E Blore for the Attorney-General of the State of Queensland, intervening (instructed by Crown Law (Qld))

Submitting appearances for the third to fifth respondents

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Minister for Planning v IGA Retail Services Pty Ltd

Administrative law – *Planning and Environment Act 1987* (Vic) ("PE Act") – Where Greater Shepparton City Council seeks to facilitate development of Shepparton North area – Where development requires amendment to Greater Shepparton Planning Scheme – Where IGA Retail Services Pty Ltd and Shepparton Pty Ltd ("IGA parties") have interests in land covered by proposed amendment – Where Council adopted proposed amendment – Where proposed amendment submitted to Minister for Planning for approval – Where amendment not yet approved by Minister – Where s 39(7) of PE Act provides that amendment to planning scheme approved by Minister not made invalid by any failure to comply with certain provisions of PE Act – Where s 39(8) of PE Act provides that person "cannot bring an action" in respect of relevant failures to comply in relation to planning scheme amendment which has not been approved – Whether s 39 of PE Act prevents IGA parties from seeking relief sought – Whether relevant failure to comply could amount to jurisdictional error.

Words and phrases – "amendment", "approval", "cannot bring an action", "certiorari", "construction", "decision anterior to approval", "development", "failure to comply", "implication", "invalid", "invalidity", "judicial review", "judicial review jurisdiction", "jurisdictional error", "land", "Minister for Planning", "originating motion", "panel", "planning amendment", "planning authority", "planning scheme", "privative clause", "relief", "reserved questions", "scheme", "seeking the relief sought", "statutory construction", "statutory scheme", "step anterior to approval", "substantially or materially affected", "supervisory jurisdiction".

Planning and Environment Act 1987 (Vic), Pt 3, Pt 8, s 39.

1 GAGELER CJ, GORDON, EDELMAN, JAGOT AND BEECH-JONES JJ. Section 39(7) of the *Planning and Environment Act 1987* (Vic) ("the PE Act") provides that any amendment to a planning scheme which has been approved by the Minister for Planning[1] is not made invalid by a failure to comply with Divs 1-3 of Pt 3 or Pt 8 of the PE Act (in relation to that amendment). Section 39(8) (read with s 39(1)-(5)) provides that, except by applying to the Victorian Civil and Administrative Tribunal ("the Tribunal") as provided for by that section, a person "cannot bring an action" in respect of any failure to comply with the same provisions in relation to an amendment to a planning scheme which has not been approved.

2 In substance, this appeal involves two questions about these provisions. The first is whether s 39(8) of the PE Act can validly prevent a person with sufficient standing from *commencing* a proceeding in the Supreme Court of Victoria seeking relief for jurisdictional error in respect of a failure to comply with Divs 1-3 of Pt 3 or Pt 8 of the PE Act in relation to an amendment which has not been approved. Consistent with established authority,[2] it cannot. The second is whether, in respect of an amendment which has not been approved (or refused), an implication should be recognised from s 39(7), and other provisions of the PE Act, that any failure to comply with Divs 1-3 of Pt 3 or Pt 8 of the PE Act could not amount to a jurisdictional error. No such implication should be recognised.

3 The appeal arises in this context. The Greater Shepparton City Council ("the Council"), the third respondent, seeks to facilitate the development of the Shepparton North area. This requires an amendment to the Greater Shepparton Planning Scheme in accordance with the procedures laid down in Pt 3 of the PE Act. The first and second respondents, IGA Retail Services Pty Ltd and Shepparton Pty Ltd (together, "the IGA parties"), have interests in land covered by the proposed amendment.

4 Consistently with the procedures in Pt 3 of the PE Act, the Council's proposed "Greater Shepparton Planning Scheme Amendment C245gshe: Shepparton North Activity Centre Structure Plan" ("the Amendment") was placed on public exhibition and the Council received a number of submissions about it, including a submission from the IGA parties. The Council resolved to refer all of

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1 PE Act, s 35(1).

2 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 513-514 [103]-[104]; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 566-567 [55], 580-581 [98]-[100].

those submissions to a panel appointed under Pt 8 of the PE Act ("the Panel"), which provided a report ("the Panel Report"). The Council, by resolution, adopted the Amendment with changes recommended by the Panel. The Amendment, as adopted, has been submitted to the appellant (the Minister) for approval, but the Minister has not yet approved the Amendment.

5 Section 39(1) of the PE Act provides, relevantly, that a person "who is substantially or materially affected by a failure" by the Minister, the Council or the Panel to comply with Divs 1-3 of Pt 3 or Pt 8 of the PE Act "in relation to an amendment which has not been approved" may refer the matter to the Tribunal for its determination.[3] Section 39 prescribes procedures for the Tribunal and, significantly, the steps the Tribunal can take in determining that matter.[4] Section 39(8) provides that "[e]xcept for an application under this section, a person cannot bring an action in respect of a failure to comply with [Divs 1-3 of Pt 3 or Pt 8] in relation to an amendment which has not been approved". Section 39(7) provides that an amendment which has been approved "is not made invalid by any failure to comply" with Divs 1-3 of Pt 3 or Pt 8.

6 The IGA parties, by originating motion filed in the Supreme Court, contend that the Panel Report is affected by jurisdictional error and invalid ("the Judicial Review Proceeding"). They seek an order from the Supreme Court quashing the Panel Report and consequential relief. The trial judge reserved two questions for the consideration of the Court of Appeal of the Supreme Court of Victoria:

> "**Question 1**
>
> Does s 39 of the *Planning and Environment Act 1987* (Vic) prevent the [IGA parties] from seeking the relief sought in the originating motion filed in this proceeding (S ECI 2024 02935)?
>
> **Question 2**
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> To the extent necessary to decide Question 1, was the decision in *East Melbourne Group Inc v Minister for Planning* (2008) 23 VR 605, as to

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3 Section 39(1) provides that the person affected may refer the matter to the Tribunal not later than one month after becoming aware of the failure.

4 PE Act, s 39(2)-(5).

the construction of s 39 of the *Planning and Environment Act 1987* (Vic), plainly wrong?"

The Court of Appeal answered Question 1 "No" and Question 2 "Unnecessary to answer".

7 The Minister appealed to this Court on a single ground: that the Court of Appeal erred in its answer to Question 1.[5] The Minister's contention was that, having regard to the statutory scheme of the PE Act, an implication was contained in s 39(7) of the PE Act that *before* a planning amendment is approved by the Minister, no error in relation to any step or decision anterior to that approval makes that step or decision invalid and therefore no error could amount to jurisdictional error.

8 For the reasons that follow, the Court of Appeal was correct to answer Question 1 "No". The appeal must be dismissed.

The PE Act

9 The purpose of the PE Act is to "establish a framework for planning the use, development and protection of land in Victoria in the present and long-term interests of all Victorians".[6] The objectives of planning in Victoria include "to provide for the fair, orderly, economic and sustainable use, and development of land".[7] The objectives of the planning framework established by the PE Act include "to establish a system of planning schemes based on municipal districts to be the principal way of setting out objectives, policies and controls for the use, development and protection of land";[8] "to establish a clear procedure for amending planning schemes, with appropriate public participation in decision making";[9] and "to ensure that those affected by proposals for the use, development or

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5 The Attorneys-General of the Commonwealth, New South Wales, South Australia and Queensland each intervened in support of the Minister.

6 PE Act, s 1.

7 PE Act, s 4(1)(a).

8 PE Act, s 4(2)(b).

9 PE Act, s 4(2)(h).

protection of land or changes in planning policy or requirements receive appropriate notice".[10]

10 Part 2 of the PE Act deals with planning schemes. The Minister "may issue directions or guidelines as to the form and content of any planning scheme"[11] and a planning authority must comply with such a direction of the Minister.[12] Under the PE Act, the Minister is a planning authority,[13] as is a municipal council for any planning scheme in force in its municipal district.[14] A planning authority has a duty and power to "prepare amendments to a planning scheme for which it is a planning authority".[15]

Amendment of planning schemes

11 Part 3 of the PE Act deals with amendment of planning schemes. The PE Act prescribes detailed steps leading up to (or anterior to) approval of an amendment.

12 Division 1 of Pt 3 sets out the initial procedural steps to be taken. A planning authority must give copies of any proposed amendment, together with explanatory and other documents to, relevantly, the Minister.[16] Certain documents, including a copy of the proposed amendment, must be made publicly available "until the proposed amendment is approved or lapses".[17]

13 Section 19 sets out notice requirements for a planning authority. A planning authority must give notice ("a s 19(1) notice") of its preparation of an amendment

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10 PE Act, s 4(2)(i).

11 PE Act, s 7(5).

12 PE Act, s 7(6).

13 PE Act, s 8(2).

14 PE Act, s 8A(1).

15 PE Act, s 12(1)(d).

16 PE Act, s 17(1)(c).

17 PE Act, s 18; see especially s 18(2)(a) and (3). The "public availability requirements" are in ss 197A-197H of the PE Act.

to a planning scheme to every Minister, public authority and municipal council that it believes may be materially affected by the amendment,[18] as well as to the owners and occupiers of land that it believes may be materially affected by the amendment.[19] If the planning authority considers the number of owners and occupiers affected makes it impractical to notify them all individually,[20] it is not obliged to do that but it must take reasonable steps to ensure that public notice of the proposed amendment is given in the area affected, and that the notice states that owners and occupiers of land affected are entitled to make submissions.[21]

14 A planning authority must publish a notice of any amendment it prepares in a newspaper generally circulating in the area to which the amendment applies.[22] After all notices have been given under s 19(1)-(2A), the planning authority must by s 19(3) publish a notice of preparation of the amendment in the Government Gazette.[23] That notice must set a date for submissions to the planning authority.[24] Section 19(5) provides that the failure of a planning authority to give a s 19(1) notice does *not* prevent the adoption or approval of an amendment by the planning authority or its submission to or approval by the Minister. Section 19(5) does not refer to notice under other sub-sections of s 19.

15 Section 20 is headed "Exemption from giving notice". If the Minister considers that compliance with any of the notice requirements in s 19 is not warranted or that the interests of Victoria or any part of Victoria make such an exemption appropriate, the Minister may exempt a planning authority from complying with the relevant requirement and may impose conditions on that exemption, including a condition which requires the planning authority to give

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18 PE Act, s 19(1)(a).

19 PE Act, s 19(1)(b), subject to s 19(1A).

20 PE Act, s 19(1A); cf s 19(1C).

21 PE Act, s 19(1B).

22 PE Act, s 19(2).

23 PE Act, s 19(3).

24 PE Act, s 19(4)(b).

notice of the amendment in any specified manner.[25] However, there are prescribed circumstances where the Minister cannot exempt a planning authority from the requirement to give notice: for example, the Minister cannot exempt a planning authority from the requirement to give notice, to the owner of any land, of an amendment which provides for the reservation of that land for public purposes, or for the closure of a road which provides access to that land.[26]

16 The Minister may also "exempt [themself] from any of the requirements of sections 17, 18 and 19 and the regulations in respect of an amendment which the Minister prepares, if the Minister considers that compliance with any of those requirements is not warranted or that the interests of Victoria or any part of Victoria make such an exemption appropriate".[27]

17 Division 2 of Pt 3 deals with public submissions about an amendment. Any person "may make a submission to the planning authority about an amendment of which notice has been given"[28] and the planning authority must make a copy of every submission publicly available.[29] A planning authority must consider all submissions made on or before the date set out in the notice.[30] After considering a submission which requests a change to the amendment, the planning authority must do one of three things: change the amendment in the manner requested;[31] refer the submission to a panel appointed under Pt 8 of

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25 PE Act, s 20(2). There was an exception to the exemption which is not relevant to the issues in this appeal.

26 PE Act, s 20(3)(a).

27 PE Act, s 20(4).

28 PE Act, s 21(1), subject to s 21(3)-(5), which are not relevant to the issues in this appeal. Section 21A permits the making of joint submissions.

29 PE Act, s 21(2).

30 PE Act, s 22(1), subject to s 22(3)-(5), which are not relevant to the issues in this appeal. The planning authority may consider a late submission and must consider one if the Minister directs: s 22(2).

31 PE Act, s 23(1)(a).

the PE Act;[32] or abandon the amendment or part of the amendment.[33] A planning authority may refer to the panel submissions which do not require a change to the amendment.[34]

18 If a planning authority refers the submissions to a panel, the panel must consider all submissions referred to it and give a reasonable opportunity to be heard to: any person who has made a submission referred to it;[35] the planning authority;[36] any responsible authority or municipal council concerned;[37] any person who asked the planning authority to prepare the amendment;[38] and any person whom the Minister or the planning authority directs the panel to hear.[39]

19 The panel must report its findings to the planning authority[40] and, in its report, the panel may make any recommendation it thinks fit.[41] After receipt of the panel's report, the planning authority must make the panel's report available to

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32 PE Act, s 23(1)(b).

33 PE Act, s 23(1)(c).

34 PE Act, s 23(2).

35 PE Act, s 24(a).

36 PE Act, s 24(b).

37 PE Act, s 24(c).

38 PE Act, s 24(d).

39 PE Act, s 24(e).

40 PE Act, s 25(1).

41 PE Act, s 25(2), subject to s 25(3)-(5), which are not relevant to the issues in this appeal.

the public[42] and must consider the panel's report before deciding whether or not to adopt the amendment.[43]

20 Part 8 of the PE Act deals with the appointment of panels and their conduct of hearings.[44] Within that Part, s 166 provides that a panel may continue to hear submissions and make its report and recommendations despite any defect, failure or irregularity in the preparation of a planning scheme or amendment or any failure to comply with Div 1, 2 or 3 of Pt 3 in relation to the preparation of the planning scheme or amendment.[45]

Adoption and approval of amendment

21 Division 3 of Pt 3 deals with adoption and approval of an amendment. After complying with Divs 1 and 2 of Pt 3 in respect of an amendment or any part of it, the planning authority may adopt the amendment or that part with or without changes.[46] A planning authority other than the Minister must submit an adopted amendment to the Minister together with prescribed information.[47]

22 The Minister may direct the planning authority to give more notice of the amendment if the Minister thinks that the notice given was inadequate[48] and may direct the planning authority to give notice of any changes made by the planning authority, or which the Minister proposes to make.[49] The Minister may allow any person affected by a change to an amendment to make a submission

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42 PE Act, s 26(2), which requires the planning authority to make the panel's report available in accordance with the "public availability requirements" during "the inspection period": see ss 26(3), 197A-197H.

43 PE Act, s 27(1).

44 See Divs 1 and 2 of Pt 8.

45 PE Act, s 166(1).

46 PE Act, s 29(1).

47 PE Act, s 31(1). Information is prescribed in reg 9 of the *Planning and Environment Regulations 2015* (Vic).

48 PE Act, s 32(1).

49 PE Act, s 33(1).

to the Minister on the change[50] and may refer any submissions to a panel appointed under Pt 8.[51] If the Minister refers those submissions to a panel, the panel must consider the submissions and give any person who made a submission referred to it a reasonable opportunity to be heard and may give any other person affected a reasonable opportunity to be heard.[52] The panel must report its findings to the Minister setting out the panel's recommendations on the changes.[53]

23 Section 35(1) confers on the Minister power to approve an amendment or a part of an amendment prepared by the Minister or submitted to the Minister,[54] with or without changes and subject to any conditions the Minister wishes to impose, or to refuse to approve the amendment or part of the amendment.[55] References in this judgment to an amendment "which has not been approved" are references to an amendment that has not yet been the subject of a decision under s 35(1) and not to a proposed amendment that has been refused under s 35(1).

24 Approval of an amendment is a significant step in the statutory scheme. The Minister must publish notice of the approval in the Government Gazette.[56] An amendment comes into operation when the notice of approval of the amendment is published in the Government Gazette or on any later day or days specified in the notice.[57] The Minister must cause a notice of the approval of the amendment to be laid before each House of the Parliament within ten sitting days after it is approved.[58] That notice must state whether the Minister has

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50 PE Act, s 34(1).

51 PE Act, s 34(2).

52 PE Act, s 34(3)-(4).

53 PE Act, s 34(5).

54 Under s 31 of the PE Act.

55 The Minister may approve only part of an amendment and may approve further parts of an amendment at any time: s 35(2)-(3).

56 PE Act, s 36(1).

57 PE Act, s 37.

58 PE Act, s 38(1).

exempted the planning authority or themself from any of the requirements of ss 17, 18 or 19 or the regulations.[59] An amendment may be revoked wholly or in part by a resolution passed by either House of the Parliament within ten sitting days after the notice of approval of the amendment is laid before that House.[60]

25 It is in that statutory context that s 39, headed "Defects in procedure", relevantly provides:

> "(1) A person who is substantially or materially affected by a failure of the Minister, a planning authority or a panel to comply with Division 1 or 2 or this Division or Part 8 in relation to an amendment which has not been approved may, not later than one month after becoming aware of the failure refer the matter to the Tribunal for its determination.
>
> (2) In addition to any other party to the proceeding the parties to a proceeding before the Tribunal under this section are –
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> (a) the person who referred the matter to the Tribunal; and
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> (b) the Minister; and
>
> (c) the planning authority.
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> (3) If a matter referred to the Tribunal under this section involves a failure by a panel to comply with Division 2 or this Division or Part 8 the panel (or a member of the panel authorised by the panel to act on its behalf) is entitled to make a written or oral submission to the Tribunal before the Tribunal completes the hearing of the matter.
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> (4) The Tribunal may determine a matter referred to it under this section and may do any one or more of the following –
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> (a) make any declaration that it considers appropriate;
>
> (b) direct that –

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59 PE Act, s 38(1A); see also s 38(1AAA) and (1B).

60 PE Act, s 38(2); see also s 38(3)-(5).

(i) the planning authority must not adopt the amendment or a specified part of the amendment; or

(ii) the Minister must not approve the amendment or a specified part of the amendment –

unless the Minister, planning authority or a panel takes action specified by the Tribunal.

(5) In exercising its jurisdiction under this section the Tribunal cannot vary a decision made in relation to a matter referred to it or set aside that decision and make a decision in substitution for the decision so set aside.

* * * * *

(7) An amendment which has been approved is not made invalid by any failure to comply with Division 1 or 2 of this Division or Part 8.

(8) Except for an application under this section, a person cannot bring an action in respect of a failure to comply with Division 1 or 2 or this Division or Part 8 in relation to an amendment which has not been approved."

Consistent with what has been stated, the reference in s 39(1) to an amendment which has not been approved is to an amendment that has not yet been the subject of a decision under s 35(1) as opposed to a proposed amendment that has been refused under s 35(1).

Key aspects

26 It is useful at the outset to identify three key aspects of the statutory scheme for amendments to planning schemes in the PE Act.

27 First, the significance of the detailed procedures prior to the approval of any amendment is self-evident.[61] Those procedures involve public notice, submissions, and consideration by up to three separate bodies – a planning authority (relevantly, a municipal council), a panel, and the Minister. Those steps are important to give effect to the PE Act's stated objectives of establishing "a clear procedure for

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61 See [11]-[22] above.

amending planning schemes, with appropriate public participation in decision making" and of ensuring "that those affected by proposals for the use, development or protection of land or changes in planning policy or requirements receive appropriate notice".[62]

28 Second, s 39 sets out a unique form of review in relation to an amendment to a planning scheme which has *not* been approved.[63] As already noted, s 39(1) provides that a person who is "substantially or materially affected by a failure of the Minister, a planning authority or a panel to comply with [Divs 1-3 of Pt 3 or Pt 8] in relation to an amendment which has not been approved", not later than one month after becoming aware of the failure, may refer the matter to the Tribunal for its determination. The Tribunal is empowered, under s 39(4), to make any declaration it considers appropriate, as well as to direct a planning authority not to adopt, or the Minister not to approve, an amendment or a specified part of the amendment *unless* the Minister, planning authority or a panel takes specified action. The Tribunal, however, cannot vary any decision made or set aside and substitute any decision. Finally, s 39(8) provides that except for an application under s 39, "a person cannot bring an action in respect of a failure to comply with [Divs 1-3 of Pt 3 or Pt 8] in relation to an amendment which has not been approved". In sum, where an amendment has not been approved, the scheme provides, in terms, that a person affected by a failure by the Minister, planning authority or panel to comply with Divs 1-3 of Pt 3 or Pt 8 may refer the matter to the Tribunal for its determination. Any referral of such a matter to the Tribunal must be made not later than one month after the person becomes aware of the failure. And the relief able to be granted by the Tribunal is limited.

29 Third, it is within that statutory scheme that s 39(7) provides that an amendment which *has* been approved "is not made invalid by any failure to comply with [Divs 1-3 of Pt 3 or Pt 8]". Section 39(7) is directed to a subject matter different from the other provisions of s 39, namely *approved* amendments. It operates in conjunction with s 39(1) and (8), which expressly apply to an amendment which *has not* been approved. The distinction is important. While an application for an approval of an amendment to a planning scheme does not attach to the land, an approval of an amendment, which will have been the subject of parliamentary oversight, and may have been relied on by third parties, is binding on all those with interests in the land subject to the scheme and their successors. Once an amendment is approved and commences operation, it is

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62 PE Act, s 4(2)(h)-(i).

63 The Tribunal is not exercising its "review jurisdiction": see [60] below.

also binding on every Minister, government department, public authority and municipal council.[64] Those different statutory consequences are significant, particularly to the implication (that no error in relation to any step or decision anterior to the Minister's approval under s 35 of the PE Act could be jurisdictional) which the Minister contends s 39(7) carries in respect of an amendment which has not been approved (the subject of s 39(1) and (8)).

Facts and procedural history

30 Under Pt 3 of the PE Act, a delegate of the Minister authorised the Council, as the relevant planning authority, to prepare and exhibit an amendment to the Greater Shepparton Planning Scheme (namely, the Amendment). The Council exhibited the Amendment and received a number of submissions about it, including a submission from the IGA parties. The Council referred the submissions to a panel,[65] and a delegate of the Minister appointed the Panel to consider the submissions.[66] The Panel conducted public hearings[67] and then provided the Panel Report to the Council. The Panel recommended, subject to a number of changes, that the Amendment be adopted as exhibited.

31 The Council resolved to adopt the Amendment with the changes recommended by the Panel and submit the Amendment to the Minister ("the April Resolution"). The Council subsequently came to the view that the April Resolution was invalid, because the exact form of the changes to the Amendment recommended by the Panel had not been before the Council when the resolution was made. The Council again resolved to adopt the Amendment (with the changes recommended by the Panel) and submit the Amendment to the Minister ("the July Resolution"). The Council submitted the Amendment (as adopted by the July Resolution) to the Minister for approval. That approval remained pending as of the hearing in this Court.

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64 PE Act, s 16.

65 PE Act, s 23.

66 PE Act, s 153.

67 PE Act, s 161.

32 On 11 June 2024 (after the April Resolution but before the July Resolution), the IGA parties commenced the Judicial Review Proceeding.[68] By their originating motion, the IGA parties sought relief including:

> "1. An injunction restraining the First Defendant (**Minister**) from approving under section 35 of the *Planning and Environment Act 1987* (Vic) (**Act**) the 'Greater Shepparton Planning Scheme Amendment C245gshe: Shepparton North Activity Centre Structure Plan' (**Amendment**), or part of the Amendment, submitted by the Second Defendant (**Council**) to the Minister on or about 23 April 2024 under section 31 of the Act.
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> 2. An order in the nature of certiorari quashing the purported resolution (**Adoption**) of the Council on 23 April 2024 under section 29 of the Act to adopt the Amendment with changes recommended by the Defendant (**Panel**) in its purported report dated 22 March 2024 (**Report**) under section 25 of the Act.
>
> 3. An order in the nature of certiorari quashing the Report.
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> 4. A declaration that the Adoption is invalid.
>
> 5. A declaration that the Report is invalid."

33 Each of the grounds in the IGA parties' originating motion is anchored to an alleged failure to comply with one or more of the provisions in Divs 1-3 of Pt 3 or Pt 8 of the PE Act. The IGA parties allege that: (1) the recommendation made in the Panel Report that the Council adopt the Amendment was legally unreasonable and hence invalid for jurisdictional error; (2) the Panel failed to consider the IGA parties' submissions and thereby committed a jurisdictional error; and (3) the Panel gave inadequate reasons for findings and recommendations in the Panel Report, so that its report is affected by jurisdictional error and error of law on the face of the record ("the Alleged Jurisdictional Errors"). The IGA parties allege that, because the Panel Report was invalid, the Council's adoption of the Amendment was also invalid and, because the Panel Report and the Council's adoption of the Amendment were invalid, the Minister lacks power to approve the Amendment.

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68 The defendants to the Judicial Review Proceeding were the Minister, the Council and members of the Panel.

34 One of the IGA parties (Shepparton Pty Ltd) also commenced two proceedings in the Tribunal under s 39 of the PE Act, seeking review of the April Resolution and the July Resolution.

Court of Appeal

35 Before the Court of Appeal, it was common ground that Question 1 should be answered by reference to the grounds set out in the IGA parties' originating motion in the Judicial Review Proceeding. The Court of Appeal considered that there could be "little doubt that the proceeding brought by the [IGA parties] in the Supreme Court [was] an action within the terms of s 39(8)". Observing that each of the grounds in the Judicial Review Proceeding was "anchored to an alleged failure to comply with one or more" of the provisions in Divs 1-3 of Pt 3 or Pt 8 of the PE Act, their Honours concluded that none of those grounds would be competent given the "clear legislative intent in s 39(8) to restrict the jurisdiction of the Supreme Court in planning matters".

36 Their Honours considered, however, that there was an important supervening consideration: following *Kirk v Industrial Court (NSW)*, it was settled that State legislation could not validly take from a State Supreme Court power to grant relief on account of jurisdictional error.[69] Their Honours therefore held:

> "Section 39(8) is to be construed so as not to exceed the legislative power of Victoria, giving it operation only to the extent to which it is not in excess of that power.[70] As a result, 'action' in s 39(8) must be read not to extend to a judicial review proceeding in the Supreme Court seeking relief for jurisdictional error."

Their Honours did, however, consider that s 39(8) might validly preclude the bringing of an action alleging an error of law on the face of the record in the Supreme Court.

37 The Court of Appeal considered an argument raised by the Minister that *Kirk* was not engaged, because non-compliance with Divs 1-3 of Pt 3 and Pt 8 prior to approval of an amendment with those requirements is not jurisdictional in nature. The Minister contended that s 39(7) is a "no invalidity" provision which renders non-compliance, including non-compliance with any steps preceding

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69 (2010) 239 CLR 531 at 581 [100].

70 *Interpretation of Legislation Act 1984* (Vic), s 6(1).

approval of a planning scheme amendment, non-jurisdictional. The Court of Appeal rejected the Minister's contention that s 39(7), by necessary implication, extends to the steps that precede approval. Their Honours considered the Minister's construction contrary to the text of the provision, as well as the context and purpose of the PE Act.

38 As noted, the Court of Appeal answered Question 1 "No". The Court of Appeal considered it unnecessary to answer Question 2.

Answer to Question 1

39 There was some dispute between the parties about what Question 1 meant. Question 1, in its terms, asks whether s 39 of the PE Act prevents the IGA parties from "seeking the relief sought" from the Supreme Court in the originating motion filed in the Judicial Review Proceeding. It did not ask whether s 39 of the PE Act prevents the IGA parties from *obtaining* the relief sought from the Supreme Court in the originating motion filed in the Judicial Review Proceeding, namely an order in the nature of certiorari to quash the Panel Report and other consequential relief. The framing of Question 1 may reflect that s 39(8) of the PE Act, in its terms, provides that, except for an application under s 39, a person "cannot *bring* an action in respect of a failure to comply"[71] with Divs 1-3 of Pt 3 or Pt 8 in relation to an amendment which has not been approved.

40 On one view, consistently with the longstanding understanding of a legislative requirement that an action "shall not be brought",[72] s 39(8) purports to do no more than establish a defence to any action that is brought in respect of the relevant failures to comply affecting amendments which have not been approved. But if s 39(8) purported to go further and to exclude a person even from seeking relief for jurisdictional error, then it would face the insurmountable obstacle that a provision of State legislation may not withdraw, negate or diminish a person with sufficient standing from invoking[73] a State Supreme Court's

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71 Emphasis added.

72 *Brisbane City Council v Amos* (2019) 266 CLR 593 at 599 [7]. See also *Minister for Home Affairs v DLZ18* (2020) 270 CLR 372 at 392-393 [28]-[31].

73 See, eg, *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 204-205; *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 24 [39]; *Citta Hobart Pty Ltd v Cawthorn* (2022) 276 CLR 216 at 229 [18], [20].

entrenched judicial review jurisdiction for jurisdictional error with a non-colourable claim.[74] Such a provision would be inconsistent with the principles laid down in *Plaintiff S157/2002 v The Commonwealth*[75] and *Kirk*.[76] Hence, it was common ground that a plaintiff could not be precluded from commencing a proceeding seeking relief for jurisdictional error from the Supreme Court as the IGA parties did in this case. Further it was also common ground that, consistent with the entrenched judicial review jurisdiction of this Court[77] and State Supreme Courts,[78] s 39 of the PE Act could not bar a claim of conscious maladministration or bad faith in respect of Divs 1-3 of Pt 3 or Pt 8 of the Act being raised in the Supreme Court.

41 Taking Question 1 as framed, the Court of Appeal was correct to answer the question "No".

Should the Court go beyond answering Question 1?

42 The IGA parties submitted that this Court should go no further than answering Question 1 "No" and that this Court should not proceed to consider the Minister's contention from s 39(7) that, having regard to the statutory scheme of the PE Act, an implication was to be recognised that, before a planning amendment is approved, *no* error in relation to *any* step or decision anterior to the Minister's approval under s 35 of the PE Act could be jurisdictional. For a number of reasons, it is appropriate for this Court to address the Minister's contention.

43 First, in order to determine if Question 1 should be answered in the way the Minister contended it was necessary for this Court to decide if s 39(7) applied in the way the Minister contended – namely, whether the Court accepted the Minister's contention that, having regard to the statutory scheme of the PE Act,

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74 *Kirk* (2010) 239 CLR 531 at 566-567 [55], 580-581 [98]-[100]. See also *Plaintiff S157* (2003) 211 CLR 476 at 504 [69], 513-514 [103]-[104].

75 (2003) 211 CLR 476 at 504 [69], 513-514 [103]-[104].

76 (2010) 239 CLR 531 at 566-567 [55], 580-581 [98]-[100].

77 *Plaintiff S157* (2003) 211 CLR 476 at 504-505 [71]-[72], 508 [82]; *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 at 156-157 [23]-[25].

78 *Kirk* (2010) 239 CLR 531 at 566-567 [55], 580-581 [98]-[100].

an implication was to be recognised from s 39(7) of the PE Act that before a planning amendment is approved by the Minister *no* error in relation to *any* step or decision anterior to that approval could amount to jurisdictional error.

44 Second, if Question 1 is answered "No" and the matter returns to the trial judge, as the IGA parties properly accepted, it remains open to the Minister to apply immediately for summary dismissal of the proceedings on the same basis as has been fully argued in this Court: that the Alleged Jurisdictional Errors are not capable of being jurisdictional and s 39(8) of the PE Act thereby prevents the IGA parties from obtaining any relief. The proceedings in this Court would have resolved very little and the precise issue that the Minister sought to agitate in this Court may ultimately return to this Court in the same proceeding.

45 Third, and relatedly, the Court of Appeal considered and rejected the Minister's argument. Whether that consideration is properly characterised as ratio or obiter, the statements by the Court of Appeal could (and would) be invoked by the IGA parties when the matter returns to the trial judge.

46 Fourth, the Minister accepted in argument that if the implication for which the Minister contends is not founded in s 39(7), the Minister's position that the alleged errors could not be jurisdictional must fail.

47 Fifth, the IGA parties have had an opportunity to respond, and have responded, in detail, to the Minister's submissions in respect of the construction and effect of the statutory scheme of review in the PE Act. Those submissions were also the subject of detailed argument in this Court, including by the Attorneys-General of the Commonwealth, New South Wales, South Australia and Queensland.

The implication relied upon by the Minister

48 The Minister's contention that, having regard to the statutory scheme, no error in relation to any step or decision anterior to the Minister's approval could be jurisdictional did not address whether the Alleged Jurisdictional Errors were made. Instead, the Minister asked the Court of Appeal and this Court to determine if the Alleged Jurisdictional Errors are *capable* of being jurisdictional. And whether those errors are *capable* of being jurisdictional, the Minister submitted, depends upon an application of the principles in *Project Blue Sky Inc v Australian Broadcasting Authority*[79] to determine whether the PE Act evinces

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79 (1998) 194 CLR 355.

an intention that a failure to comply with provisions in Divs 1-3 of Pt 3 and Pt 8 was intended to result in invalidity or not.

49 The Minister's case was broad: while it was common ground that Question 1 should be answered by reference to the grounds of review in the Judicial Review Proceeding, namely the Alleged Jurisdictional Errors, the Minister did not contend that those errors were not jurisdictional by an analysis of the specific express or implied statutory conditions that the IGA parties alleged were breached. Rather, the Minister's position was that, if, as is the case, s 39(7) ensures that an amendment which has been approved is not made invalid by any failure to comply with Divs 1-3 of Pt 3 or Pt 8, s 39(7) must carry with it a necessary implication that any such failure cannot invalidate an amendment which has not been approved. In the Minister's submission, s 39(7) is a "no invalidity" clause akin to s 175 of the *Income Tax Assessment Act 1936* (Cth), considered by this Court in *Federal Commissioner of Taxation v Futuris Corporation Ltd*.[80]

The Minister's alleged implication rejected

50 In *Project Blue Sky*, this Court set out the now-settled principle that an act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect.[81] Rather, whether the act is invalid depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition.[82] That purpose is ascertained as a matter of statutory construction, "by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition".[83]

51 Here, the implication for which the Minister contends, in *Project Blue Sky* terms, is that a legislative purpose can be discerned from s 39(7) of the PE Act that no failure to comply with Divs 1-3 of Pt 3 or Pt 8 of the PE Act prior to approval of an amendment will result in the invalidity of any step or decision anterior to any approval. The Minister's alleged implication from s 39(7) cannot be accepted: it is not established as a matter of statutory construction of the PE Act, and, as will be

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80 (2008) 237 CLR 146.

81 (1998) 194 CLR 355 at 388-389 [91].

82 *Project Blue Sky* (1998) 194 CLR 355 at 389 [91].

83 *Project Blue Sky* (1998) 194 CLR 355 at 389 [91].

explained, it is contrary to principle. No legislative purpose can be discerned from s 39(7) or other provisions in the PE Act that no error – namely, no failure to comply with Divs 1-3 of Pt 3 or Pt 8 of the PE Act – in relation to any step or decision anterior to the Minister's approval could result in invalidity of that step or decision.

52 Section 39(7) is in terms directed to an amendment "which has been approved". The Minister's submission that s 39(7), by necessary implication, applies *before* an amendment is approved is contrary to the express terms of s 39(7). In this appeal, the Amendment has not been approved. In its terms, s 39(7) does not apply.

53 Next, in relation to amendments that have not been approved, both the general statutory framework for amendment of planning schemes in the PE Act as well as the scheme of review in s 39 are inconsistent with the Minister's contention.

54 The procedural steps anterior to the approval of an amendment set out in the PE Act are detailed and extensive.[84] As the Minister submitted, the scheme of review in s 39 is an "administrative continuum" of the procedural requirements or process set out in Divs 1-3 of Pt 3 and Pt 8 of the PE Act. And as has been explained, those steps are important to give effect to the express objectives of the planning framework established by the PE Act "to establish a clear procedure for amending planning schemes, with appropriate public participation in decision making" and "to ensure that those affected by proposals for the use, development or protection of land or changes in planning policy or requirements receive appropriate notice".[85] So, for example, on the Minister's contention, a decision made by the Minister to exempt herself, or a planning authority, from the notification requirements in the PE Act, which would have "drastic consequences",[86] would be immune from judicial review. The detailed procedural framework, and the statutory consequences of an approved amendment,[87] each tend against the conclusion that s 39(7) protects a step or

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84 See [11]-[22] and [27]-[28] above.

85 PE Act, s 4(2)(h) and (i).

86 See, eg, *East Melbourne Group Inc v Minister for Planning* (2008) 23 VR 605 at 689 [366].

87 See [24]-[29].

decision preceding an approved amendment from invalidity, regardless of the nature of the alleged failure to comply with Divs 1-3 of Pt 3 or Pt 8.

55 Moreover, that statutory scheme, predating this Court's decision in *Kirk*[88] that recognised a State Supreme Court's entrenched judicial review jurisdiction for jurisdictional error,[89] is unique in the way in which s 39 addresses a failure to comply with Divs 1-3 of Pt 3 or Pt 8 of the PE Act prior to approval of an amendment.[90] Section 39(1)-(5) and (8), addressing specifically a failure or failures to take one or more of the statutorily prescribed procedural steps before an amendment is approved, reflect the importance of those procedural steps to the statutory scheme for approval of an amendment by providing that, on becoming aware of any such failure, a person affected by that failure may within one month refer the matter to the Tribunal for the Tribunal to address the failure according to the prescribed procedure. None of those provisions is consistent with a legislative intention that an error in the process leading to approval of an amendment could not amount to jurisdictional error.

56 The Minister's contention is also inconsistent with other provisions in the PE Act that contemplate that *specific* failures to comply may or may not result in the invalidity of a step or decision anterior to approval. One such provision is s 19(5), which provides that the failure of a planning authority to give a s 19(1) notice does not prevent the adoption or approval of the amendment by the planning authority or its submission to or approval by the Minister. The Minister's construction of s 39(7) would render s 19(5) otiose. Another example provision is s 20(3)(a), which expressly precludes the Minister from exempting a planning authority from a requirement to give notice to the owner of land if the amendment provides for the reservation of that land for public purposes, or the closure of a road which provides access to that land.[91] It would be odd for such a provision to exist if the Minister could innocently fail to comply with it, but the failure to comply could not affect the validity of the exemption.[92]

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88 (2010) 239 CLR 531 at 566-567 [55], 580-581 [98]-[100].

89 See [40] above and the authorities cited. See also PE Act, s 39, as at 18 November 2009.

90 See [25], [28]-[29] above.

91 See also PE Act, s 20(3)(b)-(c).

92 See also PE Act, s 166.

57 The Minister's broad contention also fails to address that s 39(7) is only applicable where a decision has been made under s 35(1) to approve an amendment. Section 39(7) does not operate on decisions under s 35(1) to *refuse* to approve an amendment and thus does not affect whether or not a decision to refuse to approve an amendment may be challenged for a failure to comply with Divs 1-3 of Pt 3 or Pt 8 of the PE Act. However, the Minister seeks to extend the operation of s 39(7) so that it applies at a point prior to the Minister's exercise of power under s 35(1) when the question of whether the amendment will be approved or refused has yet to be determined. The Minister's broad contention fails to recognise the distinction the statutory scheme draws between an amendment which has not been approved and an amendment which has been approved. That distinction reflects that a failure in respect of an amendment that is not approved may be capable of remedy without undue inconvenience given that no person is entitled to rely upon an unapproved amendment. Once an amendment has been approved, however, s 39(7) reflects that different circumstances may exist.

58 Lastly, the implication for which the Minister contends, in the terms in which it was initially expressed, is also contrary to principle. As the Minister herself accepted, consistently with *Plaintiff S157* and *Futuris*, s 39(7) itself could not extend to validating a step taken or decision made which was tainted by conscious maladministration of the PE Act, or by bad faith.[93] Put another way, s 39(7) and the Minister's implication could not extend, as a matter of principle, to validating any and all errors in the amendment process. Consequently, a revised form of the Minister's implication was that only some failures to comply with Divs 1-3 of Pt 3 or Pt 8 of the PE Act prior to approval of an amendment will result in the invalidity of any step or decision anterior to that approval.

59 The Minister's reliance on *Futuris* by analogy is misplaced. As has been explained, the statutory scheme in the PE Act, predating *Kirk*, is in some respects unique.[94] That is the reason why, contrary to the Minister's contention, s 39(7) of the PE Act is not analogous to s 175 of the *Income Tax Assessment Act*. In *Futuris*, s 175 had to be read with ss 175A and 177(1) of the *Income Tax Assessment Act*, which, respectively, directed a taxpayer dissatisfied with an assessment to the objection process in Pt IVC of the *Taxation Administration Act 1953* (Cth) and provided that a notice of assessment constituted conclusive evidence of

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93 *Plaintiff S157* (2003) 211 CLR 476 at 504-505 [71]-[72], 508 [82]; *Futuris* (2008) 237 CLR 146 at 156-157 [23]-[25].

94 See [25], [28]-[29], [55] above.

the due making of the assessment.[95] In other words, the Court in *Futuris* did not construe the effect of the "no invalidity" clause in isolation from its operation with the remainder of the Act.[96] The statutory scheme in the PE Act is distinguishable from the statutory scheme considered in *Futuris*. There is no equivalent to s 177(1) of the *Income Tax Assessment Act* in the PE Act. The review under Pt IVC of the *Taxation Administration Act* is markedly different from the review by the Tribunal under the PE Act. In some ways, applicants under s 39 of the PE Act have more rights of review – in that there is a statutory review process for steps (or decisions) prior to approval of an amendment, and those steps (or decisions) are public in sharp contrast with the tax assessment process. In other ways, applicants have fewer rights – in that there is no statutory review process in the PE Act in relation to an approved amendment.

60 Further, unlike Pt IVC of the *Taxation Administration Act* or some of the provisions of the *Migration Act 1958* (Cth),[97] s 39(1) of the PE Act does not involve the Tribunal engaging in any form of merits review or exercising its review jurisdiction under the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ("the VCAT Act").[98] The Tribunal, exercising its original jurisdiction under the VCAT Act, is concerned only with compliance with the process set out in the PE Act. And, unlike the powers available to the Tribunal in the exercise of its review jurisdiction under the VCAT Act – which include powers to affirm, vary or set aside the decision under review[99] – the relief the Tribunal may grant for a failure to comply with Divs 1-3 of Pt 3 or Pt 8 is limited by s 39(4) and (5) of the PE Act.

61 It is then necessary to address the construction of s 39(8) of the PE Act. The Court of Appeal identified that s 39(8) needed to be construed conformably with the constitutional limitation identified in *Kirk*. The approach adopted by this Court in *Plaintiff S157* and *Kirk* was to identify first the proper construction of

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95 (2008) 237 CLR 146 at 157 [24]; see also 156 [22].

96 See generally McDonald, "The entrenched minimum provision of judicial review and the rule of law" (2010) 21 *Public Law Review* 14 at 29-31.

97 See, eg, *Migration Act*, Pt 5.

98 See VCAT Act, ss 40(b) and 42. See also *Coastal Estates Pty Ltd v Bass Coast Shire Council* (2010) 177 LGERA 390 at 397 [20]-[21].

99 VCAT Act, s 51(2).

the provision.[100] Once it is accepted, as it must be, that s 39(8) must be construed conformably with constitutional considerations,[101] s 39(8) does not, on its proper construction, preclude an action in the Supreme Court seeking review for jurisdictional error.

62 If an alleged error is a failure to comply with Divs 1-3 of Pt 3 or Pt 8 of the PE Act prior to approval of the amendment, and that error is jurisdictional, the Supreme Court retains jurisdiction to review it and grant relief. That is so whether or not the same underlying facts might also give rise to separate proceedings in the Tribunal under s 39(1) of the PE Act.

63 As has been explained, the PE Act provides statutory rights of review of a limited kind for a failure to comply with Divs 1-3 of Pt 3 or Pt 8 of the PE Act prior to approval of an amendment. The Tribunal's powers under s 39 might appear to be in the nature of judicial review – in that they are concerned with the lawfulness of the conduct of the Minister, a planning authority or a panel.[102] However, they are different. The Tribunal is not exercising its review jurisdiction, and cannot vary or set aside and substitute a decision.[103] And, while it may direct that a planning authority not adopt, or the Minister not approve, a proposed amendment unless certain specified action is taken, that is materially different from an order by a Court that the specified action be taken, or an order by a Court quashing a step or decision (which might have consequences for third parties).[104] And the right of appeal to the Supreme Court is on a question of law only, and in the nature of judicial review of the Tribunal's decision.[105] The narrow confines of any appeal to the Supreme Court are relevant where the Tribunal itself is confined to review of a limited kind.

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100 *Plaintiff S157* (2003) 211 CLR 476 at 506 [76]; *Kirk* (2010) 239 CLR 531 at 582-583 [104]-[105].

101 *Interpretation of Legislation Act*, s 6(1).

102 See, eg, *Australian Conservation Foundation v Latrobe City Council* (2004) 140 LGERA 100 at 105 [21]-[22].

103 See [60] above.

104 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 580-581, 595.

105 VCAT Act, s 148(1). See also *Osland v Secretary to Department of Justice [No 2]* (2010) 241 CLR 320 at 331-332 [18].

64 In sum, the statutory scheme in the PE Act does not address errors in the taking of a step, or making of a decision, anterior to the approval of an amendment, where those errors are jurisdictional. Contrary to a contention raised by the Attorneys-General of the Commonwealth and South Australia (which was adopted by the Minister), the statutory scheme of review under the PE Act is not "materially equivalent" to a State Supreme Court's supervisory jurisdiction. It is therefore unnecessary to consider the extent to which, as South Australia argued, s 39(8) could prevent any party from obtaining relief in relation to an amendment which has not been approved without contradicting the restriction in *Kirk* on the basis that the powers conferred on the Tribunal are sufficiently equivalent to judicial review.

65 Finally, and contrary to a contention raised by the Attorney-General of Queensland, the scope of the *Kirk* principle does not require that s 39(8) be construed so as to preserve only the availability of the prerogative writs but not the power to grant declaratory relief in respect of jurisdictional error. The observations made by the majority in *Kirk* about the constitutional significance of the supervisory jurisdiction of a State Supreme Court were expressly stated to "point to the continued need for, and utility of, the distinction between jurisdictional and non-jurisdictional error in the Australian constitutional context".[106] As their Honours stated, "[l]egislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power. Legislation which denies the availability of relief for non-jurisdictional error of law appearing on the face of the record is not beyond power."[107] The proper construction of s 39(8) involves no enlargement of the principles expressed in *Kirk*.

66 Construed in that manner, the provisions in the PE Act are coherent. There is no disharmony. Where an amendment has not been approved, s 39(8) does not preclude the Supreme Court from granting relief for jurisdictional failures to comply with Divs 1-3 of Pt 3 or Pt 8 of the PE Act.[108]

67 The result of the preceding analysis is that s 39(7), alone or in conjunction with any of the other aspects of the PE Act to which the Minister referred, does not have the effect that a step anterior to the approval of an amendment is incapable of

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106 (2010) 239 CLR 531 at 581 [100].

107 *Kirk* (2010) 239 CLR 531 at 581 [100].

108 *East Melbourne* (2008) 23 VR 605 at 690 [368], [370].

being invalid for jurisdictional error. Nor does s 39(8) prevent the Supreme Court from granting relief. Consequently, whether the Alleged Jurisdictional Errors are established is to be determined at trial in the Judicial Review Proceeding.

East Melbourne

68 In *East Melbourne Group Inc v Minister for Planning*, the Court of Appeal considered the construction of s 39(7) of the PE Act and, relevantly, whether it protected an *approved* amendment from invalidity in the event of non-compliance with, among other provisions, Div 1 or 2 of Pt 3.[109] The relevant question was whether an amendment to a planning scheme by the Minister was attended by jurisdictional error because the Minister had acted unreasonably in exercising the power in s 20(4) of the PE Act to exempt herself from the notification requirements in the Act.[110] The majority considered that the Minister's exercise of her discretion to exempt herself was invalid, because the Minister's publicly stated reason for exercising the exemption power was incapable of founding a valid exercise of the power.[111]

69 The majority then held that s 39(7) "only addresses non-compliance with procedural requirements" and "does not apply to decisions which are tainted by jurisdictional error".[112] In doing so, their Honours observed that an exemption from the notification requirements of the PE Act has "drastic consequences" in that the public is denied participation in the process, and that s 20(4) conferred upon the Minister "a discretion to follow a process which departed from a number of the stated objectives of the Act".[113] The majority also noted that there was nothing express or necessarily implied in the PE Act so as to require s 39(7) to be construed "so as ... to deny a court the power to make orders which strike down the consequences of a fatally flawed exercise of the exemption discretion".[114] Thus, the majority made declarations that the amendment, and those parts of

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109 (2008) 23 VR 605 at 688 [362].

110 See, eg, *East Melbourne* (2008) 23 VR 605 at 644-645 [169], 646-647 [179], 682 [332].

111 *East Melbourne* (2008) 23 VR 605 at 682 [332].

112 *East Melbourne* (2008) 23 VR 605 at 690 [370].

113 *East Melbourne* (2008) 23 VR 605 at 689 [366].

114 *East Melbourne* (2008) 23 VR 605 at 690 [368].

the relevant planning scheme purportedly affected by the amendment, were "respectively invalid, void, and of no legal effect".[115]

70 Consistent with the earlier analysis of the statutory scheme, and subject to one qualification, *East Melbourne* was correctly decided. The qualification is that *East Melbourne* was decided prior to *Kirk* and, in addressing s 39(7), drew a distinction between non-compliance with procedural requirements and decisions tainted by jurisdictional error.[116] Not all "procedural errors" are non-jurisdictional. Whether an error is jurisdictional is determined as a matter of statutory construction of the particular statutory provision, applied to the particular facts and circumstances in issue.[117] For that reason, the construction of s 39(7) adopted in *East Melbourne* should be understood as concerned with non-jurisdictional errors. That construction gives s 39(7) a harmonious and coherent operation with the construction of s 39 in its operation in relation to an amendment which has not been approved.

Conclusion and orders

71 The appeal must be dismissed.

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115 *East Melbourne* (2008) 23 VR 605 at 691 [371].

116 *East Melbourne* (2008) 23 VR 605 at 690 [370].

117 See, eg, *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 280 CLR 321 at 325-326 [2]-[4].

72 STEWARD J. This appeal concerns the Victorian Parliament's choice as to the capacity in which the Supreme Court of Victoria may supervise certain procedural steps involved in the making of amendments to planning schemes. Whilst the jurisdiction of that Court to grant relief in respect of jurisdictional error is entrenched by reason of the decision of this Court in *Kirk v Industrial Court (NSW)*,[118] it remains open to a State Parliament to define when an error is jurisdictional. That is a question of statutory construction.[119]

73 The facts and relevant procedural history are set out in the reasons of Gageler CJ, Gordon, Edelman, Jagot and Beech-Jones JJ which I gratefully adopt.

Ground of appeal

74 In this case, the appellant advanced a single ground of appeal: that the Court of Appeal of the Supreme Court of Victoria erred in answering "No" to Question 1. That question relevantly provided: "Does s 39 of the *Planning and Environment Act 1987* (Vic) prevent the [first and second respondents] from seeking the relief sought in the originating motion filed in this proceeding ...?"

75 The Minister for Planning contended that, having regard to the text, context and purpose of Pt 3 of the *Planning and Environment Act 1987* (Vic) ("the Planning Act"), failures to comply with the procedures preceding a decision by the Minister whether to approve an amendment to a planning scheme, of the kind identified in the first and second respondents' originating motion, are not jurisdictional errors. More specifically, s 39(7) of the Planning Act was said to manifest a legislative policy that a failure to comply with certain procedures preceding approval by the Minister was not intended to result in invalidity. That implication in respect of s 39(7) must be rejected. Nonetheless, for the reasons that follow, s 39 forecloses the availability of the relief sought by the first and second respondents in the Supreme Court of Victoria.

Supervisory jurisdiction of a State Supreme Court

76 In *Kirk*, French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ held that Ch III of the *Constitution* "requires that there be a body fitting the description 'the

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118 (2010) 239 CLR 531.

119 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 388-391 [91]-[93].

Supreme Court of a State'" because these words appear – on one view, descriptively – in s 73 of the *Constitution*.[120] As their Honours said:[121]

> "In considering State legislation, it is necessary to take account of the requirement of Ch III of the *Constitution* that there be a body fitting the description 'the Supreme Court of a State', and the constitutional corollary that 'it is beyond the legislative power of a State so to alter the constitution or character of its Supreme Court that it ceases to meet the constitutional description'."

77 It is a surprising conclusion that just because the *Constitution* gives appellate jurisdiction to this Court over what is called a "Supreme Court of any State", the supervisory jurisdiction of each State Supreme Court must somehow thereby be entrenched to some degree. As is explained below, the *Constitution* does not state that to be the case.

78 On another view, *Kirk* is a classic example of this Court applying a form of constitutional originalism. In *Kirk*, their Honours explained that, at federation, each State Supreme Court had the jurisdiction of the Court of Queen's Bench and had a general power to issue the writs of certiorari, prohibition and mandamus.[122] Their Honours reasoned that "[t]o deprive a State Supreme Court of its supervisory jurisdiction enforcing the limits on the exercise of State executive and judicial power by persons and bodies other than that Court would be to create islands of power immune from supervision and restraint".[123] It was therefore said that:[124]

> "Legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power. Legislation which denies the availability of relief for non-jurisdictional error of law appearing on the face of the record is not beyond power."

The boundaries of jurisdictional error

79 In *Project Blue Sky Inc v Australian Broadcasting Authority*, McHugh, Gummow, Kirby and Hayne JJ articulated the principle that an act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect; that depends on whether there can be discerned a legislative

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120 (2010) 239 CLR 531 at 566 [55].

121 *Kirk* (2010) 239 CLR 531 at 580 [96] (footnote omitted).

122 *Kirk* (2010) 239 CLR 531 at 580-581 [97]-[98].

123 *Kirk* (2010) 239 CLR 531 at 581 [99].

124 *Kirk* (2010) 239 CLR 531 at 581 [100].

purpose to invalidate any act that fails to comply with the condition.[125] It might be thought to be unsatisfactory that the boundaries of jurisdictional error turn upon whether there can be discerned a legislative purpose to invalidate an act that fails to comply with a prescribed statutory condition.[126] On one view, all clear statutory conditions for the exercise of a power – which have been prescribed by a State Parliament – should be complied with.

80 It might also be thought to be unsatisfactory that Australia persists with the distinction between jurisdictional and non-jurisdictional error, long since substantially discarded in English law.[127] As Kirby J observed in *Federal Commissioner of Taxation v Futuris Corporation Ltd*, the classification of what is jurisdictional error is "conclusory ... [and] very difficult to define and to apply".[128] His Honour is right. Nonetheless, the distinction persists notwithstanding difficulties in its application. On one view, those difficulties, together with the constitutional entrenchment of judicial review for jurisdictional error,[129] might need further consideration on another occasion.

The Planning Act

81 The scheme of the Planning Act which addresses the making of amendments to planning schemes predates the decision in *Kirk*. *Kirk* changed the legal landscape. The relevant scheme in the Planning Act is described in detail in the reasons of Gageler CJ, Gordon, Edelman, Jagot and Beech-Jones JJ.

82 Section 39 of the Planning Act regulates how a person who is substantially or materially affected by a failure to comply with certain procedures for the making of an amendment to a planning scheme might seek a remedy. As originally enacted in 1987, s 39 was as follows:

> "(1) A person cannot bring an action in respect of a failure to comply with Division 1 or 2 or this Division [Division 3] in relation to an amendment which has not been approved unless the person is substantially or materially disadvantaged by the failure.

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125 (1998) 194 CLR 355 at 388-389 [91].

126 *Project Blue Sky* (1998) 194 CLR 355 at 389 [91].

127 cf *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 at 194-195; *R (Privacy International) v Investigatory Powers Tribunal* [2020] AC 491 at 534 [84].

128 (2008) 237 CLR 146 at 184 [129].

129 See generally *Kirk* (2010) 239 CLR 531.

(2) An amendment which has been approved is not made invalid by any failure to comply with Division 1 or 2 or this Division [Division 3].

(3) Any action in respect of a failure to comply with Division 1 or 2 or this Division [Division 3] must be taken before and determined by the Administrative Appeals Tribunal."

83 In 1989, as the Court of Appeal recognised, s 39 was replaced with a new provision.[130] For convenience, set out below is s 39 of the Planning Act as it applies in this appeal:

"(1) A person who is substantially or materially affected by a failure of the Minister, a planning authority or a panel to comply with Division 1 or 2 or this Division [Division 3] or Part 8 in relation to an amendment which has not been approved may, not later than one month after becoming aware of the failure refer the matter to the Tribunal for its determination.

(2) In addition to any other party to the proceeding the parties to a proceeding before the Tribunal under this section are –

(a) the person who referred the matter to the Tribunal; and

(b) the Minister; and

(c) the planning authority.

(3) If a matter referred to the Tribunal under this section involves a failure by a panel to comply with Division 2 or this Division [Division 3] or Part 8 the panel (or a member of the panel authorised by the panel to act on its behalf) is entitled to make a written or oral submission to the Tribunal before the Tribunal completes the hearing of the matter.

(4) The Tribunal may determine a matter referred to it under this section and may do any one or more of the following –

(a) make any declaration that it considers appropriate;

(b) direct that –

(i) the planning authority must not adopt the amendment or a specified part of the amendment; or

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130 *Planning and Environment (Amendment) Act 1989* (Vic), s 10.

(ii) the Minister must not approve the amendment or a specified part of the amendment –

unless the Minister, planning authority or a panel takes action specified by the Tribunal.

(5) In exercising its jurisdiction under this section the Tribunal cannot vary a decision made in relation to a matter referred to it or set aside that decision and make a decision in substitution for the decision so set aside.

* * * * *

(7) An amendment which has been approved is not made invalid by any failure to comply with Division 1 or 2 or this Division [Division 3] or Part 8.

(8) Except for an application under this section, a person cannot bring an action in respect of a failure to comply with Division 1 or 2 or this Division [Division 3] or Part 8 in relation to an amendment which has not been approved.

(9) This section does not apply to a planning scheme prepared by the Suburban Rail Loop Authority that applies to land to which a Suburban Rail Loop planning area declaration applies."

84 In substance, former s 39(2), set out above, became s 39(7) and former s 39(3), set out above, became s 39(1) and (8). The Court of Appeal examined the legislative history in some detail and concluded as follows:[131]

> "this history reveals a clear legislative intention to restrict the jurisdiction of the Supreme Court in relation to planning matters, including reviewing compliance with the statutory requirements for amending planning schemes. Section 39 must be construed having regard to this intention and purpose."

85 The foregoing conclusion is accurate. In other words, the applicable legislative scheme, enacted pre-*Kirk*, contemplated that complaints about a failure to comply with the mandated *procedures* for the making of an amendment to a planning scheme – prior to its approval – were to be determined only by the Administrative Appeals Tribunal and then by its successor, the Victorian Civil and Administrative Tribunal ("VCAT"). Under this legislative scheme, Parliament

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131 *IGA Retail Services Pty Ltd v Minister for Planning* (2025) 264 LGERA 154 at 178 [91].

intended that non-compliance with the procedures prescribed in the Planning Act would have consequences at law. Those consequences are the ones specified now by s 39(4) and qualified by s 39(5).

The implication advanced by the Minister

86 The Minister contended that s 39(7), in the context of the relevant scheme of the Planning Act, manifested a legislative policy that a failure to comply with certain procedures preceding approval by the Minister was not intended to result in invalidity. Ostensibly, s 39(7) of the Planning Act is similar to s 175 of the *Income Tax Assessment Act 1936* (Cth) ("the 1936 Act"). Section 175 of the 1936 Act was considered by the Full Court of the Federal Court of Australia in *Chhua v Federal Commissioner of Taxation*.[132] That case concerned an application for judicial review of the formation by the Commissioner of Taxation ("the Commissioner") of an opinion that there had been fraud or evasion for the purposes of item 5 of s 170(1) of the 1936 Act. That provision confers on the Commissioner a power to issue an amended assessment. The challenge failed because of s 175 of the 1936 Act, which is in the following terms:

> "The validity of any assessment shall not be affected by reason that any of the provisions of this Act have not been complied with."

87 In *Chhua*, the Full Court of the Federal Court of Australia explained that s 175 was an expression of Parliament's intention that non-compliance with the requirements of the 1936 Act would not invalidate an assessment issued by the Commissioner,[133] whilst observing that taxpayers otherwise had rights of objection, review and appeal in Pt IVC of the *Taxation Administration Act 1953* (Cth). Section 175 is an effective privative clause.[134] The Court said:[135]

> "Section 175 makes clear that compliance with the provisions of those Acts is not a 'condition precedent' to the making of an efficacious assessment of

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132 (2018) 262 FCR 228.

133 (2018) 262 FCR 228 at 236 [21]. This was expressed to be subject to the "assessment" of taxation not being tentative or the product of conscious maladministration and thus not constituting an "assessment" to which s 175 of the 1936 Act applies: *Futuris* (2008) 237 CLR 146 at 157 [25].

134 cf *Futuris* (2008) 237 CLR 146 at 183-184 [128]. Another example of a Federal statute validly reducing the jurisdiction of a Court in another context may be seen in *Werrin v The Commonwealth* (1938) 59 CLR 150.

135 *Chhua* (2018) 262 FCR 228 at 236 [21], citing *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992 at 1001 [50]; 207 ALR 12 at 24.

> tax. The difference between the migration cases concerning jurisdictional error and *Futuris*, accordingly turns on the scope of the 'jurisdiction' conferred. As Gummow and Hayne JJ also observed in [*Minister for Immigration and Multicultural and Indigenous Affairs v*] *SGLB* ... 'the nature of the alleged error will turn upon the meaning of the legislative criterion of jurisdiction, making the construction of the legislation the primary and essential task.'"

88 So too is the position with s 39(7). Once an amendment to a planning scheme has been approved, Parliament's manifest intention is that non-compliance with Div 1, 2 or 3 of Pt 3 or Pt 8 of the Planning Act does not result in the amendment being invalid. That is subject to one qualification accepted by the Solicitor-General for Victoria: namely, that the amendment has not been the product of conscious maladministration or bad faith.

89 However, s 39(7) applies only *following* the approval of an amendment to a planning scheme. It cannot apply to complaints – concerning a failure to comply with certain procedures – which are made *prior* to approval of an amendment. Nor, contrary to the submissions made by the Minister but consistently with the conclusion of the Court of Appeal,[136] does s 39(7), read in the context of the other relevant provisions of the Planning Act, give rise to an implication that, prior to approval of an amendment, a failure to comply is not jurisdictional and does not result in invalidity. That would cut across Parliament's intention for a person who is substantially or materially affected by a relevant failure to have recourse to VCAT in accordance with s 39(1), but only to VCAT in the first instance under s 39(8).

90 The application of s 39(7) in curtailing a person's rights of judicial review concerning an *approved* amendment to a planning scheme was greatly qualified by the decision of the Court of Appeal of the Supreme Court of Victoria in *East Melbourne Group Inc v Minister for Planning*.[137] In that case, Ashley and Redlich JJA construed s 39(7) as being limited to failures to comply with procedural requirements. The provision did not apply to decisions tainted by jurisdictional error.[138] In contrast, Brooking J in *Grollo Australia Pty Ltd v Minister for Planning*[139] construed the privative clause, now contained in s 39(7)

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136 See *IGA Retail Services Pty Ltd v Minister for Planning* (2025) 264 LGERA 154 at 179-180 [101]-[103].

137 (2008) 23 VR 605.

138 (2008) 23 VR 605 at 690 [370].

139 [1993] 1 VR 627.

(which was formerly s 39(2)), in broader terms than the approach in *East Melbourne*. Brooking J said:[140]

> "With an instrument which is either an amendment to a planning scheme or a whole new planning scheme ... one can well understand its being thought necessary by Parliament notwithstanding prior defects, even though serious and resulting in injustice, to place beyond question the validity of an instrument which may well by the time it comes to be attacked have been acted upon by many persons, in many ways and in many important matters."

91 It is not necessary to decide whether *East Melbourne* is correct. As already mentioned, this case does not concern a planning scheme amendment which has been *approved* and s 39(7) therefore does not apply to this case.

The scope of VCAT's powers of review prior to approval

92 Turning to VCAT's powers of review *prior* to an amendment being approved, save in one respect, it would be mistaken to conclude that VCAT's powers of review under s 39 are limited to errors which may be characterised as merely "procedural" in nature. That is not what s 39 states. It draws no distinction between procedural as against substantive errors. As Brooking J observed in *Grollo*, the words "any failure to comply" in the former s 39(2) (now s 39(7)) are "perfectly general".[141] So too are the words "a failure to comply" in s 39(1), (3) and (8). Properly construed, those words extend to any failure to follow the procedures laid down in Div 1, 2 or 3 of Pt 3 or Pt 8. That is why s 39 is headed "Defects in procedure". Divisions 1, 2 and 3 of Pt 3 and Pt 8 set out procedures to be followed which may result, relevantly, in an amendment to a planning scheme. As Quigley J observed in *Rockford Constant Velocity Pty Ltd v Melbourne City Council*:[142]

> "[Section] 39 of the [Planning] Act operates as a form of procedural safeguard, conferring on the Tribunal a type of supervisory jurisdiction to identify and remedy any defect in the procedure adopted by the Minister, a planning authority, or a panel in the course of the exercise of the powers and the discharge of the duties provided for in Divisions 1 to 3 of Part 3 of the [Planning] Act."

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140 *Grollo* [1993] 1 VR 627 at 644.

141 [1993] 1 VR 627 at 644.

142 [2024] VSC 343 at [79].

93 The limit on VCAT's power of review under s 39, as Quigley J also correctly observed in *Rockford*,[143] is that it cannot undertake any merits review of, for example, the recommendation of a panel. That is the consequence of s 39(5) of the Planning Act, which expressly provides that VCAT cannot "vary a decision made" in relation to a matter referred to it or set aside such a decision and make its own decision in substitution. The other limitation is one of standing; a person can only seek review in VCAT of a failure to comply with certain procedural requirements if they have been substantially or materially affected by it.[144]

No binary outcome

94 It follows that the relevant scheme in the Planning Act does not present a binary outcome for determining what constitutes jurisdictional error. It cannot be said that Parliament intended that a failure to comply with the procedures required by Div 1, 2 or 3 of Pt 3 or Pt 8 was not to result in legal consequences; nor can it be said that Parliament intended that such a failure was amenable to judicial review in the trial division of the Supreme Court. The difficulty in discerning legislative intent here is that Parliament, in drafting s 39, assumed that it was entirely free to constrain the jurisdiction of the Supreme Court contrary to the decision of this Court in *Kirk*.

95 However, the Supreme Court has nonetheless always retained supervisory jurisdiction over the former Administrative Appeals Tribunal and now VCAT. Section 148 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ("the VCAT Act") permits a party, with leave, to appeal on a question of law from an order of VCAT to the Supreme Court. Although s 148 uses the word "appeal", the Supreme Court exercises jurisdiction in its original, and not its appellate, jurisdiction, and proceedings are in the nature of judicial review.[145]

96 In that respect, the Solicitor-General for South Australia contended that the *Kirk* principle is not offended when a State confers an alternative jurisdiction with authority to correct jurisdictional error, provided that the jurisdiction is no narrower than that which would have been available by the grant of prerogative relief for jurisdictional error by the Supreme Court, and that the Supreme Court retains supervision of that alternative jurisdiction. He submitted that VCAT offered remedies that were no narrower than the traditional supervisory jurisdiction of the Supreme Court. Thus, he contended that s 39(1) and (4) of the Planning Act permit a party to seek relief in the nature of certiorari, prohibition and mandamus

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143 [2024] VSC 343 at [90].

144 *Rockford* [2024] VSC 343 at [82].

145 *Osland v Secretary to Department of Justice [No 2]* (2010) 241 CLR 320 at 331-332 [18], 351 [71].

when there has been a failure to comply with the procedures mandated for making an amendment to a planning scheme. This included: a power to make declarations of invalidity pursuant to s 39(4)(a), which is relief equivalent to the issue of a writ of certiorari; a power to direct that a planning authority must not adopt, and the Minister must not approve, an amendment to a planning scheme pursuant to s 39(4)(b)(i) and (ii), which is relief equivalent to the issue of a writ of prohibition; and a power to compel necessary action pursuant to s 39(4)(b)(i) and (ii), which is relief equivalent to the issue of a writ of mandamus. As already mentioned, the granting of all these types of relief is subject to curial review in the Supreme Court.

97 In determining the correctness of the Solicitor-General for South Australia's submission, the pivotal dispositive principle from *Kirk* is that there must be a body, relevantly here in Victoria, that fits the description of a "Supreme Court of a State". Although, at federation, each State Supreme Court had the jurisdiction of the Court of Queen's Bench and had a general power to issue the writs of certiorari, prohibition and mandamus,[146] in some circumstances the jurisdiction of a State Supreme Court that answered that description was limited by privative clauses that had been enacted by the various colonial parliaments prior to federation in 1901. A good example of such a privative clause in the colony of Victoria was former s 53 of the *Income Tax Act 1895* (Vic), which provided as follows:

> "Except as in this Act expressly provided no decision or determination of the Commissioner or any county court or police magistrate shall be considered or reviewed by any court whatsoever or be removed or removable by *certiorari* or otherwise into the Supreme Court for any want or alleged want of jurisdiction or for any error or alleged error of form or substance or on any ground whatsoever."

98 Another example may be found in the former s 203 of the *Licensing Act 1890* (Vic), which provided as follows:

> "No determination order or proceedings under Part II of this Act or any amendment thereof shall be removed or removable by *certiorari* or otherwise into the Supreme Court for any want or alleged want of jurisdiction or for any error or alleged error of form or substance or on any ground whatsoever."

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146 *Kirk* (2010) 239 CLR 531 at 580-581 [97]-[98].

99 Prior to 1901, it was an unremarkable and accepted attribute of the jurisdiction of the Supreme Court of Victoria that its supervisory jurisdiction could be limited in the foregoing ways by an Act of Parliament. The same was true of the Court of Queen's Bench. However, the effect of such privative clauses was a matter of statutory interpretation. In *The Colonial Bank of Australasia v Willan*, the Privy Council, on appeal from the Supreme Court of the Colony of Victoria, said:[147]

> "It is, however, scarcely necessary to observe that the effect of [a privative clause] is not absolutely to deprive the Supreme Court of its power to issue a writ of certiorari to bring up the proceedings of the inferior Court, but to control and limit its action on such writ. There are numerous cases in the books which establish that, notwithstanding the privative clause in a statute, the Court of Queen's Bench will grant a certiorari; but some of those authorities establish, and none are inconsistent with, the proposition that in any such case that Court will not quash the order removed, except upon the ground either of a manifest defect of jurisdiction in the tribunal that made it, or of manifest fraud in the party procuring it."

100 However, that was not the end of the matter: sufficiently clear statutory language could extend a privative clause to cover a want of or excess of jurisdiction. In *In re Biel*, Higinbotham CJ, in delivering the judgment of the Court, considered the effect of *Willan*, and said the following about s 203 of the *Licensing Act 1890* (Vic):[148]

> "It is difficult to conceive what fuller or more effective language could be employed for the purpose of indicating the intention of the Legislature that the determination of the Licensing Court under Part II of this Act should not be brought before the Supreme Court by writ of *certiorari*. It is familiar knowledge that general privative clauses taking away *certiorari* have been found in many Acts of Parliament, and also that notwithstanding such clauses superior courts – the Queen's Bench in England and the Supreme Court in Victoria – have held that these clauses do not deprive the superior courts of jurisdiction to grant *certiorari* to inquire into the validity of the determination of an inferior court where there had been a want of jurisdiction in such court. Either a manifest defect of jurisdiction in the tribunal making the adjudication, or manifest fraud in the party procuring it, is a ground, notwithstanding the ordinary privative clause in an Act of Parliament, for applying to the Supreme Court to question the determination of an inferior court. ...

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147 (1874) LR 5 PC 417 at 442, quoted in *Kirk* (2010) 239 CLR 531 at 580 [97].

148 (1892) 18 VLR 456 at 458-460.

> Every kind of want of or excess of jurisdiction is a ground for *certiorari* going in the case when the ordinary privative clause only exists. But this section is, in our opinion, intended to cover that very case, and to prevent in any case where a total or partial want of or excess of jurisdiction appears in any inferior court, the proceedings of that court being reviewed by means of this writ. … It was suggested to the Court that it should struggle against giving its obvious interpretation to this section in order to prevent an alleged injustice being done. Speaking for myself, I protest against such a suggestion. This Court has not to struggle against the plain meaning of an Act of Parliament, it has to obey it and to carry it out. … But when an Act of Parliament inserts words to meet the very case in point, I think we should be violating our duty if we were to attempt to struggle against the plain meaning of that Act."

101 The foregoing reasoning is entirely consistent with what was at the time s 41 of the Victorian *Constitution*,[149] which was in the following terms:

> "All the Courts of Civil and Criminal Jurisdiction within Victoria, and all Charters, legal Commissions, Powers, and Authorities, and all Offices, judicial, administrative, or ministerial, therein respectively, except in so far as the same may be abolished, altered, or varied by or may be inconsistent with the Provisions of this Act, or shall be abolished, altered, or varied by any Act or Acts of the Legislature, shall continue to subsist in the same Form and with the same Effect as if this Act had not been made."

102 *In re Biel* was not considered in the reasons of this Court in *Kirk* although it was expressly raised in argument. Nor was the concession made by counsel in *Willan* that the jurisdiction to issue a writ of certiorari may indeed be validly "taken away ... by express words".[150] These issues have been the subject of much academic criticism. The very learned Dr Oscar Roos has argued as follows:[151]

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149 *Victoria Constitution Act 1855* (Imp) (18 & 19 Vict c 55), Sch 1.

150 (1874) LR 5 PC 417 at 433. Nor did this Court's reasons in *Kirk* (2010) 239 CLR 531 advert to the effect of the *Judicial Committee Act 1844* (Imp) (7 & 8 Vict c 69), which secured imperial oversight over colonial courts: see *Nadan v The King* [1926] AC 482 at 492-493 per Viscount Cave LC.

151 Roos, "Accepted Doctrine at the Time of Federation and *Kirk v Industrial Court of New South Wales*" (2013) 35(4) *Sydney Law Review* 781 at 790-792 (footnotes omitted).

> "the reported cases from the colonial era about the efficacy of privative clauses dealt with the issue as one of statutory interpretation, rather than as one of legislative capacity. I maintain that the Privy Council's 1874 decision in *Colonial Bank of Australasia v Willan* supports this observation for two reasons. The first is that Willan's counsel, in argument, accepted that the right to certiorari might be taken away by express words and that the availability of certiorari was merely a presumption, albeit a strong one, which had not been displaced in this instance. The second is that, if the Privy Council had intended to move away from well-established 19th-century orthodoxies concerning parliamentary sovereignty, notwithstanding the concessions made by Willan's counsel, it would do so using much clearer language than that in its judgment. I should also add that my interpretation of the Privy Council's judgment in *Willan* is consistent with the vast majority of subsequent decisions that cite *Willan* as an authority, and numerous secondary materials that cite or discuss the decision. Indeed, in one such consistent decision, *Re Biel*, the Victorian Supreme Court cited *Willan* and determined that a privative clause, cast in wider terms than the privative clause at issue before the Privy Council in *Willan*, was effective to oust judicial review, on grounds of want or excess of jurisdiction, *as a matter of statutory interpretation*. The fact that *Re Biel* was not even cited in the Court's judgment in *Kirk*, let alone distinguished or disapproved, is, in itself, noteworthy. *Re Biel* is a colonial Supreme Court decision that is inconsistent with the High Court's argument about the defining characteristics of the Supreme Courts at the time of Federation. It was cited by counsel in written submissions and in argument before the High Court and was the subject of some discussion at the hearing. The lack of any reference to *Re Biel* in *Kirk* provides but one illustration of the inadequate nature of the Court's historical analysis ..." (emphasis in original)

103 Another distinguished legal academic, Prof Jeffrey Goldsworthy, has commented on the "theory" of *Kirk*, whereby every State must always have a Supreme Court, and thus State Parliaments must necessarily be denied plenary legislative power to remove any defining characteristics of such courts. He has argued as follows:[152]

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152 Goldsworthy, "*Kable*, *Kirk* and Judicial Statesmanship" (2014) 40(1) *Monash University Law Review* 75 at 97.

> "The problem with this theory is that there is no evidence whatsoever for it, and strong evidence against it. If it were true that, during the relevant period before and after 1900, a privative clause depriving a Supreme Court of its jurisdiction-enforcing jurisdiction would have been regarded as depriving it of its identity as a 'Supreme Court', surely someone would have noticed this and said so. Yet no one ever did, not in *Willan*, or in *Re Biel*, or in cases in the early 1900s in which privative clauses were discussed. Indeed, counsel's submissions in *Willan* conceding that an explicit privative clause would be effective, and the decision in *Re Biel*, are direct evidence to the contrary. In *Re Biel*, the Victorian Supreme Court upheld the efficacy of an unusually explicit privative clause while apparently being blissfully unaware that, as a result, it was no longer entitled to be called a 'Supreme Court'."

104 There is much to be said for the observations made by Dr Roos and Prof Goldsworthy, although it should be emphasised that those observations were not the subject of argument on this occasion before the Court. With the greatest respect, the historical foundation upon which *Kirk* rests is attended by possible problems which this Court is yet to consider.

105 In addition, the jurisdiction of a court answering that description of a Supreme Court of a State was by colonial enactment sometimes also limited to a supervisory role that was confined to deciding questions of law. In the case of the colony of Victoria, the provisions of the *Licensing Act 1890* (Vic) again supply an example of this type of jurisdiction. Part III of that Act established a "Licensing Court" in each Licensing District with "exclusive jurisdiction" to, amongst other things, grant or refuse licences for the sale of liquor. The supervisory jurisdiction of the Supreme Court over the Licensing Court was limited to a "point of law".[153] Section 58 of that Act thus provided:

> "After the determination by any Licensing Court of any cause or matter which it has power under the provisions of this Act to determine, if any person feel himself aggrieved by such determination as being erroneous in point of law, he may apply in writing within one month after the same to such Licensing Court to state and sign a case setting forth the facts and the grounds of such determination for the opinion thereon of the Supreme Court; and such party ... shall within fourteen days after receiving such case transmit the same to the said court, first giving notice in writing of such appeal with a copy of the case to the other party ..."

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153 See, eg, *Re Adams* (1890) 12 ALT 45 at 46.

106 In *Marriott v Coleman*, McTiernan, Menzies and Owen JJ explained the effect of a relevantly equivalent provision[154] in the following terms:[155]

> "By the *Licensing Act* the Licensing Court is given exclusive jurisdiction to hear and determine cases concerning *inter alia* the granting or refusal of registration of clubs under the provisions of the Act (s 57(1)). The decision of that Court is made conclusive save as in the Act provided which authorizes an appeal to the Supreme Court on questions of law by way of case stated (ss 59-66)."

107 The foregoing provisions in the *Licensing Act 1890* (Vic) and the *Licensing Act 1958* (Vic) are analogous to the supervisory jurisdiction of the Supreme Court over VCAT. That jurisdiction coheres with the jurisdiction of the Supreme Court of Victoria at and prior to 1901, and a Court that has such jurisdiction answers the description of a "Supreme Court of a State" for the purposes of Ch III of the *Constitution*. It avoids any suggestion of "islands of power" remaining immune from the Supreme Court's "supervision and restraint".[156]

108 The foregoing is also consistent with the following observations of Spigelman CJ writing extra-judicially. In an article entitled "The centrality of jurisdictional error",[157] his Honour referred to s 71(1) of the *Land and Environment*

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154 Section 59 of the *Licensing Act 1958* (Vic) relevantly corresponded to s 58 of the *Licensing Act 1890* (Vic). Section 59 of the *Licensing Act 1958* (Vic) relevantly provided:

> "(1) After the determination by the Licensing Court of any cause or matter which it has power under the provisions of this Act to determine if any person feels himself aggrieved by such determination as being erroneous in point of law, he may apply in writing within one month after the same to the Licensing Court to state and sign a case setting forth the facts and the grounds of such determination for the opinion thereon of the Supreme Court.
>
> (2) Such party ... shall within fourteen days after receiving such case transmit the same to the said court, first giving notice in writing of such appeal with a copy of the case to the other party ..."

155 (1963) 109 CLR 129 at 133.

156 *Kirk* (2010) 239 CLR 531 at 581 [99].

157 (2010) 21 *Public Law Review* 77.

Court Act 1979 (NSW), which states that certain proceedings "may not be commenced or entertained in the Supreme Court". His Honour wrote:[158]

> "*Kirk* could be seen to call in question the validity of s 71(1) of the *Land and Environment Court Act*. However, although again I cannot express a concluded view, the fact that decisions of the Land and Environment Court are subject to appeal to the Court of Appeal would probably save this particular provision."

109 In other words, the limited supervisory jurisdiction of the Supreme Court of New South Wales over the Land and Environment Court was consistent with it answering the description of a Supreme Court of a State for the purposes of Ch III of the *Constitution*.

110 It follows that South Australia's submission should be accepted, but only because of the retention by the Supreme Court of Victoria of supervisory jurisdiction over VCAT's review power conferred by s 39 of the Planning Act.

Errors within jurisdiction

111 It follows that I have reached the following conclusions with much hesitation given the unpersuasive state of the law. First, Parliament must have intended that failures to comply with the procedures mandated by Div 1, 2 or 3 of Pt 3 or Pt 8 are errors within jurisdiction. Parliament has instead intended that the consequence of non-compliance with those procedures is review by VCAT, which has had conferred on it the statutory remedial power supplied by s 39(4). That conclusion is perhaps unsurprising. Divisions 1, 2 and 3 of Pt 3 and Pt 8 are concerned with procedures, including for notice giving, consultation and consideration in the making of a recommendation, relevantly here, that an amendment to a planning scheme should be adopted by the planning authority, and then submitted to the Minister for approval.

112 Secondly, Parliament has intended that errors of law made by VCAT when exercising its supervisory powers can be jurisdictional in nature, and are thus subject to review by the Supreme Court pursuant to s 148 of the VCAT Act. Such a scheme is consistent with the *Kirk* principle.

113 Thirdly, the extent to which the *Kirk* principle can preclude a State Parliament from enacting privative clauses should be decided on another occasion.

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158 Spigelman, "The centrality of jurisdictional error" (2010) 21 *Public Law Review* 77 at 91.

Disposition

114 It follows that the first question posed by Quigley J should have been answered "Yes". Section 39 of the Planning Act does not offend the *Kirk* principle, and validly forecloses the relief sought in the first and second respondents' originating motion. It is unnecessary to answer the second question posed.

115 The appeal should be allowed and the order made by the Court of Appeal on 7 August 2025 should be set aside and, in its place, there be an order that the questions reserved by the order made by Quigley J on 29 October 2024 be answered (1) "Yes"; and (2) "Unnecessary to answer".

GLEESON J.

Introduction

116 This appeal concerns the limits of State legislative power to restrict judicial review by the Supreme Court of Victoria of alleged failures to comply with provisions in the *Planning and Environment Act 1987* (Vic) ("the PEA"). Divisions 1 to 3 of Pt 3, and Pt 8, of the PEA ("the participation provisions") make detailed provision for "appropriate public participation in decision making"[159] prior to exercise of the power conferred on the appellant Minister to approve or refuse to approve an amendment to a planning scheme.[160]

117 The factual context involves a proposed amendment to the Greater Shepparton Planning Scheme, called the "Greater Shepparton Planning Scheme Amendment C245gshe: Shepparton North Activity Centre Structure Plan" ("the proposed amendment"). On 22 March 2024, a panel of two persons,[161] appointed by a delegate of the Minister under Pt 8 of the PEA to consider submissions about the proposed amendment, made a report of its findings, including recommendations, purportedly pursuant to s 25 of the PEA ("the Report"). On 23 July 2024, the third respondent, the Greater Shepparton City Council, decided to adopt the proposed amendment subject to changes reflecting recommendations contained in the Report, purportedly acting pursuant to s 29 of the PEA ("the Adoption").[162] The first and second respondents ("the IGA parties") apprehend that the Minister will approve the proposed amendment, with or without changes, purportedly in the exercise of her power under s 35 of the PEA. The IGA parties apprehend that, as amended, the planning scheme will contain provisions adverse to their interests.

118 The IGA parties filed an originating motion in the Supreme Court of Victoria, a superior court of record of general jurisdiction,[163] seeking that Court's exercise of its supervisory jurisdiction over the Report, the Adoption, and the Minister's apprehended decision. The principal relief sought by the IGA parties in the proceeding comprises: (1) an injunction restraining the Minister from making

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159 See PEA, s 4(2)(h).

160 PEA, s 35.

161 Who are, together, the fourth respondent to this appeal, as members of a panel appointed by the Minister under PEA, s 153.

162 The third respondent had initially resolved to adopt the proposed amendment on 23 April 2024, but subsequently came to the view that that resolution was invalid, and so made a further resolution on 23 July 2024.

163 *Constitution Act 1975* (Vic), ss 75, 76, 85.

the apprehended decision; (2) orders in the nature of certiorari quashing the Adoption and the Report; and (3) declarations that the Adoption and the Report are invalid.

119 The Minister resisted the IGA parties' claim, relying on s 39(8) of the PEA, in Div 3 of Pt 3, which provides:

> "Except for an application under this section, a person cannot bring an action in respect of a failure to comply with Division 1 or 2 or this Division or Part 8 in relation to an amendment which has not been approved."

120 The provisions pursuant to which the Report was made, the Adoption occurred, and the apprehended approval of the proposed amendment would occur all fall within the scope of s 39(8). Section 25 is in Div 2 of Pt 3 and ss 29 and 35 are in Div 3 of Pt 3 of the PEA. On its face, s 39(8) applies to the proceeding brought by the IGA parties as "an action in respect of a failure to comply with" s 25 (in connection with the making of the Report) and s 29 (in connection with the Adoption). For present purposes, it does not matter whether s 39(8) also applies to the proceeding insofar as the IGA parties seek an injunction restraining the Minister from making the apprehended decision.

121 The Minister obtained an order, pursuant to s 17B of the *Supreme Court Act 1986* (Vic) ("the SCA"), reserving two questions for the consideration of the Court of Appeal of the Supreme Court of Victoria.[164] The first question is whether s 39 of the PEA prevents the IGA parties from "seeking the relief sought in the originating motion" in the proceeding. The second question is, to the extent that it is necessary to decide the first question, whether the decision in *East Melbourne Group Inc v Minister for Planning*[165] as to the construction of s 39 of the PEA is plainly wrong.

122 The main issue on the appeal to this Court is the correct answer to the first question. For the following reasons, the correct answer is "yes, by the Minister pleading s 39(8) as a defence" and the Court of Appeal erred by answering the question in the negative. As to the second question, it is unnecessary to answer. Although the correct interpretation of s 39(8) is based, in part, on its contextual relationship with s 39(7), arriving at that interpretation does not require a decision about the correctness of the conclusion of the majority in *East Melbourne Group* that an approved amendment, and those parts of the relevant planning scheme

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164 See reasons of Gageler CJ, Gordon, Edelman, Jagot and Beech-Jones JJ at [6].

165 (2008) 23 VR 605.

purportedly affected by the amendment, were invalid by reason of jurisdictional error because of a breach of a participation provision.[166]

123 Accordingly, I would allow the appeal, set aside the order of the Court of Appeal made on 7 August 2025, and in its place order that the reserved questions be answered (1) "yes, by the Minister pleading s 39(8) as a defence"; and (2) "unnecessary to answer".

The first question reserved for consideration

124 In this Court, an issue arose about the scope of the first question. It was agreed that, notwithstanding the reference to s 39 in the first question, s 39(8) is the only sub-section of s 39 that may affect the IGA parties' claims for judicial review in the originating motion. The first question must therefore be understood to ask whether s 39(8) operates to prevent the IGA parties from "seeking the relief sought in the originating motion".

125 The Court of Appeal answered that question "no", concluding that, as the IGA parties' grounds of review in the originating motion allege, or are consequential upon, jurisdictional error, the IGA parties are entitled to be heard by a trial judge about whether the alleged defects in the Report and the Adoption amount to jurisdictional error and, if so, what relief should be granted.

126 The IGA parties argued that the Court of Appeal correctly understood the first question to ask nothing more than whether s 39(8) excludes a person from seeking relief for jurisdictional error by making a non-colourable claim, given that the Court of Appeal, in answering the first question, stated that s 39(8) of the PEA "does not prevent judicial review for jurisdictional error".[167]

127 I do not accept that the first question is so narrow. If understood in the way contended for by the IGA parties, the answer is obviously no, and the Minister never suggested to the contrary. As the Court of Appeal noted, *Kirk v Industrial Court (NSW)*[168] confirmed the constitutional constraint on State legislative power to limit the jurisdiction of a State Supreme Court to review administrative decisions for jurisdictional error.[169] The Minister's submissions to the Court of Appeal explicitly acknowledged the Supreme Court's constitutionally entrenched minimum supervisory jurisdiction to enforce the limits on the exercise of,

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166 *East Melbourne Group* (2008) 23 VR 605 at 690 [370].

167 *IGA Retail Services Pty Ltd v Minister for Planning* (2025) 264 LGERA 154 at 183 [120].

168 (2010) 239 CLR 531.

169 *IGA Retail Services* (2025) 264 LGERA 154 at 168 [44].

relevantly, State executive power by persons and bodies other than the Supreme Court.[170]

128 Such a limited scope is inconsistent with the Court of Appeal's consideration and rejection of the Minister's submission that non-compliance with a participation provision is not jurisdictional in nature. This aspect of the Court of Appeal's reasons addresses the dispute between the parties concerning whether, by the operation of s 39(8), the grounds of review alleged by the IGA parties are necessarily non-jurisdictional, notwithstanding that they are asserted to be jurisdictional in the originating motion.[171]

129 The scope of the first question must be identified in the context of the IGA parties' invocation of the Supreme Court's jurisdiction by filing the originating motion,[172] and the Minister's invocation of the Court's procedural powers to obtain an order under s 17B of the SCA and then to seek from the Court of Appeal its answers to the questions reserved for consideration. By filing the originating motion, the IGA parties in fact took a step by which they sought "the relief sought in the originating motion". If the Minister sought only a determination of the Supreme Court's lack of jurisdiction, she could have applied for summary relief, or to strike out the originating motion.[173] By seeking answers to reserved questions, the Minister accepted the authority of the Supreme Court to decide the reserved questions and not merely to decide whether the Court had jurisdiction to hear and determine the subject matter of the originating motion. Answers to reserved questions are intended to dispose of substantive issues between the parties that will bring finality to the dispute between the parties, subject only to the grant of special leave to this Court.[174]

130 That the Court of Appeal understood the first question to extend to whether s 39(8) of the PEA denies the possibility of jurisdictional error, by non-compliance with a participation provision prior to approval of an amendment, is consistent with the Court of Appeal's detailed rejection of the Minister's arguments about the scope

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170 *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 131 [20]; cf Leeming, *Authority to Decide: The Law of Jurisdiction in Australia*, 2nd ed (2020) at 36-37, 44.

171 *IGA Retail Services* (2025) 264 LGERA 154 at 179 [100], 183 [120].

172 cf *Berowra Holdings Pty Ltd v Gordon* (2006) 225 CLR 364 at 371 [15]-[16].

173 cf *Berowra Holdings* (2006) 225 CLR 364 at 371 [16]; Leeming, *Authority to Decide: The Law of Jurisdiction in Australia*, 2nd ed (2020) at 37, 46.

174 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 357 [49]; *Fisher v The Commonwealth [No 2]* [2023] FCAFC 181.

of s 39(8) based upon *Project Blue Sky Inc v Australian Broadcasting Authority*.[175] Those arguments were directed to the proposition that, as a matter of construction of s 39(8), non-compliance with a participation provision is not capable of amounting to jurisdictional error. *Project Blue Sky* addresses the distinction between jurisdictional and non-jurisdictional error that has been recognised as delimiting the entrenched minimum supervisory jurisdiction.[176] The Court's jurisdiction to engage in judicial review was not in issue in *Project Blue Sky*.[177]

131 The second question, about the correctness of the Court of Appeal's decision in *East Melbourne Group,* sheds light on the scope of the first question. That decision addressed the correct interpretation of s 39 of the PEA, not merely as a question of jurisdiction, but in the different context of an amendment that had been approved.[178] The alleged jurisdictional error concerned non-compliance with a participation provision, namely, the Minister's discretion in s 20(4), anterior to approval of the amendment, to exempt herself from notification requirements. The majority of the Court of Appeal found that the Minister's non-compliance with that participation provision involved jurisdictional error, where the stated reason for the Minister's exemption decision was wholly implausible so as to be incapable of founding a valid exercise of the exemption power.[179] The majority concluded that "the end product of a fatally flawed exercise of the exemption discretion is not protected against relief at the instance of a person with sufficient standing".[180] The substantive relief ordered by the Court of Appeal was to invalidate parts of the relevant planning scheme affected by the amendment.

132 Concerning s 39(8), the majority in *East Melbourne Group* observed that "only where an amendment has not been approved does [s 39] expressly state, by [s 39(8)], that a person cannot bring an action in respect of non-compliance with, inter alia, [Div] 1 or 2 of Pt 3. Why permit action if it could lead nowhere?"[181] Their Honours explicitly left "for another day the question whether [s 39(8)] would

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175 (1998) 194 CLR 355. See *IGA Retail Services* (2025) 264 LGERA 154 at 170-171 [54]-[56], 179 [100]-[101], 182 [112].

176 *Hossain* (2018) 264 CLR 123 at 131 [20].

177 cf *Berowra Holdings* (2006) 225 CLR 364 at 375 [28].

178 PEA, s 39(7).

179 *East Melbourne Group* (2008) 23 VR 605 at 682 [332].

180 *East Melbourne Group* (2008) 23 VR 605 at 691 [370].

181 *East Melbourne Group* (2008) 23 VR 605 at 690 [368].

preclude a right to seek and obtain relief for jurisdictional error".[182] Thus, the decision in *East Melbourne Group* is not relevant to the first question as interpreted by the IGA parties, but may be relevant to the effect of non-compliance with a participation provision.

133 Where the IGA parties had, in fact, invoked the jurisdiction of the Supreme Court, and no issue arose as to the Court's jurisdiction to engage in judicial review for jurisdictional error, the issue raised by the first question can concern only whether the effect of s 39(8) is to limit the Court's powers (without denying its jurisdiction to engage in judicial review for jurisdictional error) or to deny the Court's jurisdiction in this proceeding because the alleged errors are non-jurisdictional errors.

Interpretation of s 39(8)

134 Interpreting the first question in the manner set out above, it is necessary to have regard to two presumptive principles. The first is that every Victorian Act is to be construed so as not to exceed the legislative power of Victoria.[183] The second is that the legislature does not intend to deprive the courts of jurisdiction, "other than to the extent expressly stated or necessarily to be implied".[184]

Text

135 The text of s 39(8) has four elements: (1) an exception; (2) a prohibition on bringing an action; (3) the subject matter of the prohibited action, namely, failure to comply with the participation provisions; and (4) the qualification that the failure to comply relates to an amendment which has not been approved.

136 As to the first element, s 39(8) applies "[e]xcept for an application under this section". The relevant application is provided for by s 39(1), which permits a person who is "substantially or materially affected by a failure of" specified persons or bodies to comply with "Division 1 or 2 or this Division [of Pt 3] or Part 8 in relation to an amendment which has not been approved" to "refer the matter" to the Victorian Civil and Administrative Tribunal ("the Tribunal") "for its

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182 *East Melbourne Group* (2008) 23 VR 605 at 690 [368] fn 205.

183 *Interpretation of Legislation Act 1984* (Vic), s 6(1).

184 *Public Service Association (SA) v Federated Clerks' Union* (1991) 173 CLR 132 at 160. See also *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 633; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 505 [72]; *Berowra Holdings* (2006) 225 CLR 364 at 375 [31]; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 560 [38].

determination". Such a referral may only be made "not later than one month after becoming aware of the failure".

137 The participation provisions are: (1) Div 1 of Pt 3, entitled "Exhibition and notice of amendment" and comprising ss 17 to 20A; (2) Div 2 of Pt 3, entitled "Public submissions about an amendment" and comprising ss 21 to 28; (3) Div 3 of Pt 3, entitled "Adoption and approval of amendment" and comprising ss 29 to 39, and (4) Pt 8, entitled "Panels" and comprising ss 153 to 170. Section 39(1) provides for time-limited administrative review of non-compliance with a participation provision upon referral by a person who satisfies the requirement of being "substantially or materially affected by" the failure to comply. A significant limitation upon this requirement is that the failure to comply must be "in relation to an amendment which has not been approved". A significant limitation upon the scope of the administrative review is that, by s 39(5), in exercising its jurisdiction under s 39, the Tribunal cannot vary a decision made in relation to a matter referred to it or set aside the decision and make a decision in substitution for the decision so set aside.

138 The administrative review available under s 39(1) indicates a legislative purpose of promoting compliance with the participation provisions, "in relation to an amendment which has not been approved", by conferring a limited form of review jurisdiction on the Tribunal (with, as a consequence, a right of appeal on a question of law[185]).

139 As to the second element, the words "cannot bring an action" in s 39(8) are analogous to the language of provisions that impose time limits upon the bringing of an action, in contrast with the typical statutory techniques for attempting to restrict the scope of judicial review.[186] Although the parties rejected an invitation to engage with this issue, it cannot be overlooked. For example, various sections of the *Limitation of Actions Act 1958* (Vic) are expressed to provide that "no action shall be brought" after a certain time has expired.[187] This form of language has also been used to deny the bringing of an action in the absence of a memorandum or

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185 *Victorian Civil and Administrative Tribunal Act 1998* (Vic), s 148.

186 Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability*, 7th ed (2022) at 1136-1137 [20.90]. See, eg, *Migration Act 1958* (Cth), ss 474(1) and 486A, considered in *Plaintiff S157/2002* (2003) 211 CLR 476 at 497-498 [48]-[50].

187 See ss 6(1), 8, 10(2) and (4), 19, 20(1) and (2), 22 and 23(1)(c). See also *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 404-405; *Minister for Home Affairs v DLZ18* (2020) 270 CLR 372 at 382-383 [3].

note of an agreement for the sale of land.[188] In New South Wales, statutory provisions state that a person "may not bring an action" under the provision after a passage of time.[189] Statutes of limitation, "in the traditional form, [do] not go to the jurisdiction of the court to entertain the claim but to the remedy available and hence to the defences which may be pleaded".[190]

140 Relevant to this second element of s 39(8), the Court of Appeal identified the "central question" as whether the IGA parties' proceeding is an "action" for the purposes of s 39(8) of the PEA.[191] The Court of Appeal concluded that there could be "little doubt that the proceeding brought by the [IGA parties] in the Supreme Court is an action within the terms of s 39(8)".[192] The IGA parties did not contend for a different conclusion.[193]

141 The third element, namely, the subject matter of the actions prohibited by s 39(8), is broad. That subject matter includes requirements for providing information about proposed amendments to specified persons (eg, ss 17, 18, 19); exemptions from the requirements to provide information (eg, s 20); and functions and powers conferred upon planning authorities (eg, ss 22, 23, 26, 27, 28, 29), panels (eg, ss 24, 25, 25A and Pt 8) and the Minister (eg, ss 20A, 32, 33, 34, 35) in connection with a proposed amendment. Ultimately, the participation provisions facilitate the Minister's power to approve or refuse to approve a proposed amendment to a planning scheme, allowing for "appropriate public participation" in that decision-making. Generally, unless a decision is made by the Minister to approve or refuse to approve an amendment, non-compliance with a participation provision does not produce legal consequences for persons potentially affected by the Minister's decision.

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188 *Statute of Frauds 1677* (29 Car II c 3), s 4. In Victoria, see *Instruments Act 1958* (Vic), s 126(1).

189 *Strata Schemes Management Act 2015* (NSW), s 106(6); *Community Land Management Act 2021* (NSW), s 109(6).

190 *The Commonwealth v Mewett* (1997) 191 CLR 471 at 534, quoted in *Berowra Holdings* (2006) 225 CLR 364 at 372 [20]. See also *Verwayen* (1990) 170 CLR 394 at 405.

191 *IGA Retail Services* (2025) 264 LGERA 154 at 174 [71].

192 *IGA Retail Services* (2025) 264 LGERA 154 at 178 [92].

193 cf *Applicants A1 and A2 v Brouwer* (2007) 16 VR 612 at 632 [82], [83]. See Greenberg (ed), *Stroud's Judicial Dictionary of Words and Phrases*, 11th ed (2023), vol 1 at 44-45, "action".

142 Finally, as to the fourth element, s 39(8) applies only to a failure to comply with a participation provision "in relation to an amendment which has not been approved". That is, the sub-section does not apply to an action that might be brought if the Minister exercises the power to alter the status quo by approving an amendment, as was the case in *East Melbourne Group*. The significance of this qualification is that s 39(8) applies to the period before the process of amendment has produced legal consequences of the kind that may flow from an amended planning scheme. In this regard, it is relevant to note that, by s 6 of the PEA, a planning scheme may have a wide variety of legal consequences, including: regulating or prohibiting the use or development of any land;[194] stating strategic plans, policy statements, codes and guidelines relating to the use or development of land;[195] and requiring specified things to be done to the satisfaction of various persons or authorities.[196] As a practical matter, non-compliance with a participation provision may affect the prospect of a decision by the Minister with adverse legal consequences for a person or persons.

Purpose of s 39(8)

143 The Court of Appeal's conclusion that there was "a clear legislative intention to restrict the jurisdiction of the Supreme Court in relation to planning matters, including reviewing compliance with the statutory requirements for amending planning schemes",[197] must be understood in the context of the settled approach of courts to interpreting provisions using language of this kind.[198] Legislative intent is "not an objective collective mental state".[199] Rather, its ascertainment "is asserted as a statement of compliance with the rules of construction, common law and statutory, which have been applied to reach the preferred results and which are known to parliamentary drafters and the courts".[200] The Victorian legislature must be taken to have been aware of this settled approach when enacting s 39(8).

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194 PEA, s 6(2)(b).

195 PEA, s 6(2)(d).

196 PEA, s 6(2)(h).

197 *IGA Retail Services* (2025) 264 LGERA 154 at 178 [91].

198 cf *Berowra Holdings* (2006) 225 CLR 364 at 372-373 [21].

199 *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at 592 [43]. See also *Zheng v Cai* (2009) 239 CLR 446 at 455 [28].

200 *Lacey* (2011) 242 CLR 573 at 592 [43].

144 The four elements of the text of s 39(8) reveal that its purpose is to limit disruption to the process of amending planning schemes through litigation prior to the approval of an amendment. Section 39(8) does not express an intent to restrict the Court's supervisory jurisdiction. Such an intent could have been expressed by restricting the sorts of inquiries in which the Court could engage, or forbidding the Court from granting remedies traditionally used as vehicles of judicial review, or restricting the grounds of judicial review. At least on its face, s 39(8) does not evince a legislative intent of the kind identified by the Court of Appeal.

Statutory context

145 The statutory context includes the broad policy objectives of planning in Victoria that are stated in s 4(1) of the PEA. Those objectives include: to provide for the fair, orderly, economic and sustainable use and development of land;[201] and to balance the present and future interests of all Victorians.[202] While, as already noted, a planning scheme (and hence an amendment to a planning scheme) may include provisions that directly affect individual parcels of land, or affect individuals, by establishing codes or guidelines that affect the use or development of land, such a scheme has a broad operation across the area covered by the scheme. A scheme may "set out policies and specific objectives"[203] and otherwise make provisions affecting the relevant community generally, such as designating a Minister, public authority or municipal council as an acquiring authority for the purposes of the PEA for land reserved for public purposes,[204] and setting out different procedures for particular classes of applications for permits.[205]

146 Several features of the PEA reflect a broader purpose of streamlining the process of amending planning schemes, consistent with constraining judicial review of that process unless and until an amendment has been approved or lapses. Firstly, several provisions confine participation in the amendment process, including by conferring broad powers to dispense with elements of the process. An important element of the scheme is the requirement in s 19 to give notice of the preparation of an amendment to a planning scheme to specified classes of affected people, including the owners and occupiers of land that the planning authority believes may be materially affected by the amendment.[206] However, this

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201 PEA, s 4(1)(a).

202 PEA, s 4(1)(g).

203 PEA, s 6(2)(a).

204 PEA, s 6(2)(fa).

205 PEA, s 6(2)(hb).

206 PEA, s 19(1)(b).

notification requirement is qualified by: (1) an exception from compliance with the requirement of giving notice of the preparation of an amendment under s 19(1) if the planning authority "considers the number of owners and occupiers affected makes it impractical to notify them all individually about the amendment";[207] (2) the Minister's power to exempt a planning authority from the notification requirements in s 19 or the regulations in respect of an amendment, if the Minister considers "that compliance with any of those requirements is not warranted, or that the interests of Victoria or any part of Victoria make such an exemption appropriate";[208] and (3) a similar power for the Minister to exempt herself from any of the requirements in ss 17, 18 and 19 and the regulations in respect of an amendment which the Minister prepares.[209]

147 Secondly, s 19(5) provides that failure to give a notice under s 19(1) "does not prevent the adoption or approval of the amendment by the planning authority or its submission to or approval by the Minister", subject to exceptions. This provision appears to deny utility to judicial review of a failure to give notice in relation to an amendment which has not been approved.

148 Thirdly, the Minister is empowered to exempt a planning authority from the requirement under s 27(1) to consider a panel report before deciding whether or not to adopt an amendment "if the Minister considers that delay in considering whether or not to adopt the amendment would adversely affect the planning of the area".[210]

149 Fourthly, the limited scope of the administrative review mechanism in s 39(1) indicates a purpose of avoiding disruption to the statutory procedure.

150 Fifthly, s 197, which is headed "Expedition", provides that:

> "Where the Minister or any responsible authority, planning authority, referral authority, public authority, municipal council, panel, committee or officer is required to do any act, including making any decision or forming any opinion, that act must be done as promptly as is reasonably practicable, in any event within the time limits prescribed or any extension of those time limits allowed by or under this Act, so that loss or damage to any person from unreasonable or unnecessary delay is avoided."

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207 PEA, s 19(1A).

208 PEA, s 20(2).

209 PEA, s 20(4).

210 PEA, s 27(3).

151 Another contextual matter is the relationship between s 39(7) and (8). Section 39(8) stands in contrast with s 39(7), which is a "non-invalidity" clause.[211] Section 39(7) provides that an approved amendment is "not made invalid by any failure to comply" with the participation provisions. In *East Melbourne Group*, the majority of the Court of Appeal found that s 39(7) did not prevent judicial review of an approved amendment for jurisdictional error in failing to comply with a participation provision.[212] In context, s 39(8) has a function of preserving the operation of s 39(7) to the fullest extent possible, by precluding litigation that might otherwise outflank that operation.[213]

152 A final matter of statutory context is the provision for parliamentary scrutiny of a Minister's decision to approve an amendment. The amendment decision is subject to revocation (wholly or partly) "by a resolution passed by either House of the Parliament within 10 sitting days after the notice of approval of the amendment is laid before that House".[214] In this way, the Minister is politically accountable for any decision to alter the status quo by amending a planning scheme.

Other relevant matters

153 Section 39(8) may be contrasted with privative clauses that impose a time limit on the commencement of judicial review proceedings. In *Bodruddaza v Minister for Immigration and Multicultural Affairs*, this Court held that a privative clause[215] was invalid because it curtailed or limited the right or ability of the applicant to seek relief under s 75(v) of the *Constitution*.[216] It was critical to this conclusion that the privative clause prevented this Court from making orders relieving against failure to comply with the time limit of 84 days established by

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211 See, eg, *M J Davis Industrial Pty Ltd v Fairfield City Council* (1999) 107 LGERA 118; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212; *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146.

212 (2008) 23 VR 605 at 690-691 [368]-[371].

213 cf *R v Coldham; Ex parte Australian Workers' Union* (1983) 153 CLR 415 at 418-419.

214 PEA, s 38(2).

215 *Migration Act*, s 486A.

216 *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at 672 [58]-[60].

the section.[217] That limit was found to subvert the constitutional purpose of the remedy provided by s 75(v),[218] being to restrain officers of the Commonwealth from exceeding Federal power.[219]

154 In contrast with the privative clause in *Bodruddaza*, s 39(8) of the PEA does not impose an absolute time limit within which a person may commence proceedings. Rather, it delays the time when proceedings may be commenced. In that respect, it is similar to the provision considered in *Berowra Holdings Pty Ltd v Gordon*, which provided that a worker was "not entitled to commence court proceedings" seeking damages in respect of a workplace injury unless six months had elapsed since notice of the injury was given to the employer.[220] The Court found that the provision did not extinguish rights or create new rights but postponed the remedy for the common law right to initiate proceedings in a court of competent jurisdiction.[221] The provision conferred a right to object on the employer, which was to be raised in accordance with the procedural rules of the relevant court.

155 In *Minister for Home Affairs v DLZ18*,[222] the privative clause in issue provided that certain proceedings "may not be instituted or continued in any court".[223] This Court held that the privative clause did not limit the jurisdiction of any court to hear and determine claims of the kinds described in the clause, but provided the Commonwealth "with an available answer to those claims if they [were] made in a court other than the High Court".[224]

Consideration

156 The text of s 39(8) indicates that it does not purport to deprive the Supreme Court of its entrenched supervisory jurisdiction over administrative decisions and conduct, but rather it confers a right on the Minister to object to proceedings for

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217 *Bodruddaza* (2007) 228 CLR 651 at 661 [16], 671-672 [55].

218 *Bodruddaza* (2007) 228 CLR 651 at 672 [58].

219 *Bodruddaza* (2007) 228 CLR 651 at 668 [45].

220 (2006) 225 CLR 364 at 369 [6]. See *Workers Compensation Act 1987* (NSW), s 151C(1).

221 *Berowra Holdings* (2006) 225 CLR 364 at 376 [35].

222 (2020) 270 CLR 372.

223 *Migration Act*, s 494AB(1).

224 *DLZ18* (2020) 270 CLR 372 at 383 [4], 393 [31].

judicial review in respect of a failure to comply with a participation provision in relation to an amendment which has not been approved. That restriction on the capacity of a person to seek judicial review is consistent with the subject matter of s 39(8), which is confined to decisions or conduct that are anterior to the exercise of power that will most obviously have legal consequences for affected individuals, namely, the Minister's decision to approve or refuse to approve an amendment or part of an amendment.

157 This interpretation of s 39(8) is consistent with its purpose and congruent with other provisions of the legislative scheme that are evidently designed to streamline the process of approval of an amendment. It is also consistent with the quasi-legislative nature of such amendments, the broad purposes of the relevant requirements, the broad policy objectives of planning in Victoria that are stated in s 4(1) of the PEA, and the power of Parliament to revoke an amendment. The interpretation does not detract from the focus of judicial review being upon the extent of power and the legality of its exercise, rather than the protection of individual interests.[225] That focus can be achieved by judicial review of non-compliance with a participation provision after an amendment has been approved. Finally, there is no danger of "islands of power" (adopting the language of *Kirk*[226]); there is merely a restriction upon judicial review during the period prior to approval of an amendment.

158 In my view, s 39(8) operates as a command to litigants to refrain from bringing an action for failure to comply with a participation provision "in relation to an amendment which has not been approved". This operation subsists regardless of whether s 39(8) also reveals a legislative purpose that an act done in breach of a participation provision is not invalid.[227] The legislative command expressed in s 39(8) gives rise to a choice to be exercised by the Minister "either to do nothing or to seek an appropriate order from the court".[228] Accordingly, the more difficult question of the scope of jurisdictional error for non-compliance with a participation provision arises only in relation to an amendment which has been approved or which has lapsed.[229] That is not this case.

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225 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36; Basten, "The supervisory jurisdiction of the Supreme Courts" (2011) 85 *Australian Law Journal* 273 at 293-294.

226 (2010) 239 CLR 531 at 581 [99].

227 cf *Project Blue Sky* (1998) 194 CLR 355 at 390 [93].

228 *Berowra Holdings* (2006) 225 CLR 364 at 370-371 [14].

229 PEA, s 30.

The second question reserved for consideration

159 Although the answer to the first question required consideration of the contextual significance of s 39(7), it is unnecessary to decide whether the majority in *East Melbourne Group* erred in their interpretation of s 39(7) except to note that the suggested distinction between decisions tainted by jurisdictional error and non-compliance with "procedural requirements" has relevant application to the interpretation of s 39(8) only if the Minister chooses not to invoke the defence afforded by s 39(8). While the descriptor "procedural requirement" tends to raise a question about the immateriality of non-compliance,[230] the categories of procedural and non-jurisdictional error are not co-extensive. Rather, where a statute sets out a requirement to comply with a procedure, it is a question of statutory interpretation whether "it was a purpose of the legislation that an act done in breach of the provision should be invalid".[231]

Conclusion

160 The appeal should be allowed. The order made by the Court of Appeal of the Supreme Court of Victoria on 7 August 2025 should be set aside and, in its place, it should be ordered that the questions reserved by the order made by Quigley J on 29 October 2024 be answered: (1) "yes, by the Minister pleading s 39(8) as a defence"; and (2) "unnecessary to answer".

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230 Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability*, 7th ed (2022) at 361 [7.220].

231 *Project Blue Sky* (1998) 194 CLR 355 at 390 [93]. See also *Plaintiff S157/2002* (2003) 211 CLR 476 at 489 [20]; *Adams v Lambert* (2006) 228 CLR 409 at 419 [26]; *Master Education Services Pty Ltd v Ketchell* (2008) 236 CLR 101 at 112 [26]; *Awad v The Queen* (2022) 275 CLR 421 at 430 [18].