HIGH COURT OF AUSTRALIA

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

LENDLEASE CORPORATION LIMITED & ANOR APPELLANTS

AND

DAVID WILLIAM PALLAS AND JULIE ANN PALLAS AS TRUSTEES FOR THE PALLAS FAMILY SUPERANNUATION FUND & ANOR RESPONDENTS

Lendlease Corporation Limited v Pallas
[2025] HCA 19
Date of Hearing: 5 November 2024
Date of Judgment: 7 May 2025
S108/2024

ORDER

1. *Appeal allowed.*

2. *Set aside the order made by the Court of Appeal of the Supreme Court of New South Wales on 17 April 2024 and, in its place, order that the separate question stated by Ball J on 13 September 2023 be answered in the affirmative.*

3. *Each party's costs of the appeal be its costs in the proceeding in the Supreme Court of New South Wales.*

4. *The appellants pay the costs of the contradictor in the appeal.*

On appeal from the Supreme Court of New South Wales

Representation

E A Collins SC with C G Winnett and B Lambourne for the appellants (instructed by Herbert Smith Freehills)

W A D Edwards KC with R J May for the respondents (instructed by Maurice Blackburn Lawyers)

K C Morgan SC with Z L M Hillman as contradictor (instructed by MinterEllison)

CATCHWORDS

Lendlease Corporation Limited v Pallas

Representative actions – Practice and procedure – Orders – Notices to group members – Where representative proceeding under Pt 10 of *Civil Procedure Act 2005* (NSW) ("CPA") – Where defendant proposed to provide notice ("proposed notice") setting out its intention to seek certain order if proceeding settled – Where proposed notice indicated defendant's intention to seek orders that a group member who had neither opted out nor registered to participate in the proceeding would remain a group member, but shall not, without leave of the Court, be permitted to seek any benefit pursuant to any settlement of the proceeding that occurs before final judgment – Where unregistered group member's claims against defendant would therefore be extinguished by settlement – Where intermediate appellate court authority in conflict – Whether Supreme Court of New South Wales could make an order under s 175(5) of CPA that proposed notice be given to group members.

Words and phrases – "appellate jurisdiction", "compelling reason", "conflict of interest", "forensic advantage", "fundamental precept", "group member", "inconsistency of interest", "intention to seek an order", "intermediate appellate court", "notice", "opt in", "opt out", "plainly wrong", "power to order", "precedent", "ratio decidendi", "registration", "representative proceeding", "separate question", "seriously considered obiter dicta", "settlement", "settlement approval", "settlement negotiations", "statutory context".

Civil Procedure Act 2005 (NSW), Pt 10, ss 159(1), 161, 162, 166(1)(d), 171(1), 173, 175(1), 175(5), 175(6), 176, 177, 179(b), 183.

GAGELER CJ, GLEESON AND JAGOT JJ.

The question in the appeal

1 In a representative proceeding under Pt 10 of the *Civil Procedure Act 2005* (NSW) ("the CPA"), can the Supreme Court of New South Wales make an order under s 175(5) that notice be given to group members of the intention of the defendant (and perhaps the representative plaintiff), if the proceeding is settled, to seek an order that a group member who has neither opted out of the proceeding nor registered to participate in the proceeding shall remain a group member (and whose claims against the defendant will therefore be extinguished by the settlement) but shall not, "without leave of the Court, be permitted to seek any benefit pursuant to any settlement (subject to Court approval) of [the] proceeding that occurs before final judgment"?

2 The Court of Appeal of the Supreme Court of New South Wales (Bell CJ, Ward P, Gleeson, Leeming and Stern JJA), in answering in the negative a separate question to this effect referred to it for determination, held that the Supreme Court did not have the power to order that such a notice be given.[1] In so holding, their Honours concluded that an earlier decision of the Court of Appeal, *Wigmans v AMP Ltd*,[2] was not plainly wrong, so its reasoning had to be followed to the effect that the Supreme Court had no power to order the giving of the proposed notice.[3] Their Honours, in consequence, disagreed with the Full Court of the Federal Court of Australia (Murphy, Beach and Lee JJ) in *Parkin v Boral Ltd*[4] that *Wigmans v AMP Ltd* was plainly wrong.[5] *Parkin* concerned the materially identical provisions of Pt IVA of the *Federal Court of Australia Act 1976* (Cth) ("the FCA"). Further, and again contrary to the Full Court of the Federal Court of Australia in *Parkin*, their Honours concluded that the giving of such a notice would: (a) subvert the statutory scheme, in which group members are taken to be entitled to the benefits of the proceeding unless they opt out of the proceeding, by converting it into a scheme in which group members must opt in to be taken to be entitled to the benefits of the proceeding, contrary to the text, context and purpose

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1 *Pallas v Lendlease Corporation Ltd* (2024) 114 NSWLR 81.

2 (2020) 102 NSWLR 199.

3 (2024) 114 NSWLR 81 at 88-90 [19]-[23], 113 [127], 116 [138], 116 [139]-[140], 120 [160].

4 (2022) 291 FCR 116.

5 (2024) 114 NSWLR 81 at 107-113 [94]-[123], 113 [127], 116 [138], 116 [139], 116-120 [141]-[159], 120 [160].

of Pt 10 of the CPA; and (b) place the representative plaintiff in an untenable position of conflict between its interests and those of unregistered group members who had not opted out of the representative proceeding.[6]

3 As will be explained, the Court of Appeal has construed the statutory powers in Pt 10 of the CPA too narrowly. The considerations which led it to hold that the Supreme Court does not have the power to order the giving of the proposed notice are legitimate concerns about the operation of Pt 10 of the CPA (and the equivalent Pt IVA of the FCA). Those legitimate concerns, however, do not confine the power of the Court to order that such a notice be given. Rather, they properly inform the steps the Court might consider necessary or appropriate to manage the inconsistency of interest to which a representative plaintiff might become subject in the settlement of a proceeding and in deciding whether to approve any such settlement.

The statutory scheme

4 As noted, Pt 10 of the CPA is in materially identical terms to Pt IVA of the FCA. The provisions of the CPA conveniently cross-refer to the equivalent provisions of the FCA. Those cross-references are reproduced below.

5 By s 155 of the CPA (cf s 33A FCA): a "representative party" means "a person who commences representative proceedings"; "representative proceedings" are proceedings regulated by s 157 (cf s 33C FCA); "group member" means "a member of a group of persons on whose behalf representative proceedings have been commenced"; "sub-group member" means "a person included in a sub-group established under section 168" (cf s 33Q FCA); and "sub-group representative party" means "a person appointed to be a sub-group representative party under section 168".

6 Section 157(1) of the CPA (cf s 33C FCA) provides that where "7 or more persons have claims against the same person", "the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances", and "the claims of all those persons give rise to a substantial common question of law or fact", "proceedings may be commenced by one or more of those persons as representing some or all of them". By s 159(1) (cf s 33E FCA), subject to presently irrelevant exceptions in s 159(2), "the consent of a person to be a group member is not required".

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6 (2024) 114 NSWLR 81 at 107-112 [97]-[117], 115 [136], 116 [138], 116 [139], 116-120 [141]-[158], 120 [160]; contra 113-115 [128]-[135].

7 By s 173 of the CPA (cf s 33V FCA):

"(1) Representative proceedings may not be settled or discontinued without the approval of the Court.

(2) If the Court gives such approval, it may make such orders as are just with respect to the distribution of any money, including interest, paid under a settlement or paid into the Court."

8 Section 175 of the CPA (cf s 33X FCA) provides that:

"(1) Notice must be given to group members of the following matters in relation to representative proceedings –

(a) the commencement of the proceedings and the right of the group members to opt out of the proceedings before a specified date, being the date fixed under section 162(1),

(b) an application by the defendant in the proceedings for the dismissal of the proceedings on the ground of want of prosecution,

(c) an application by a representative party seeking leave to withdraw under section 174 as representative party.

...

(4) Unless the Court is satisfied that it is just to do so, an application for approval of a settlement under section 173 must not be determined unless notice has been given to group members.

(5) The Court may, at any stage, order that notice of any matter be given to a group member or group members.

(6) Notice under this section must be given as soon as practicable after the happening of the event to which it relates."

9 By s 176(1) of the CPA (cf s 33Y FCA) the "form and content of a notice under section 175 must be approved by the Court". By s 176(8) the "failure of a group member to receive or respond to a notice does not affect a step taken, an order made, or a judgment given, in any proceedings".

10 Section 177 of the CPA (cf s 33Z FCA) provides that:

"(1) The Court may, in determining a matter in representative proceedings, do any one or more of the following –

...

(e) make an award of damages for group members, sub-group members or individual group members, being damages consisting of specified amounts or amounts worked out in such manner as the Court specifies,

(f) award damages in an aggregate amount without specifying amounts awarded in respect of individual group members.

(2) In making an order for an award of damages, the Court must make provision for the payment or distribution of the money to the group members entitled.

(3) Subject to section 173, the Court is not to make an award of damages under subsection (1)(f) unless a reasonably accurate assessment can be made of the total amount to which group members will be entitled under the judgment.

(4) If the Court has made an award of damages, the Court may give such directions (if any) as it thinks just in relation to –

(a) the manner in which a group member is to establish the member's entitlement to share in the damages, and

(b) the manner in which any dispute regarding the entitlement of a group member to share in the damages is to be determined."

11 Section 178 of the CPA (cf s 33ZA FCA) enables the Court, "in making provision for the distribution of money to group members", to provide for "the constitution and administration of a fund consisting of the money to be distributed".

12 By s 179 of the CPA (cf s 33ZB FCA) a judgment given in representative proceedings: (a) "must describe or otherwise identify the group members who will be affected by it"; and (b) "binds all such persons other than any person who has opted out of the proceedings under section 162".

13 Section 183 of the CPA (cf s 33ZF FCA) provides that "[i]n any proceedings (including an appeal) conducted under this Part, the Court may, of its

own motion or on application by a party or a group member, make any order that the Court thinks appropriate or necessary to ensure that justice is done in the proceedings".

The legal and practical context of the separate question

14 The principal judgments in the Court of Appeal, those of Bell CJ (with whom Gleeson and Stern JJA agreed) and Leeming JA (who also agreed with Bell CJ), correctly identified the legal and practical context in which the separate question arose for determination.

15 The respondents to this appeal (also the respondents in the Court of Appeal and the representative plaintiffs in the underlying proceeding), who are shareholders in the first appellant in this appeal (the first applicant in the Court of Appeal and the first defendant in the underlying proceeding), which gave them rights in units in the trust for which the second appellant in this appeal is the responsible entity (the second applicant in the Court of Appeal and the second defendant in the underlying proceeding) (together, the appellants are referred to as "Lendlease"), alleged that "Lendlease breached its continuous disclosure obligations and engaged in misleading or deceptive conduct during the period from 17 October 2017 to 8 November 2018 during which period, approximately 445 million shares were traded".[7]

16 The Court of Appeal was also undoubtedly right to infer that the giving of the proposed notice had two purposes. In circumstances where, in the ordinary course, the representative proceeding would be referred by the Supreme Court to mediation, the giving of the notice would both, as Bell CJ put it: (a) "encourage currently unregistered group members either to opt out of the group prior to any mediation or to opt in to avoid the 'risk [of] missing out on the benefit of any settlement which might be agreed before final judgment'"; and (b) "arm Lendlease (and also the plaintiffs as the representative parties) with an argument to be made to any judge called upon to approve any settlement pursuant to s 173 of the CPA that non-registered group members should *not* be permitted to participate in the fruits of any settlement on the footing that they had been given the choice of opting out or opting in prior to the settlement and had not availed themselves of that opportunity".[8]

17 Unpacking these two purposes further, it is apparent that the concept of "opting out" of a representative proceeding is a part of the statutory scheme. If a

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7 (2024) 114 NSWLR 81 at 85 [5].

8 (2024) 114 NSWLR 81 at 87 [12] (emphasis in original).

representative proceeding is filed, the originating application or other document filed in support must "describe or otherwise identify the group members" (s 161(1) CPA). Such identification need not be by name and the number of group members need not be specified (s 161(2) CPA), meaning that membership of the group may be by description of circumstances. Fundamental to the statutory scheme is that a person may be a member of the group without their consent (s 159(1) CPA) or, indeed, their knowledge. A person who is a member of the group must have an opportunity to opt out of membership before the proceeding is heard (s 162 CPA). At a practical level, a person must know they are a member of the group to have a meaningful opportunity to opt out of group membership. To facilitate group members knowing they are group members, notice must be given to them of, amongst other things, the commencement of the proceedings and their right to opt out of the proceedings before the date fixed under s 162(1) (s 175(1)(a) CPA).

18 In contrast, being "registered" or "unregistered" as a group member is not a part of the statutory scheme. The concept of "registering" as a group member is a result of the practical operation of several aspects of the statutory scheme. The statutory process of a group member opting out of group membership means that the representative plaintiff and the representative plaintiff's lawyers will know the number of people who are not group members but, without something more, will not know the number of group members. In some cases, estimating the number of group members with a reasonable degree of accuracy may be simple. In other cases, estimating the number of group members with a reasonable degree of accuracy may be impossible. The representative plaintiff and the representative plaintiff's lawyers have an interest in being able to estimate the number of group members with a reasonable degree of accuracy for several purposes, including: negotiating an appropriate settlement (for example, to ensure that the settlement negotiated involves an amount appropriate for distribution between all participating group members); facilitating the Court approving the settlement; facilitating the Court making such orders as are just with respect to the distribution of any money paid under the settlement; and, if the case does not settle, facilitating the Court working out the award of damages and making orders for the payment or distribution of the money to the group members entitled (including the establishment of such entitlement by group members and providing for the constitution and administration of a fund consisting of the money to be distributed to group members who are so entitled).

19 The defendant and the defendant's lawyers also have an interest in being able to estimate the number of group members with a reasonable degree of accuracy for the same reasons as the representative plaintiff and the representative plaintiff's lawyers, and for the additional reason of taking maximum advantage of the effect of s 179(b) of the CPA. From the perspective of the defendant and the defendant's lawyers, facilitating registration of group members' participation in the representative proceeding enables the defendant and the defendant's lawyers, in

particular, to: (a) better estimate the defendant's total potential liability to those who are group members (and its potential liability to those who opt out of the representative proceeding in order to preserve their own cause of action against the defendant); (b) negotiate a settlement with the representative plaintiff with greater confidence as to that total potential liability, including by minimising the risk of group members who have neither registered their participation in nor opted out of the representative proceeding, after settlement, seeking to benefit from the terms of the settlement; and (c) by maximising the number of group members known to the defendant and the defendant's lawyers before a settlement is negotiated, ensuring the settlement can be tailored accordingly and ensuring that the maximum number of group members are bound by any approved settlement in accordance with s 179(b) of the CPA. From the perspective of the defendant and the defendant's lawyers, for example, it would be undesirable: to negotiate a settlement with a relatively small proportion of the potential group members; and after negotiating such a settlement and seeking approval for it, to become aware of numerous other group members who either want to share in or increase the settlement amount or want to be permitted to opt out of the proceeding in order to preserve their own cause of action against the defendant.

20 On this basis, the two purposes Bell CJ identified as informing the giving of the proposed notice are to be understood as reflecting the practical reality of a representative proceeding, namely that: on the one hand, the provisions of the statutory scheme contemplate that a group member who does not opt out of proceedings in response to a notice under s 175(1)(a) as contemplated by s 162 remains a group member and is therefore able to benefit from, but is also bound by, a judgment (by settlement or otherwise) in accordance with s 179(b); and, on the other hand, to facilitate the settlement of a representative proceeding and to improve its prospects of being approved by the Court, the representative plaintiff and the defendant and their lawyers need to be able to estimate the number of group members with a reasonable degree of accuracy.

21 This said, it should not be assumed that the interests of (on the one hand) a representative plaintiff and the representative plaintiff's lawyers and (on the other hand) a defendant and its lawyers are consistent and congruent. At different stages of the representative proceeding, the interests of each may converge or compete with other of their interests and interests may take different weight in the assessment of the appropriate course of action to take. For example, a representative plaintiff and the representative plaintiff's lawyers have an interest in ensuring that membership of the group is defined in a way that clearly identifies the criteria for membership, minimises the risk of intra-group disputation, and maximises the potential number of group members to ensure that, if the claim succeeds (by settlement or otherwise), there is an adequate award of damages to cover the costs of the proceedings not recoverable from the defendant and to justly compensate group members for loss. A defendant's interest in the giving of notice

such as the proposed notice is to maximise the number of group members who have registered their participation in the proceeding so any settlement can be tailored to that number. It is only if a material number of group members do not register or opt out in response to the proposed notice (the first primary purpose of the giving of the notice) that a defendant also has an interest in having given the notice to provide it with a forensic advantage in being able to argue on settlement that those group members should not obtain any benefit from the settlement but should be bound by the judgment approving the settlement (the second primary purpose of the giving of the notice). That is, if the first primary purpose of the giving of the notice is satisfactorily achieved, the second primary purpose of the giving of the notice is immaterial. It is only if the first primary purpose of the giving of the notice is not satisfactorily achieved that the second primary purpose becomes relevant.

22 The salient point is this. It is not to be assumed that the interests of a representative plaintiff and the representative plaintiff's lawyers are continuously consistent and congruent throughout a representative proceeding. It is not to be assumed that the interests of a defendant and the defendant's lawyers are continuously consistent and congruent throughout a representative proceeding. It is also not to be assumed that the interests of a representative plaintiff and the representative plaintiff's lawyers, in respect of each step in a representative proceeding, are opposed to the interests of a defendant and the defendant's lawyers in that proceeding. Equally, it is not to be assumed that the interests of a representative plaintiff and the representative plaintiff's lawyers are inconsistent and incongruent with the interests of group members who have neither opted out nor registered their participation in the proceeding. There are potential and actual inconsistencies of interests between all these persons, but those inconsistencies will wax and wane depending on the circumstances. The potential for inconsistencies of interests is inherent in the statutory scheme and is to be managed by the Court in the interests of the administration of justice as they appear in the circumstances of each case.

The earlier decisions

23 The principal decision of this Court on which the Court of Appeal relied in support of its reasoning was *BMW Australia Ltd v Brewster*.[9] In that case, Kiefel CJ, Bell, Keane, Nettle and Gordon JJ held that s 183 of the CPA did not empower the Supreme Court of New South Wales to make an order, early in the representative proceeding, that provided for a litigation funder's remuneration to be fixed as a proportion of any moneys ultimately recovered in the proceeding, for all group members to be proportionately liable for that remuneration, and for that

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9 (2019) 269 CLR 574.

proportionate liability to have priority over all other payments from the moneys so recovered (a "common fund order").[10] Their Honours' reasoning accepted that s 183 of the CPA was expressed in broad terms but considered that, in context, s 183 contemplated the making of any order "to ensure that the proceeding is brought fairly and effectively to a just outcome", and not any order in favour of a third party (the litigation funder) to ensure the proceeding could be pursued.[11] In reaching this conclusion, Kiefel CJ, Bell and Keane JJ: (a) distinguished the concept of an order ensuring justice is done in the representative proceeding (which would be within the scope of s 183 CPA) from an order ensuring the proceeding could be heard and determined as a matter of commercial practicality (which would be outside the scope of s 183 CPA);[12] (b) did not accept that the statutory provisions supported a legislative intention that "maintaining litigation, whatever its ultimate merit or lack thereof, is itself doing justice to the parties";[13] (c) characterised the order sought as one "centrally concerned to determine whether the proceeding is viable at all as a vehicle for the doing of justice between the parties to the proceeding", which was outside the scope of s 183 of the CPA;[14] (d) characterised s 183, in context, as a "supplementary source of power" or a "gap-filling" provision,[15] which neither performed the same function as other statutory provisions concerning representative proceedings nor "was intended to meet the exigencies of litigation not adverted to at all by those other provisions";[16] (e) considered that the Court attempting to fix a litigation funder's remuneration at an early stage of the representative proceeding would be a "speculative exercise" absent any criteria to enable evaluation of the appropriateness or necessity (or otherwise) of the remuneration rate so fixed;[17] and (f) concluded that the making of such an order at an early stage of the representative proceeding would be inconsistent with the statutory scheme, which contains a provision (namely, s 173

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10 (2019) 269 CLR 574 at 588 [1], 589 [3], 624 [125], 628 [135].

11 (2019) 269 CLR 574 at 599 [47]. See also 624-625 [125]-[127], 631-632 [146]-[148].

12 (2019) 269 CLR 574 at 600 [49]-[50]. See also 624-625 [125]-[127], 633 [153].

13 (2019) 269 CLR 574 at 601 [52].

14 (2019) 269 CLR 574 at 601 [53]. See also 633-634 [154]-[155].

15 (2019) 269 CLR 574 at 603 [60], 605-606 [69]-[70]. See also 624 [124]-[125], 631 [145], 632 [147].

16 (2019) 269 CLR 574 at 603 [60].

17 (2019) 269 CLR 574 at 604-605 [66]-[67].

CPA) that "expressly contemplate[s] the making of an order at the conclusion of the proceedings".[18] On this basis, their Honours concluded that construing s 183 as permitting the making of such an order would be to use s 183 "as a vehicle for rewriting the scheme of the legislation".[19]

24 In reaching that conclusion, their Honours observed that:[20]

> "As this Court has noted, the opt out model adopted by Pt IVA of the FCA and Pt 10 of the CPA is designed so that a representative proceeding may continue even if group members are unaware of it; and group members 'are under no obligation to identify themselves'. That said, both legislative schemes do allow identification of all group members (as far as is possible) in order to distribute any proceeds. That this is so is apparent from ss 33V, 33X(3)-(4), 33Z and 33ZA of the FCA. Reference to the terms of these provisions confirms that the legislative scheme contemplates that the occasion for the making of orders in relation to distribution of the proceeds of the action is its successful completion."

25 Their Honours cited *Mobil Oil Australia Pty Ltd v Victoria*[21] in support of the proposition that "a representative proceeding may continue even if group members are unaware of it". In the relevant part of *Mobil Oil*, Gaudron, Gummow and Hayne JJ observed that it followed from the opt out procedure adopted in the provisions applicable to representative proceedings in Victoria that "[g]roup members … need take no positive step in the prosecution of the proceeding to judgment to gain whatever benefit its prosecution may bring".[22]

26 In support of the proposition in *BMW Australia Ltd v Brewster* that "both legislative schemes do allow identification of all group members (as far as is possible) in order to distribute any proceeds",[23] their Honours referred to ss 173,

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18 (2019) 269 CLR 574 at 605 [68]-[69], 607 [75]. See also 624 [124], 630 [141], 632 [147].

19 (2019) 269 CLR 574 at 606 [70].

20 (2019) 269 CLR 574 at 607 [73] (footnotes omitted), referring to *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at 31-32 [38]-[40] and quoting *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd [No 2]* [2010] FCA 176 at [31].

21 (2002) 211 CLR 1 at 31-32 [38]-[40].

22 (2002) 211 CLR 1 at 32 [40].

23 (2019) 269 CLR 574 at 607 [73].

175, 177 and 178 of the CPA (ss 33V, 33X, 33Z, 33ZA FCA). These are the provisions which, amongst other things, require the Court to approve any settlement of a representative proceeding, enable the Court to award damages and, in awarding damages, require the Court to make "a reasonably accurate assessment … of the total amount to which group members will be entitled under the judgment" (s 177(3) CPA) and "provision for the payment or distribution of the money to the group members entitled" (s 177(2) CPA).

27 In a decision which considered *BMW Australia Ltd v Brewster*, *Haselhurst v Toyota Motor Corporation Australia Ltd t/as Toyota Australia*,[24] Payne JA in the Court of Appeal (with whom Bell P, Macfarlan and Leeming JJA, and Emmett A-JA agreed) explained why the Supreme Court of New South Wales did not have power under s 183 of the CPA to make an order described as effecting a "soft class closure" in anticipation of settlement negotiations.[25] The proposed order provided that a group member who had neither opted out nor registered their participation in the representative proceeding before a specified date would remain a group member and be bound by any judgment or settlement but, if settlement was reached before the trial commenced and was approved by the Court, the group member would be bound by the terms of the settlement and barred from making claims against the defendant relating to the subject-matter of the proceeding, including being unable to participate in any compensation or otherwise benefit from any relief.[26] Payne JA reasoned that such an order could not be made as: (a) an order with this effect could be made only on approval of a settlement (s 173 CPA) or the giving of judgment after a hearing (s 177 CPA);[27] and (b) the fact that the Court might not approve the settlement did not alter the nature of the proposed order as a contingent extinguishment of the group members' rights of action against the defendant.[28] Reflecting the statement from *Mobil Oil* referred to above, Payne JA also observed that "[a] group member … need take no positive step in the prosecution of the proceeding to judgment or settlement to gain whatever benefit its prosecution may bring. Once there is an amount of money available,

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24 (2020) 101 NSWLR 890.

25 (2020) 101 NSWLR 890 at 892 [1], 896 [19], 896 [20], 897 [26], 917 [114], 922 [138].

26 (2020) 101 NSWLR 890 at 897 [25].

27 (2020) 101 NSWLR 890 at 903 [53].

28 (2020) 101 NSWLR 890 at 904 [59].

whether by judgment or settlement, the group member will then have to take a positive step to share in the proceeds."[29]

28 In the subsequent decision of *Wigmans v AMP Ltd*,[30] the Court of Appeal (Macfarlan, Leeming and White JJA) considered a proposed order that, if the representative proceeding settled within specified time parameters, "the parties intend to apply to the Court for an order that any Group Member who by the Class Deadline does not opt out and who is not a New Registered Group Member or Existing Registered Group Member will not receive any benefit pursuant to the settlement".[31] Referring to *Haselhurst*, their Honours said that the proposed order "is prima facie contrary to a fundamental precept of Pt 10, as confirmed by the joint judgments in *Mobil Oil* and *Brewster*, and inherent in the legislative choice of an opt-out regime. If what is contemplated … comes to pass, group members who take no positive step will gain no benefit from any settlement and will have their rights extinguished. Indeed, it is reasonable to expect that the extinction of passive or unregistered group members' rights would be one of the drivers of any settlement between registered group members and [the defendant]. This prima facie gives rise to a conflict between group members who are registered and those who are not."[32] Their Honours considered that the conflict of interest between the representative plaintiff and the unregistered group members in any settlement negotiation and approval hearing would be "real, immediate and direct" as the representative plaintiff would be propounding a settlement from which the unregistered group members would receive nothing but by which they would be bound.[33] It followed, in their Honours' view, that s 175(5) of the CPA, despite being in apparently unqualified terms,[34] did not empower the giving of the proposed notice as the practical effect of the orders did not conform to Pt 10 of the CPA.[35]

29 Their Honours did not accept that resolution of the conflict of interest could be either effectively managed or deferred until a hearing as to whether the

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29 (2020) 101 NSWLR 890 at 909 [87].

30 (2020) 102 NSWLR 199.

31 (2020) 102 NSWLR 199 at 204 [25].

32 (2020) 102 NSWLR 199 at 214 [79].

33 (2020) 102 NSWLR 199 at 221 [120].

34 (2020) 102 NSWLR 199 at 218 [100].

35 (2020) 102 NSWLR 199 at 219 [104], 224 [132].

settlement should be approved as the proposed order required group members to decide in the near future whether to register or not.[36] Their Honours also made this point in overall response to the submissions that the proposed order was within power:[37]

> "We are conscious that the [CPA] proceeds on the basis that there may be an open class, including a class with hundreds of thousands of members such as that defined in [the representative plaintiff's] Commercial List Summons. But the facts that (a) the legislation permits that to occur, and (b) [the representative plaintiff] has availed itself of acting for a very large number of group members, in no way justify making orders which will subvert two fundamental aspects of the regime, which is that [the representative plaintiff] acts for *all* group members, and that group members may do nothing prior to a settlement and still reap its benefits."

30 In *Parkin*, the Full Court of the Federal Court considered that the decision in *Wigmans v AMP Ltd* was plainly wrong.[38] Murphy and Lee JJ (with whom Beach J agreed) noted that "potential or actual conflicts of interest are an inevitable by-product of a regime where the self-appointed representative applicant's individual claim is the vehicle through which the common questions are to be tried" and stated that Pt IVA "contemplates that the conflicts will be addressed through the representative applicant's duty not to act contrary to the interests of the group members and, critically, by the Court exercising its protective role in relation to group members' interests".[39] Their Honours held that "to the extent that a conflict of interest may exist, it does not demonstrate that there is no power under s 33X(5) to make the proposed order" but rather "the existence of a conflict of interest is a reason why the Court decides that it is appropriate to order that group members be given notice" of the intention by one or more parties (there, the applicant) to apply to the Court for the order foreshadowed in the notice as that "is the very sort of matter about which group members should be informed".[40]

31 The Court of Appeal in the present case proceeded on the basis that the "starting point of the analysis is not whether s 175(5) of the CPA confers power on this court to include a notification of the kind sought to be included in the opt

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36 (2020) 102 NSWLR 199 at 221-222 [120]-[126].

37 (2020) 102 NSWLR 199 at 223 [131] (emphasis in original).

38 (2022) 291 FCR 116 at 145 [109]-[110].

39 (2022) 291 FCR 116 at 148 [126], 153 [156].

40 (2022) 291 FCR 116 at 145 [113], 150 [134].

out and registration notice that the parties seek to be issued in the present case". Rather, the Court of Appeal asked whether its "recent unanimous decision in *Wigmans* (which both parties accepted compelled a negative answer to that question) is 'plainly wrong' and should not be followed".[41] Their Honours answered that question in the negative.[42]

32 The question for this Court, in contrast, is not whether *Wigmans v AMP Ltd* is plainly wrong. The circumstance that the Court of Appeal was confronted by a decision of the Full Court of the Federal Court concluding that an earlier decision of the Court of Appeal was plainly wrong provides no occasion to add to or modify the rules of precedent applicable between intermediate appellate courts established in *Australian Securities Commission v Marlborough Gold Mines Ltd*[43] and *Hill v Zuda Pty Ltd*[44].

33 The question for this Court is whether s 175(5), properly construed, empowers the Supreme Court of New South Wales to order the giving of the proposed notice. As will be explained, s 175(5) empowers the Supreme Court of New South Wales to order the giving of the proposed notice.

The Court of Appeal's reasoning

34 The principal reason driving the conclusion in *Wigmans v AMP Ltd* and the case under appeal is that the proposed notice would subvert the statutory scheme by converting it from one in which group members may opt out of the representative proceeding but need not opt in (that is, register their participation in the representative proceeding) to benefit from an approved settlement or judgment into one in which group members must opt in to so benefit. A corollary of this is that in the negotiation of any settlement a representative plaintiff is required to represent the interests of all group members, which is to be understood to mean all members of the group as defined in the representative plaintiff's originating documents. If, however, a notice to the proposed effect were to be given, on the Court of Appeal's reasoning, in the negotiation of any settlement and at the hearing for its approval, a representative plaintiff would be acting only in the interests of the group members who had opted in to the representative proceeding (by registering their participation). This is because the basis for the negotiation would

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41 (2024) 114 NSWLR 81 at 107 [93].

42 (2024) 114 NSWLR 81 at 113 [124], 113 [127], 116 [138], 116 [139], 120 [160].

43 (1993) 177 CLR 485 at 492.

44 (2022) 275 CLR 24 at 34-35 [25]-[26].

reflect the effect of the proposed order (that all group members, registered or not, would be bound by the settlement if approved but that unregistered group members would not, without leave of the Court, be able to participate in the benefits of the settlement).

35 Other strands of thinking are also apparent from the Court of Appeal's reasoning in *Wigmans v AMP Ltd* and the present case. They include that: (a) s 175(5), in common with s 183, is a general provision and therefore would not be construed as enabling the making of an order the effect of which would be to transform the statutory scheme from an opt out scheme into an opt in scheme;[45] (b) on the same basis, s 175(5) would not be construed as enabling the making of an order the effect of which would be to "give apparent judicial blessing to a representative plaintiff engaging in what would inevitably be a conflict of interest";[46] and (c) rather than subverting the statutory scheme in this manner, the problem which the proposed notice seeks to address (enabling the representative plaintiff and the defendant and their lawyers to be able to estimate the number of group members with reasonable accuracy to facilitate a settlement) is readily achievable by other methods, including the revising of the definition of the group so as to include only those members who have registered their participation in the representative proceeding.[47] By this means, the conflict of interest between the representative plaintiff and unregistered group members would be avoided. The representative plaintiff and the defendant and their lawyers could negotiate a settlement knowing the number of group members entitled to share in the settlement (albeit not knowing the number of unregistered group members who would retain their rights against the defendant).

36 Bell CJ (with whom Gleeson, Leeming and Stern JJA agreed, Ward P in dissent on this issue[48]) also concluded that the power in s 175(5) of the CPA is qualified by the terms of s 175(6). According to this reasoning, reading s 175(5) with s 175(6) leads to the conclusion that the reference to "any matter" in s 175(5) must be construed to mean "any event which has happened". The proposed notice, being notice of a present intention of Lendlease (and perhaps the representative plaintiffs) to seek a certain order at any settlement approval hearing, on this basis,

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45 See, eg, (2024) 114 NSWLR 81 at 109 [104].

46 See, eg, (2024) 114 NSWLR 81 at 110 [107].

47 See, eg, (2024) 114 NSWLR 81 at 112 [117].

48 (2024) 114 NSWLR 81 at 115-116 [137], 116 [138], 120 [159], 120 [160].

is outside the scope of s 175(5) because a present intention as to future conduct is not an event that has happened.[49]

Construing the statute

37 In neither *Wigmans v AMP Ltd* nor the present case did the Court of Appeal suggest that, on approving a settlement, the Supreme Court of New South Wales does not have power under s 173(2) of the CPA, in making "such orders as are just with respect to the distribution of any money" under an approved settlement, to order that a group member who has neither opted out nor registered to participate in the proceeding before a specified date shall not be permitted, without leave of the Court, to seek any benefit pursuant to the settlement. By s 173(2), the Supreme Court clearly has power to make the order foreshadowed by the proposed notice. The issue therefore is to be understood as whether a general provision in respect of the giving of notice to group members of "any matter" in s 175(5) empowers the giving of notice of an intention on the part of one or more of the parties to seek an order at a settlement approval hearing which the Supreme Court has power to make. Framed in this way, the issue is exposed as one concerning the capacity of the Supreme Court to ensure that group members are made aware of a present intention of at least Lendlease to seek the making of an order at any settlement approval hearing which Lendlease can seek, and the Supreme Court can make, in the representative proceeding.

38 Neither *Mobil Oil* nor *BMW Australia Ltd v Brewster* determines that the Supreme Court does not have the power to order the giving of the proposed notice. The observation in *Mobil Oil* that "[g]roup members … need take no positive step in the prosecution of the proceeding to judgment to gain whatever benefit its prosecution may bring"[50] should be understood to reflect the general architecture of the statutory scheme, not to embody a constraint on the Supreme Court's power to give notice of any matter relevant to the doing of justice between the parties both immediately and in the future. The essential point of *BMW Australia Ltd v Brewster* was that the proposed notice of the common fund order was not within the general power of s 183 of the CPA because, given the function of s 183 in the statutory scheme as a supplementary or gap-filling power, the section did not enable the making of orders not directed to the doing of justice between the parties but, rather, directed to ensuring the proceedings could be maintained as a matter of their commercial viability. That is a different point from the power to give the proposed notice under s 175(5) of the CPA.

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49 See, eg, (2024) 114 NSWLR 81 at 92 [32], 111 [112], 112 [119].

50 (2002) 211 CLR 1 at 32 [40].

39 If, as is the case, the Supreme Court can make an order as part of the approval of a settlement under s 173(2) of the CPA to the effect that a group member who has neither opted out nor registered to participate in the proceeding before a specified date shall not be permitted without leave of the Court to seek any benefit pursuant to the settlement, it necessarily follows that, without express words to the contrary, there is no justification in the text, context or apparent purpose of s 175(5) to construe that provision as not empowering the Supreme Court to order the giving of the proposed notice. This is because the doing of justice between the parties includes ensuring group members are kept informed of matters relevant to them in the representative proceeding. The present intention of at least Lendlease to seek the making of an order at any settlement approval hearing which Lendlease can seek, and the Supreme Court can make, is a matter relevant to group members in the representative proceeding.

40 There is no meaningful analogy between (on the one hand) a provision such as s 183 of the CPA, as a gap-filling or supplementary provision, not functioning to empower orders that the statutory scheme does not contemplate may be made at all to do justice between the parties or contemplates may only be made as part of the approval of any settlement or giving of any award of damages and (on the other hand) a notice-giving provision such as s 175(5) of the CPA, the purpose of which should be understood as providing a mechanism to ensure that group members are kept informed of all matters relevant to them in the representative proceeding.

41 While s 175(5) is to be construed in the context of s 175(6), the presence and terms of the latter provision are an insufficient basis to construe the words "any matter" in s 175(5) as confined to only a matter constituting an event that has happened. No doubt, if an event relevant to group members has occurred, s 175(6) functions to require notice to be given to group members "as soon as practicable after the happening of the event". But imposing a temporal obligation on the giving of notice where an event has occurred by s 175(6) does not mean s 175(5) is to be construed as confined to the giving of notice of such events. In circumstances where the purpose of s 175(5) is to ensure that group members are kept informed of "any matter" relevant to them in the representative proceeding, the power in s 175(5) should be construed as liberally as its expansive language permits. The only control on the scope of the power in s 175(5) therefore is relevance. The "matter", be it an event that has occurred, a future event, a present intention, or otherwise, may be the subject of a notice under s 175(5) if it is relevant to group members in the representative proceeding.

42 Further, it is one thing to conclude that a supplementary or gap-filling provision such as s 183 of the CPA does not enable the Supreme Court to make an order, before settlement negotiations, contingently extinguishing the rights of group members who have neither opted out nor registered their participation in a

representative proceeding (as in *Haselhurst*[51]). The making of such an order before a hearing to approve any settlement is readily able to be characterised as impermissibly usurping the capacity of the Court subsequently, at a hearing for the approval of any settlement, to perform the function which s 173(2) requires, namely for the Court to make "such orders as are just with respect to the distribution of any money". The making of such an order is therefore impermissible because it denies the Court the subsequent capacity, at the hearing for the approval of any settlement, to discharge its functions in accordance with s 173(2). It is another thing, however, to conclude that the Supreme Court, under an apparently plenary provision for the giving of notice to group members such as s 175(5), the manifest purpose of which is to keep them informed of any matter relevant to them in the representative proceeding, may not give a notice of such a relevant matter because it does or might provide one or both parties with a forensic advantage they would not have had but for the giving of the notice.

43 That the giving of notice of one or both parties' intention to seek an order of the kind foreshadowed by the proposed notice does or might give one or both a forensic advantage also cannot be considered in isolation from other aspects of the practical context in which the provisions operate. It is relevant to group members to know that, if a settlement is agreed between them, one or both parties intend to seek an order that a group member who has neither opted out nor registered to participate in the proceeding shall not be permitted, without leave of the Court, to seek any benefit pursuant to any settlement (but will be bound by the settlement if approved). If group members are not given notice of that intention of one or both of the parties, that will not prevent one or both of the parties applying for such an order at a hearing for approval of the settlement. The difference will be that, if notice is given, the party or parties applying for the order will be able to support their application by submitting that group members had an opportunity to participate in the settlement by registering if they so wished but, if no notice is given, the party or parties applying for the order will not be able to support their application by making that submission. Either way, however, the function of the Supreme Court under s 173 remains the same – to approve or not approve the settlement under s 173(1) and, if it approves the settlement, to "make such orders as are just with respect to the distribution of any money" under s 173(2). Therefore, in contrast to the circumstances in *Haselhurst*, ordering the giving of the proposed notice does not impermissibly usurp any part of the Supreme Court's function under s 173 of the CPA. It does not prevent the Supreme Court from discharging that function as required. It does no more than provide notice to group members of one fact, amongst numerous other facts, potentially relevant to the Court exercising its powers under s 173. In so providing, the giving of the proposed notice also fulfils the purpose of s 175(5) by ensuring group members are kept informed of a

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51 (2020) 101 NSWLR 890.

matter relevant to them in the representative proceeding (being the present intention of one or both of the parties to seek the order at any hearing for approval of the settlement).

44 That the giving of the proposed notice would create a new inconsistency of interest for the representative plaintiffs may be accepted. That inconsistency, however, must be understood in the broader scope of the inconsistencies of interest inherent in the statutory scheme. No doubt a representative plaintiff always has an interest in achieving a settlement with a defendant if the representative proceeding can be settled for an award of damages commensurate with the loss and litigation risks of the representative plaintiff. The statutory provisions assume, however, that despite this self-interest of the representative plaintiff, the representative plaintiff will be able to adequately represent the interests of all group members. Under s 171(1) of the CPA, it is only if "it appears to the Court that a representative party is not able adequately to represent the interests of the group members" that the Court may substitute another group member as representative party. Similarly, by s 166(1)(d) of the CPA, the Court may, on application by the defendant or of its own motion, order that proceedings no longer continue under Pt 10 if it is satisfied that it is in the interests of justice to do so because "a representative party is not able to adequately represent the interests of the group members". That is, the statutory provisions assume that a representative party will be subject to inconsistencies of interest and do not treat the existence of such inconsistencies, in and of themselves, as precluding the representative party performing its representative function. The statutory provisions require more than the mere existence of an inconsistency of interest before the Court may intervene – the provisions adopt a functional test involving that the representative party *is not able adequately to* represent the interests of the group members before an inconsistency of interest may preclude the representative party from continuing to perform its representative function.

45 It is also relevant that the purpose of the proposed notice – to encourage group members to register to participate in any settlement – does not itself involve or exacerbate any inherent inconsistency of interest of the representative plaintiffs in respect of group members. If the notice achieves its purpose of maximising the number of group members who register their participation in the representative proceeding, the notice, to that extent, in fact will have minimised the potential for inconsistency between the representative plaintiffs and group members by ensuring that as many group members as possible can benefit from the settlement. It is only if the notice fails to achieve its purpose of maximising the number of group members who register their participation in the representative proceeding that there may be enough group members who have neither opted out nor registered their participation in the representative proceeding to constitute a material threat to the approval of any settlement. Yet in all circumstances, the Court retains the power not to grant the order foreshadowed by the notice.

46 Moreover, it is not the case that a representative plaintiff is necessarily unable to adequately represent the interests of group members who have neither opted out nor registered their participation in the representative proceeding in the negotiation or approval of any settlement. A properly advised representative plaintiff negotiating and seeking Court approval of a settlement will know that a critical aspect of the Court's mandate under s 173 is to ensure fairness and justice as between all group members including and, perhaps, particularly to those in respect of whom a question might arise as to whether the representative plaintiff has adequately represented their interests or can continue to do so. The terms of s 173 give a representative plaintiff a strong interest in achieving a settlement which has the best prospects of obtaining Court approval: such a settlement is one which is just and fair to all group members, including those who have neither opted out nor registered their participation in the representative proceeding. The upshot is that concerns about inconsistencies of interest, while legitimate, should not be understood as qualifying the power of the Supreme Court under s 175(5). Such legitimate concerns are to be managed by the Court as and when the need is considered to arise by, and in accordance with, the relevant legislative provisions (including ss 166(1)(d) and 171(1) of the CPA), which recognise the existence of inherent inconsistencies of interest between group members, but take a functional rather than reflexively preclusive approach to their management.

47 It is also not the case that the giving of the proposed notice transforms the statutorily mandated opt out scheme into an impermissible opt in scheme. The practical context of the statutory scheme means that a representative plaintiff's lawyer has an ongoing interest in registering group members and, if possible, obtaining their agreement to participate in litigation funding arrangements. The proposed notice does not require a group member to opt out or register their participation. It is intended to inform group members that if they do neither by a specified date and the representative proceeding settles as between the parties, then Lendlease and the representative plaintiffs (or, alternatively, Lendlease) will seek an order from the Court to the effect that such group members be bound by the settlement (thereby extinguishing their individual rights against Lendlease) but not be permitted without leave to benefit from the settlement. Encouraging group members to register their participation in a representative proceeding for the purpose of facilitating effective settlement negotiations does not transform an opt out scheme into an opt in scheme. The proceeding may or may not settle. The Court is not bound to make the foreshadowed order. The representative plaintiffs and Lendlease also know that the Court is not bound to make the foreshadowed order. They know in addition that the Court will be sensitive to the potential for inconsistencies of interest between the representative plaintiffs and group members who have neither opted out nor registered their participation in accordance with the notice to have affected the fairness and justice of the settlement for which approval is sought and the terms of any such approval. In these circumstances, if that potential has resulted in the appearance of inadequate

representation by the representative plaintiffs of the interests of all group members, the Court has powers to make orders intended to expose or ameliorate that inadequacy as appropriate. It is in the interests of neither the representative plaintiffs nor Lendlease to present the Court with a settlement for approval in which there is the appearance of unfairness or injustice to any group members. Such an appearance will immediately raise concerns as to whether the representative plaintiffs can continue to adequately represent the interests of all group members and be relevant to the Court deciding whether to approve the settlement.

48 Finally, it may be accepted that there are alternatives to the giving of the proposed notice. The existence of these alternatives would be relevant to the Court's discretion whether to order the giving of the proposed notice. They do not, however, indicate a lack of power to make such an order.

Answer to the separate question and consequential orders

49 For these reasons the separate question should be answered "yes". The orders otherwise proposed by Gordon and Steward JJ should also be made.

50 GORDON AND STEWARD JJ. A representative proceeding (or "class action") is in the Supreme Court of New South Wales between the respondents, as representative plaintiffs, and the appellants ("Lendlease") in accordance with Pt 10 of the *Civil Procedure Act 2005* (NSW) ("the CP Act"). In general terms, the representative plaintiffs commenced the proceeding on behalf of a group of persons who acquired an "interest" in certain securities issued by Lendlease during the period from 17 October 2017 to 8 November 2018 ("the group members"). It is alleged that, during the relevant period, Lendlease engaged in misleading or deceptive conduct and breached its continuous disclosure obligations. It is alleged that, as a result, group members suffered loss and damage

51 The proceeding is open class. The size of the class is potentially very large. The exact size is unknown. During the relevant period the volume of applicable Lendlease securities traded on the Australian Securities Exchange was 444,877,832. The group members include not only those who were registered as the owner of securities, but also those who held an equitable interest in such securities, unbeknownst to Lendlease.

52 Lendlease seeks an order pursuant to s 175(1) and (5), and s 176(1), of the CP Act requiring the issue of a certain notice to group members. The proposed notice would inform members of three choices that they may make. Relevantly, the notice provides as follows:

> "This Notice is sent to you because it is possible you are a member of the class in the Lendlease Class Action. If you are a member of the class in the class action you have three options:
>
> 1. **Register to participate** in the class action by no later than [TBC] (see 'Option A' on page 9). Registering to participate will ensure that you receive any money to which you may be entitled in the event that there is a successful outcome in the class action by way of settlement or judgment.
>
> 2. **Opt out** of the class action by no later than [TBC] (see 'Option B' on page 10). Opting out will exclude you from the class action, meaning you will not be eligible to receive compensation in the event of a successful outcome, but you will keep your right to make your own claim.
>
> 3. **Do nothing** by [TBC] (see 'Option C' on page 10). If you do nothing the parties, alternatively, Lendlease, will seek an order, which, if made, has the effect that you will remain a group member in the class action, but you may, subject to any orders of the Court, not be entitled to receive any payment or other benefit from a future settlement of the class action. If a settlement occurs, then a further

> notice will be distributed, or advertised, advising of the settlement, and there may or may not be another opportunity to register (this will be a matter for the Court and there is no guarantee any further opportunity will arise)."

53 The proposed notice should be explained in more detail. That part of the notice which informs group members of their right to opt out by a fixed date is in conventional form and need not be elaborated further. The part which invites members to register their claim is less orthodox. It costs nothing to register, and those group members who take this step will suffer no disadvantage (unlike those who "do nothing"). Registration may be undertaken by completing and submitting an online registration form. The Court was not supplied with the details of this form but was told that it would address the identity of the group member making a claim, the price paid for the securities and, if sold, the money received for the securities.

54 At the request of the parties, a judge of the Supreme Court of New South Wales stated as a question for consideration by the Court of Appeal of the Supreme Court of New South Wales whether the Supreme Court has *power*, pursuant to ss 175(1) and (5) and 176(1) of the CP Act or otherwise, to approve the giving of a notice of the kind sought by Lendlease. A previous decision of the New South Wales Court of Appeal – *Wigmans v AMP Ltd*[52] – held that no such power existed. A subsequent decision of the Full Court of the Federal Court of Australia, concerning the equivalent provisions contained in Pt IVA of the *Federal Court of Australia Act 1976* (Cth) ("the FCA Act") – *Parkin v Boral Ltd*[53] – held that such a power did exist and that *Wigmans* was "plainly wrong".

55 Below, the Court of Appeal unanimously answered the separate question posed in the negative. For the reasons which follow, the Supreme Court of New South Wales does have the power to order the giving of a notice of the kind sought here by Lendlease. On appeal, this Court had the benefit of submissions addressed to it by a contradictor. The Court is very grateful for such assistance.

Part 10 of the CP Act

56 Part 10 was inserted into the CP Act by the *Courts and Crimes Legislation Further Amendment Act 2010* (NSW). Its provisions were "substantially

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52 (2020) 102 NSWLR 199.

53 (2022) 291 FCR 116.

modelled"[54] on Pt IVA of the FCA Act and are in materially identical terms. To address the issue of power, an understanding of the relevant provisions of Pt 10 is required.

57 Pursuant to s 157(1) of the CP Act, a representative proceeding can be commenced where: seven or more persons have claims against the same person; the claims of all those persons are not necessarily the same, but are in respect of, or arise out of, the same, similar or related circumstances; and the claims give rise to a substantial common question of law or fact; in which case, proceedings can be commenced by one or more of those persons as representing some or all of them. It is the representative plaintiff who may define the group;[55] the group may be limited and perhaps require registration of claims in some way, and is thus commonly described as "closed", or it may require no such registration, and thus be commonly regarded as "open". Registration is not required by Pt 10 but is a common feature of representative proceedings. It provides the representative plaintiff with information about the potential size of the class and the identity of the group members. In that respect, the representative plaintiff can be characterised as having assumed, upon the commencement of proceedings, a "limited form of statutory agency".[56]

58 The consent of a person to be a group member is not required,[57] but a group member otherwise has a right to "opt out" of the proceeding.[58] This feature of Pt 10 was pivotal in the reasoning of the Court of Appeal below. The right to opt out is facilitated by the giving of a notice informing group members of the ability to exercise the right before a date fixed by the Court.[59] This way of forming a group is reflected in the following observation of Gaudron, Gummow and Hayne JJ in *Mobil Oil Australia Pty Ltd v Victoria*:[60]

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54 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 24 November 2010 at 28066.

55 Part 10 provides that the representative plaintiff is to identify the group members: see CP Act, s 161(1)(a).

56 *Elliott-Carde v McDonald's Australia Ltd* (2023) 301 FCR 1 at 14 [54].

57 CP Act, s 159.

58 CP Act, s 162.

59 CP Act, ss 162, 175(1)(a).

60 (2002) 211 CLR 1 at 32 [40] (emphasis added).

> "[P]ersons who are group members may opt out of the proceeding and, if they do, they are taken never to have been a group member (unless the Court otherwise orders) ... *Group members, however, need take no positive step in the prosecution of the proceeding to judgment to gain whatever benefit its prosecution may bring*."

The last sentence of that observation assumed considerable importance in the arguments below and before this Court.

59 Another critical feature of the Pt 10 regime is that a class action may not be settled or discontinued without the approval of the Court.[61] In giving approval, the Court may make such orders "as are just" with respect to the distribution of money paid under a settlement or paid into Court.[62] It is at the stage of the approval of any settlement that Lendlease would make its submission to exclude unregistered group members from benefitting in any way. It was not argued that the Court could never approve a settlement on these terms, or that it had no power to refuse to make the order. The Court's power of approval is emblematic of its supervisory jurisdiction over class actions. Another example of this jurisdiction is the Court's power to substitute a representative plaintiff with another group member where that representative is not adequately able to represent the interests of group members.[63] In that respect, because a settlement can only be effective with an order or orders of the Court, it should be accepted that Pt 10 is directed at achieving fair and effective outcomes by means of settlement as well as by final judgment.

60 Section 175 of the CP Act addresses the power and duty of the Court to require that notice of certain matters is given to group members. It provides:

> "**Notice to be given of certain matters** (cf s 33X FCA)
>
> (1) Notice must be given to group members of the following matters in relation to representative proceedings—
>
> (a) the commencement of the proceedings and the right of the group members to opt out of the proceedings before a specified date, being the date fixed under section 162(1),

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61 CP Act, s 173(1).

62 CP Act, s 173(2).

63 CP Act, s 171.

(b) an application by the defendant in the proceedings for the dismissal of the proceedings on the ground of want of prosecution,

(c) an application by a representative party seeking leave to withdraw under section 174 as representative party.

(2) The Court may dispense with compliance with any or all of the requirements of subsection (1) if the relief sought in the proceedings does not include any claim for damages.

(3) If the Court so orders, notice must be given to group members of the bringing into Court of money in answer to a cause of action on which a claim in the representative proceedings is founded.

(4) Unless the Court is satisfied that it is just to do so, an application for approval of a settlement under section 173 must not be determined unless notice has been given to group members.

(5) The Court may, at any stage, order that notice of any matter be given to a group member or group members.

(6) Notice under this section must be given as soon as practicable after the happening of the event to which it relates."

The reference in parentheses to "s 33X FCA" is to the equivalent power found in s 33X of the FCA Act.

61 Section 176 of the CP Act concerns the form and content of notices issued in accordance with s 175. Section 176(6) provides that a notice that concerns a "matter" for which the Court's leave or approval is required must specify the period within which a group member (or other person) may apply to the Court, or take some other step, in relation to the matter. Section 176(7) provides that, if a notice includes or concerns conditions, it must specify the conditions and the period, if any, for compliance.

62 Section 177 of the CP Act concerns the giving of judgment by the Court. Relevantly, this includes the power to make an award of damages constituted by specified amounts or such other amounts as worked out by the Court,[64] or as an "aggregate amount without specifying amounts awarded in respect of individual group members".[65] Pursuant to s 177(2) of the CP Act, in making an award of

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64 CP Act, s 177(1)(e).

65 CP Act, s 177(1)(f).

damages, the Court must make provision for the payment or distribution of the money to the group members entitled. In doing so, pursuant to s 178(1), the Court may provide for the constitution and administration of a fund consisting of the money to be distributed.

63 Pursuant to s 177(3), the Court may not make an award of damages in an aggregate amount "unless a reasonably accurate assessment can be made of the total amount to which group members will be entitled under the judgment".

64 Importantly to the scheme constituted by Pt 10, pursuant to s 179(b), a judgment given in a class action "binds" all persons identified as group members "other than any person who has opted out of the proceedings under section 162".

65 Finally, s 183 of the CP Act should be noted. It provides that the Court may, on application by a party or a group member or of its own motion, "make any order that the Court thinks appropriate or necessary to ensure that justice is done in the proceedings". Section 183 confers a broad power. As observed by Beach J in *Earglow Pty Ltd v Newcrest Mining Ltd*,[66] this power can oblige group members to take positive steps in a proceeding, contrary to the general observation made by this Court in *Mobil* (set out above), such as the provision of discovery, the provision of particulars, the possible provision of a contribution towards security for costs, and the provision of particulars concerning group members' identities to facilitate the service of subpoenas. In, for example, *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd [No 2]*, the Federal Court observed that it may be appropriate to make discovery orders binding on group members "in aid of mediation, for example where the parties face asymmetric information which may lead to an unfair settlement".[67] And in *Regent Holdings Pty Ltd v Victoria*, the Court of Appeal of the Supreme Court of Victoria also stated that ordering particulars and discovery can, in a given case, make sense in order to "provide the defendants with sufficient information to formulate rational settlement offers".[68]

66 However, the power conferred by s 183 is not without limits. In *BMW Australia Ltd v Brewster*,[69] this Court decided that neither s 183, nor the equivalent provision in Pt IVA of the FCA Act (s 33ZF), empowers a court to make a

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66 (2015) 230 FCR 469 at 482-483 [47]-[52], referred to with approval by Beach J in *Wetdal Pty Ltd v Estia Health Ltd* [2021] FCA 475 at [89]-[90] and by the Full Court of the Federal Court in *Parkin v Boral Ltd* (2022) 291 FCR 116 at 130 [54].

67 [2010] FCA 176 at [32].

68 (2012) 36 VR 424 at 428-429 [15].

69 (2019) 269 CLR 574.

"common fund order" at an early stage of a class action. Such an order provides for the quantum of a litigation funder's reward to be fixed as a proportion of any moneys recovered in the proceedings. Such an order, made at an early stage, may promote the interests of the funder of the action, but it is not, at *that* stage, "necessary to ensure that justice is done in the proceedings". As Kiefel CJ, Bell and Keane JJ observed:[70]

> "While the power conferred by these sections is wide, it does not extend to the making of a [common fund order]. These sections empower the making of orders as to *how* an action should proceed in order to do justice. They are not concerned with the radically different question as to whether an action *can* proceed at all."

The reasons of the Court of Appeal

The curial context

67 The question about power arises in an important historical context. In 2020, the New South Wales Court of Appeal handed down its decision in *Haselhurst v Toyota Motor Corporation Australia Ltd*.[71] The Court of Appeal decided that the Supreme Court had no power under s 183 of the CP Act to order a "soft" class closure. The order considered in *Haselhurst* provided that only group members who had registered their claims with a defendant before a certain date could obtain the benefit of any settlement. If no settlement was achieved, however, unregistered group members could participate in any favourable judgment obtained. The description of "soft" class closure therefore meant a class closure that operated only for the purposes of settlement.

68 The Court of Appeal decided, following a consideration of *Brewster*, that such an order would strike at the heart of Pt 10; it did so "by setting up an alternative regime of extinguishment of group members' rights of action for the purpose of encouraging the parties towards a pre-trial settlement".[72] The Court also concluded that such an order would place the representative plaintiffs in a position of "insoluble conflict of interest"[73] in any settlement negotiations. On the one hand, the representative plaintiffs must act in the best interests of the registered members and obtain for them a favourable settlement; on the other hand, the representative plaintiffs must still act for the benefit of the unregistered members, for whom a

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70 (2019) 269 CLR 574 at 589 [3] (emphasis in original).

71 (2020) 101 NSWLR 890.

72 (2020) 101 NSWLR 890 at 918 [122].

73 (2020) 101 NSWLR 890 at 918 [120].

settlement would foreclose any right to benefit from the class action.[74] The fact that the order would enhance the prospects of settlement was of no moment, because the method chosen to secure such an outcome was "contrary to the scheme established by the legislature".[75]

69 Subsequently, but in the same year, the New South Wales Court of Appeal handed down its decision in *Wigmans*.[76] In that case, the primary judge had ordered that a notice be given to group members informing them of the parties' intention, which was expressed in the following terms: that "the parties intend to apply to the Court for an order that any Group Member who by the Class Deadline does not opt out and who is not a New Registered Group Member or Existing Registered Group Member will not receive any benefit pursuant to the settlement".[77] The Court of Appeal decided that there was no power in Pt 10 to issue such a notification.[78] The order was said to be contrary to the fundamental precept of Pt 10 that a group member need not do anything in order to obtain the benefit of any settlement or favourable judgment.[79] Whilst the proposed notification did not purport to extinguish the rights of unregistered members, it was nonetheless necessary to consider its "practical effect".[80] That effect, it was said, would be that in any mediation the representative plaintiff would bargain away the claims of unregistered members in order to secure the only type of settlement which the defendant would accept and which could only be for the benefit of registered members. In this way, the proposed notice would place the representative plaintiff in an insoluble position of conflict.[81]

70 In *Parkin*, the Full Court of the Federal Court of Australia decided that *Wigmans* was "plainly wrong".[82] The decision in *Parkin*, amongst other things,

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74 (2020) 101 NSWLR 890 at 918 [120].

75 (2020) 101 NSWLR 890 at 918-919 [122].

76 (2020) 102 NSWLR 199.

77 (2020) 102 NSWLR 199 at 204 [23], [25]-[26].

78 (2020) 102 NSWLR 199 at 201 [3].

79 (2020) 102 NSWLR 199 at 214 [77]-[79].

80 (2020) 102 NSWLR 199 at 219 [103]-[104].

81 (2020) 102 NSWLR 199 at 221 [118]-[120].

82 (2022) 291 FCR 116 at 145 [109]-[110].

addressed whether the Federal Court had the power, pursuant to s 33X(5) of the FCA Act, to direct the giving of a notice informing group members that:[83]

> "[U]pon any settlement of this proceeding [the representative applicant] will seek an order, which, if made, has the effect of providing that any Group Member who by a registration date: (i) has not registered; or (ii) has not opted out in accordance with the orders made by the Court, will remain a Group Member for all purposes of this proceeding but shall not, without leave of the Court, be permitted to seek any benefit pursuant to any settlement (subject to Court approval) of this proceeding that occurs before final judgment".

71 The foregoing is substantially the same as the proposed notification in this matter. Section 33X(5) is also the same as s 175(5) of the CP Act. It permits the Federal Court, at any stage, to "order that notice of any matter be given to a group member or group members".

72 The circumstances in *Parkin* were analogous to those in this matter. That proceeding was a securities class action in which the identity of all eligible group members was not known and was not knowable; at some point, if members were to benefit from settlement or judgment, they would need to take the active step of identifying themselves and their claim.[84] As here, it was said that the act of registration would increase the likelihood of settlement to the benefit of group members and to the respondent in that case (Boral Ltd).[85]

73 Murphy and Lee JJ (with whom Beach J agreed) decided that the Federal Court had power to order a notification of the kind described above. Their Honours did so for a number of reasons. The first concerned the text of s 33X(5). This was characterised as "broad and unqualified"; language of this kind, it was said, should not be read down by implications not supported by the text.[86] In that respect, the Court decided that the phrase "any matter" in s 33X(5) of the FCA Act, which also appears in s 175(5) of the CP Act, must include any matter relevant to a group member's decision as to whether to opt out of a class action. This could include being given notice of a defendant's intention to seek an order from the Court that

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83 (2022) 291 FCR 116 at 119 [5].

84 (2022) 291 FCR 116 at 121-122 [14].

85 (2022) 291 FCR 116 at 122 [15].

86 (2022) 291 FCR 116 at 145 [111].

unregistered group members may not benefit from any settlement.[87] Such information, the Court decided, was the very sort of thing a group member should know about.[88] *Wigmans* was thus wrongly decided. The Court otherwise accepted that there may be discretionary reasons, not going to power, as to why such a notification should not be given to group members.[89]

74 Secondly, the Full Court disagreed with the proposition, accepted in *Wigmans*, that it is a "fundamental precept" of the class action regime that group members may "do nothing" and yet still benefit from any settlement or favourable judgment. Whilst accepting that, generally speaking, group members may remain passive, the so-called precept was not absolute; for the reasons given by Beach J in *Wetdal Pty Ltd v Estia Health Ltd*,[90] group members, before settlement or judgment, may from time to time be required to take a range of positive steps.[91] In any event, any such "precept" was not supported by the text of s 33X(5). As Murphy and Lee JJ observed:[92]

> "The scope of the general power in s 33X(5) is not identified by: (a) observing that the statutory scheme is an opt out scheme; (b) identifying that as a 'fundamental precept'; and then (c) using that generalised phrase as a controlling concept to identify what may or may not be consistent with such a scheme; that is, by searching for the meaning of s 33X(5) by reference to that extra-statutory expression, rather than by reference to text, context and purpose."

75 Finally, the Full Court accepted that the giving of the notice might lead a representative applicant into a position of conflict, but observed that potential or actual conflicts of interest are an "inevitable by-product" of class action regimes.[93] Such conflicts are addressed in two ways: by the representative applicant's duty

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87 (2022) 291 FCR 116 at 145 [112]; see also *Lenthall v Westpac Banking Corporation [No 2]* (2020) 144 ACSR 573 at 583 [31].

88 (2022) 291 FCR 116 at 145 [113].

89 (2022) 291 FCR 116 at 145 [114].

90 [2021] FCA 475 at [89]-[90], citing *Earglow Pty Ltd v Newcrest Mining Ltd* (2015) 230 FCR 469 at 482-483 [47]-[52].

91 (2022) 291 FCR 116 at 145-146 [115]-[118]; see also *Regent Holdings Pty Ltd v Victoria* (2012) 36 VR 424.

92 (2022) 291 FCR 116 at 146 [117].

93 (2022) 291 FCR 116 at 148 [126].

not to act contrary to the interests of group members, and by the protective power of the Court when approving any settlement.[94] If anything, the Court also noted, the potential existence of this type of conflict might itself justify the need to forewarn group members of the intentions of a respondent/defendant (or a representative applicant/plaintiff, as the case may be).[95]

The disposition below

76 In the present matter, Bell CJ gave the leading judgment below. As mentioned above, his Honour was not satisfied that *Wigmans* was plainly wrong, and in such circumstances considered he should follow its authority.[96] Bell CJ rejected the criticism in *Parkin* of the "fundamental precept" of Pt 10 of the CP Act identified in *Wigmans*; to rely on that precept was simply to construe Pt 10 as a whole.[97] In that respect, it was observed, care needed to be taken to distinguish cases where the class had already been closed as against cases where the group was entirely open.[98]

77 More fundamentally, Bell CJ was of the view that the proposed notification would turn "the statutory scheme on its head".[99] It would convert an opt out regime into, "in practical terms at least", an opt in scheme. Parliament could not have intended for there to be a power to issue a notification which had such consequences.[100] Nor could Parliament have intended that the Court would have the power to issue a notice which would inevitably lead to a conflict of interest, of

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94 (2022) 291 FCR 116 at 148-149 [126], [130]-[131].

95 (2022) 291 FCR 116 at 150 [134].

96 *Pallas v Lendlease Corporation Ltd* (2024) 114 NSWLR 81 at 107 [94], 113 [124].

97 (2024) 114 NSWLR 81 at 108 [98].

98 (2024) 114 NSWLR 81 at 108 [99]. *Regent Holdings Pty Ltd v Victoria* (2012) 36 VR 424, for example, was said to concern a closed class.

99 (2024) 114 NSWLR 81 at 109 [104].

100 (2024) 114 NSWLR 81 at 109 [104].

the kind described above, with "apparent judicial blessing".[101] The conflict was, in Bell CJ's view, "insoluble".[102] His Honour thus concluded:[103]

> "[W]hat is really happening is an attempt in the interests of the defendant and a subset of group members (namely, those who register prior to any in principle settlement being reached) to secure a settlement one element of which is the claims of remaining group members (namely, those who have not registered) are extinguished. ... But a representative plaintiff who has chosen to act on behalf of all members cannot adequately represent all when it is in that party's own interest, and those of registered members, to achieve a settlement, which result is diametrically opposed to the interests of unregistered members."

78 Bell CJ was also of the view that the power conferred by s 175(5) was not unqualified. First, a notice must relate to an "event" and, secondly, this was limited to historical events that occurred before the giving of the notice.[104] Here, Bell CJ was of the view that the proposed notice did not relate to any "event" as such, but was instead a statement of present intention concerning possible future settlement negotiations.[105] And, to the extent that the power conferred by s 175(5) might be said to be expressed in broad terms, this did not immunise it from being necessarily read down by reference to statutory context; in that respect, it was noted that equally broad language may be found in s 183 of the CP Act, yet the equivalent provision in Pt IVA of the FCA Act (s 33ZF) was given a confined meaning in *Brewster*.[106]

A question of power

79 The question posed in this appeal is about power. It is not concerned with the merits of Lendlease's proposed notice. In considering the issue of power, it is important not to conflate the issue of whether the Supreme Court has power with the issue of whether it should exercise that power. In the submissions of the contradictor, and in the reasons of the Court of Appeal, conflation of this kind can

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101 (2024) 114 NSWLR 81 at 110 [107].

102 (2024) 114 NSWLR 81 at 110 [110].

103 (2024) 114 NSWLR 81 at 111 [113].

104 (2024) 114 NSWLR 81 at 112 [119].

105 (2024) 114 NSWLR 81 at 111 [112].

106 (2024) 114 NSWLR 81 at 92 [32].

be observed (especially concerning whether the proposed notice would place a representative plaintiff into a position of conflict).

80 The respondents, whilst agreeing that the Court does have power, made it clear that, in the event that power is found to exist, they reserved their position as to whether an order approving the proposed notice should be made. In that respect, it is clear that – even without the proposed order – the respondents would need, in the discharge of their duty to act in the best interests of group members, to inform them of Lendlease's plans in any event. Because of the respondents' position (namely, that the Court has power to approve the proposed notice), the Court of Appeal appointed a contradictor to make submissions. As noted above, the contradictor also appeared before this Court.

The power to issue the notification

(i) A preliminary observation

81 It is important to observe what the proposed notice does and does not do. It does not affect any legal right of a group member. Instead, it is informative. It tells group members, consistently with ss 162 and 175(1)(a) of the CP Act, of their right to opt out before a date yet to be fixed. As already explained, no complaint is made about this aspect of the notice. It then tells group members about an order that Lendlease proposes to seek from the Court in the future excluding unregistered group members from participating in any settlement. That too informs group members of a matter which may be relevant to their interest in the proceeding.

82 By giving this notice, Lendlease may obtain a forensic advantage by being able to argue, on any application for settlement approval, that unregistered group members should not be able to participate as they had been given ample opportunity to opt out or in and had not done so. The quality of any such advantage may be doubted, as the Court will be fully aware of the reason why Lendlease sent the notice, and its intention to make this argument; that might justify the Court in giving it less weight in any settlement approval. There is otherwise no guarantee that the order will be made. And even if it is, group members remain group members; unregistered members will always be able to seek orders from the Court that they be entitled to some part of any settlement amount as a condition of court approval; no party suggested to the contrary. The form of the notice makes this expressly clear: it states that whether there may be another opportunity to register a claim following settlement "will be a matter for the Court". Moreover, the respondents are under a duty anyway to inform the group members about Lendlease's intentions; they presumably have now been told of what is to occur and Lendlease has obtained – at least in part – its forensic advantage in any event.

83 The notice also invites members to register their claims. The contradictor described registration as "mandatory" in the sense of, it is "mandatory" to register

in order to participate in the settlement and contrary to the nature of the opt out regime. That characterisation should be rejected. Registration will not be mandatory; the existence of a "do nothing" option in the proposed notice makes this clear. However, group members are incentivised to register. That is because of what the notice will say about the order that Lendlease will seek in relation to those who "do nothing". The proposed notice describes the incentive to register a claim or claims in the following terms:

> "[I]f you do wish to remain a Group Member in the class action, you are strongly encouraged to register your claim (Option A above) before [TBC] so as not to risk missing out on the benefit of any settlement which might be agreed before final judgment. As noted above, there is no cost to register your claim."

84 Of course, Lendlease may or may not be successful in persuading the Court to make the order sought. Group members who "do nothing" remain group members. The Court would thus have available to it a number of options to protect the interests of those members if it is "just" to do so in approving any settlement for the purposes of s 173(2) of the CP Act. They might include: giving such group members a further option to register; the appointment of a separate representative to act in the interests of unregistered group members pursuant to s 171 of the CP Act; or requiring the respondents to act to protect unregistered members in some way.

85 In sum, the act of registration is bound up with the legal efficacy of the order Lendlease wishes to secure but which may never be made. Responding to the invitation simply requires completing an online form. No group member who chooses to do this suffers any detriment. And, as set out above, early registration does not foreclose the legal possibility of registration later on.

(ii) Text

86 The question then becomes: does s 175(5) authorise the Supreme Court of New South Wales to order a notice which informs group members about the foregoing matters?

87 The language of the provision certainly supports the existence of such a power. The power is to order the giving of a notice about "any matter" and "at any stage". The word "matter" is more than apt to cover the information which Lendlease wishes to send. Indeed, it is wide enough – on the issue of power – to extend to any type of information which is relevant to group members in the representative proceeding. To the extent that the word "event" in s 175(6) qualifies this power, it is, with respect, easily satisfied. Each of three things identified by Lendlease (the commencement of proceedings and the requirement to give notice of the right to opt out; the forming of an intention to seek an order excluding

unregistered group members from participating in settlement; and the fixing of the date within which to opt out or register), and which are said to satisfy this word, amply does so; each is plainly an "event". Even if the only thing that could be an "event" were the forming of the intention to seek an order, the state of a person's mind is as much a fact, or event, as "the state of [their] digestion".[107] Ward P below was thus correct to conclude that the distinction drawn by Bell CJ between the happening of an event and the formation of an intention is "somewhat technical".[108]

(iii) Purpose

88 The next issue is whether the statutory purpose of Pt 10 of the CP Act, or more particularly of s 175(5), demands that the provision be read down in some way, or in the way which has found favour with the Supreme Court of New South Wales. In particular, does the "fundamental precept" of Pt 10 deny the existence of the power in question?

89 As to the purpose of Pt 10, the following observations of Kiefel CJ, Bell and Keane JJ in *Brewster* are apt:[109]

> "The objectives of Pt IVA of the [FCA Act] were identified by the Australian Law Reform Commission ('the ALRC') prior to its enactment. They were two-fold: first, to enhance access to justice for claimants by allowing for the collectivisation of claims that might not be economically viable as individual claims; and secondly, to increase the efficiency of the administration of justice by allowing a common binding decision to be made in one proceeding rather than multiple suits. Part IVA of the [FCA Act], and later Pt 10 of the [CP Act], which emulated Pt IVA, pursued these objectives through the regime for representative proceedings tailored to address these defects in the law."

90 Critical also to the issue of overall purpose is the observation of Gordon J in *Brewster* that Pt IVA of the FCA Act (and thus also Pt 10) is procedural and not substantive in nature: "it permits representative proceedings".[110] A construction of its provisions that facilitates the conduct and resolution of a class action, whether by way of settlement or final judgment, is to be preferred.

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107 *Edgington v Fitzmaurice* (1885) 29 Ch D 459 at 483.

108 (2024) 114 NSWLR 81 at 115 [137].

109 (2019) 269 CLR 574 at 611 [82] (footnote omitted); see also at 619 [110], 651 [205].

110 (2019) 269 CLR 574 at 628 [136]. The observation might be qualified having regard to ss 173, 177 and 179.

91 As to the particular purpose of s 175(5), it appears within a provision which expressly provides for the issuing of notices about: the commencement of proceedings and opting out (s 175(1)(a)); any application by a defendant for the dismissal of a proceeding for want of prosecution (s 175(1)(b)); any application by a representative party seeking leave to withdraw from that role (s 175(1)(c)); the bringing into court of money in answer to a cause of action on which a claim in the representative proceeding is founded (s 175(3)); and an application for approval of a settlement (s 175(4)). In this context, it should be accepted that the particular purpose of s 175(5) is to arm the Court with the power to order any *other* notice relating to the conduct of a class action which is before it. It should be expected that this power will be exercised by the Court as part of its supervisory role when it is necessary to inform group members about key matters. In that respect, Beach J in *Wetdal* was correct to observe that s 33X(5) of the FCA Act, and thus also s 175(5), is "facultative, not restrictive".[111] It would be contrary to this purpose if the Court had power to approve a settlement that excluded unregistered group members, but did not have power to inform group members of the intention to seek settlement on this basis.

92 There was some debate about Lendlease's purpose in seeking a notice of the kind proposed. Below, Bell CJ, with whom Gleeson, Leeming and Stern JJA agreed, was of the view that the proposed notice had two purposes.[112] The first was to encourage unregistered group members either to opt out of the group prior to any mediation or to opt in to avoid the risk of missing out on the benefit of any settlement. The second was "to arm Lendlease (and also the plaintiffs as the representative parties) with an argument to be made to any judge called upon to approve any settlement pursuant to s 173 of the CPA that non-registered group members should *not* be permitted to participate in the fruits of any settlement on the footing that they had been given the choice of opting out or opting in prior to the settlement and had not availed themselves of that opportunity".[113] The latter purpose was described as a "forensic benefit".[114] The utility of this supposed advantage, for the reason given above, is perhaps doubtful.

93 Without denying the foregoing, Lendlease nonetheless submitted that the core purposes of the proposed notice were also to promote the possibility of settlement, and to encourage finality. That an essential attribute of Pt 10 is to encourage the fair, effective and final resolution of claims, whether by means of a

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111 [2021] FCA 475 at [93].

112 (2024) 114 NSWLR 81 at 87 [12].

113 (2024) 114 NSWLR 81 at 87 [12] (emphasis in original).

114 (2024) 114 NSWLR 81 at 109 [105].

settlement or judgment, was not denied by any party. Lendlease relied upon an affidavit affirmed by Mr Betts, a partner of Herbert Smith Freehills (who act for Lendlease), who states that he specialises in class action litigation. He deposes that Lendlease needs a "better" or "proper" understanding of the number of potential claimants so that questions of quantum can be meaningfully addressed in any settlement negotiations. So much should be accepted given the number of trades in the relevant securities during the pleaded period and the number of legal and equitable "interests" that might have been held in such securities. Mr Betts also states that if settlement is possible, Lendlease will want to settle with all possible claimants on a final basis and avoid the need to defend similar subject matter claims after the resolution of the proceeding. Again, so much may be accepted. Any defendant to a class action seeks finality in litigation, and such an objective is entirely reasonable. Although the interests of the defendant and representative plaintiff do not necessarily or always align, registration may also benefit the representative plaintiff. For example, registration helps the representative plaintiff to understand the size and identity of the class in order to negotiate an appropriate settlement and facilitate Court approval of that settlement.

94 It follows that the notice proposed by Lendlease promotes both the general purposes of Pt 10, or at least is not inconsistent with them, and the particular purpose of s 175(5). The notice relates to the conduct of the class action and should have the effect of promoting its settlement.

(iv) Fundamental precept

95 The power to order the proposed notification is not denied because of the suggested "fundamental precept" of Pt 10 that a group member need not do anything in order to obtain the benefit of any settlement or favourable judgment. That precept is not as absolute as the Court of Appeal thought, and, with respect, makes too much out of the observation made by Gaudron, Gummow and Hayne JJ in *Mobil*, set out above. That observation describes an ordinary and expected incident of the opt out model for representative proceedings. But it was not intended to establish a categorical principle of legislative presupposition that group members are always entitled to do nothing before benefitting from a settlement or favourable judgment, or limit the Court's powers to give notice of any matter which may be relevant to group members in the proceeding. There is no such "fundamental precept".

96 Having regard to the language of Pt 10 of the CP Act, and its conferral of supervisory powers on the Court, it would indeed be a remarkable and most unlikely conclusion if it were always the case that the only thing a group member needed to do before settlement or judgment was to opt out if they wished to. Such a conclusion would be inconsistent with contemporary principles of civil litigation, which, in their application in New South Wales, have an overriding purpose of facilitating "the just, quick and cheap resolution of the real issues in the

proceedings".[115] That may or may not require a group member, in a given case, to perform some procedural act or acts, such as discovery or the giving of particulars or other information. The possible need for the taking of such steps in a given case is supported by s 177(3), which assumes that the Court will have before it, at some point, sufficient information about group members and their claims in order to make a reasonably accurate assessment of the amount of any judgment to be ordered.

97 Such a conclusion does not turn Pt 10 "on its head". Nor does it convert the scheme of Pt 10 into an opt in, rather than opt out, legislative regime. Members remain group members, and thus subject to the binding effect of s 179 of the CP Act, unless they have earlier opted out. And even an opt in model, especially in the case of an open class, will require group members at some point to provide information in order to share in the benefit of any settlement or judgment. Whilst ordinarily that takes place after settlement of an action, or the obtaining of a favourable judgment, there will be cases where it will be in the interests of a just, quick and cheap resolution of the real issues for such information to be supplied at an earlier stage. Whether this matter is such a case will be a matter for the trial judge.

(v) Conflicts of interest

98 Nor does the possible future conflict of interest preclude the Supreme Court of New South Wales from having the power to order the proposed notification. As the Full Federal Court in *Parkin* correctly observed, conflicts of this kind will often feature in a class action, and they are anticipated by the statute and are addressed by the representative plaintiff's duty not to act contrary to the interests of group members and by the Court's supervisory and protective role.[116] The latter encompasses the Court's capacity to, if necessary, decline to approve a settlement and to replace a representative plaintiff who is unable to adequately represent group members. The Court can also appoint a contradictor (as it did in this matter), or an *amicus curiae*, to represent the interests of unregistered group members.[117]

99 But the concern about possible conflicts is, in any event, premature. The order that Lendlease seeks has yet to be made and may never be made. Even if it is made, the respondents will remain obliged to act in the interests of all members, both registered and unregistered, in negotiating with Lendlease. How that duty

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115 CP Act, s 56; see also FCA Act, s 37M.

116 (2022) 291 FCR 116 at 148 [126].

117 See Supreme Court of New South Wales, Practice Note SC Gen 17 (24 July 2024) at 12 [39].

might be discharged has yet to be resolved. But none of these concerns deny the power of the Court to at least give notice of what Lendlease seeks to do. The giving of such a notice, which is merely informative of Lendlease's objectives, itself creates no detriment, and perhaps only enhances the possibility of settlement. In that respect, the observation of the Full Federal Court in *Parkin* cannot be ignored: court-approved settlements of securities class actions are "by an overwhelming margin" the most common way of resolving group members' claims.[118] Resolution of claims by settlement is fundamental to both Pt 10 of the CP Act and Pt IVA of the FCA Act.[119] It is of no moment if the giving of the notice also promotes the commercial interests of Lendlease. If settlement is achieved, it would promote the interests of both Lendlease and group members.

Additional error

100 It was contended that there was an additional error concerning the approach that an intermediate appellate court should adopt where there are conflicting decisions of the kind described above. It is strictly unnecessary for this additional error to be considered.

101 Nonetheless, we make the following brief remarks. Decisions of this Court establish the limited circumstances in which an intermediate appellate court or a trial judge can depart from a decision of another intermediate appellate court on the interpretation of Commonwealth legislation, uniform national legislation or the common law of Australia.[120] Beyond that it is not necessary for this Court to consider whether there should be any additional rule applicable to the circumstance where an intermediate appellate court is confronted by a conflict between one of its earlier decisions and a later decision of another intermediate appellate court, as the Court of Appeal was in this case.

102 Instead it is sufficient to note that there will always be cases where judges differ about what is the better statement of legal principle or the better construction of a particular statutory provision. Inevitably, then, there will be cases where an intermediate appellate court that is so confronted might favour a statement of principle or a construction expressed in its earlier judgment different from that reached by that other intermediate appellate court.

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118 (2022) 291 FCR 116 at 125 [29].

119 (2022) 291 FCR 116 at 148 [127].

120 *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 492; *Hill v Zuda Pty Ltd* (2022) 275 CLR 24 at 34-35 [25]-[26].

103 The course taken by an intermediate appellate court confronted with that circumstance must take account of several considerations. Those considerations underpin the verbal formulae used in the decisions of this Court just noted. First, adopting a view different from that expressed in the later intermediate appellate court will inevitably encourage the losing party to consider an application for special leave to appeal against the second decision based on s 35A(a)(ii) of the *Judiciary Act 1903* (Cth) and engage this Court's obligation to resolve differences of opinion between intermediate appellate courts. Second, there is only one common law of Australia.[121] There are not separate or distinct "State common laws". Third, certainty and coherence are critical. These considerations are especially important in the interpretation and application of Commonwealth legislation and uniform national legislation and the common law of Australia.

Disposition

104 For the foregoing reasons this appeal must be allowed. The orders of the Court should be:

(a) Appeal allowed.

(b) Set aside the order made by the Court of Appeal of the Supreme Court of New South Wales on 17 April 2024 and, in its place, order that the separate question stated by Ball J on 13 September 2023 be answered in the affirmative.

(c) Each party's costs of the appeal be its costs in the proceeding in the Supreme Court of New South Wales.

(d) The appellants pay the costs of the contradictor in the appeal.

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121 *Lipohar v The Queen* (1999) 200 CLR 485 at 505-506 [44]-[45].

105 EDELMAN J. I agree with the reasons for decision of Gordon and Steward JJ and with the orders that their Honours propose. I write separately to address two matters in further detail. The first is the reliance in this proceeding by the New South Wales Court of Appeal upon the decision of this Court in *BMW Australia Ltd v Brewster* ("*Brewster*").[122] The second is the institutional rules of precedent to be applied to the decisions of intermediate appellate courts exercising appellate jurisdiction, which was the second of the two issues into which the appellants divided their case.

Brewster

106 A central plank in the reasoning of the Court of Appeal in this case was the decision of this Court in *Brewster*,[123] in which a majority of this Court held that the power in s 183 of the *Civil Procedure Act 2005* (NSW) ("the CP Act"), for the Supreme Court of New South Wales to make an order that it "thinks appropriate or necessary to ensure that justice is done in" representative proceedings instituted under Pt 10 of the CP Act, did not extend to making a common fund order prior to the conclusion of the proceedings. For instance, Bell CJ observed in the present case that, "[v]iewed in isolation, s 175(5) of the [CP Act] is a provision of great apparent breadth but so, too, was s 183".[124]

107 Despite a long legal history of awards in the nature of common fund orders being made prior to the conclusion of proceedings,[125] and despite the breadth of the text of provisions such as s 183, the reasoning of Kiefel CJ, Bell and Keane JJ in the majority in *Brewster* apparently considered that the text, context, and purpose of such provisions required the *meaning* of those provisions to be understood as though they contained additional words excluding the making of common fund orders prior to the conclusion of the proceedings.[126] This was said not to be a suggestion that the purpose of provisions such as s 183 required that the *application* of the provision's meaning—the provision's scope of operation—should be confined.[127] In a passage concerning context, relied upon heavily on this appeal, Kiefel CJ, Bell and Keane JJ endorsed paragraphs from the decision in

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122 (2019) 269 CLR 574.

123 (2019) 269 CLR 574.

124 *Pallas v Lendlease Corporation Ltd* (2024) 114 NSWLR 81 at 92 [32].

125 *Brewster* (2019) 269 CLR 574 at 650 [203] and see generally at 644-650 [189]-[202].

126 *Brewster* (2019) 269 CLR 574 at 589 [3], 600 [48].

127 *Brewster* (2019) 269 CLR 574 at 600 [48].

Mobil Oil Australia Pty Ltd v Victoria[128] which included the view that "[g]roup members ... need take no positive step in the prosecution of the proceeding to judgment to gain whatever benefit its prosecution may bring".

108 Like the approach taken by Gordon and Steward JJ, I do not consider that it is necessary to address in any detail the correctness of the reasoning of Kiefel CJ, Bell and Keane JJ in *Brewster*, which is an issue raised in appeals which were listed for hearing in this Court at the time of writing these reasons but which have now been heard.[129] Whatever might be thought of the implication that was said to be derived from the text, context, and purpose of s 183 of the CP Act (and the equivalent provision also considered in *Brewster*[130]), that implication cannot be transplanted to s 175(5) of the CP Act. Moreover, as Gordon and Steward JJ explain, the view expressed in *Mobil Oil Australia Pty Ltd v Victoria* cannot be anything more than a general principle, subject to numerous exceptions, and certainly not a legislative presupposition capable of founding an implied legislative constraint upon s 175(5) of the CP Act.

Rules of precedent in intermediate appellate courts

109 A rule of precedent concerning decisions of intermediate appellate courts, established by this Court in seriously considered obiter dicta, is that a trial judge or an intermediate appellate court should not depart from the ratio decidendi of an earlier intermediate appellate court decision in another jurisdiction[131] on the interpretation of Commonwealth legislation, uniform national legislation, or the common law unless the trial judge or later intermediate appellate court considers the earlier decision to be plainly wrong[132] or, in language that should be preferred, unless there is a compelling reason to do so.[133]

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128 (2002) 211 CLR 1 at 32 [40], cited in *Brewster* (2019) 269 CLR 574 at 607 [73].

129 See *R&B Investments Pty Ltd v Blue Sky Alternative Investments Ltd (In liq)* (2024) 304 FCR 395; *Kain v R&B Investments Pty Ltd as Trustee for the R&B Pension Fund* [2024] HCASL 286.

130 *Federal Court of Australia Act 1976* (Cth), s 33ZF.

131 Subject to binding statements to the contrary by this Court.

132 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 151-152 [135]; *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390 at 411-412 [49]; *Hili v The Queen* (2010) 242 CLR 520 at 538 [57]; *R v Falzon* (2018) 264 CLR 361 at 380 [49].

133 *Hill v Zuda Pty Ltd* (2022) 275 CLR 24 at 34-35 [25].

110 That rule of precedent was applied in the later of two decisions relevant to this case. The first relevant decision was that of the New South Wales Court of Appeal itself in *Wigmans v AMP Ltd* ("*Wigmans*")[134] and the second relevant decision was that of the Full Court of the Federal Court of Australia in *Parkin v Boral Ltd* ("*Parkin*"),[135] which concluded that the decision in *Wigmans* was plainly wrong. The issue of precedent in this case arose in the unusual situation in which the decision in *Parkin* was itself subsequently challenged in the New South Wales Court of Appeal.

111 The rule of precedent established by this Court was not expressed to be subject to an exception where the same question is being considered by a third intermediate appellate court, which is the same court as the first intermediate appellate court whose first decision has been held to have been plainly wrong by a second intermediate appellate court. But at one point in the reasoning of the New South Wales Court of Appeal in the present case, an exception to the rule of precedent was suggested for such a third intermediate appellate court.[136]

112 In this Court, this issue of the rules of precedent in intermediate appellate courts concerning conflicting intermediate appellate court decisions necessarily arises only as a matter of seriously considered obiter dicta. There is no circumstance in which it could ever be necessary for the determination of an appeal to this Court that the issue of precedent in intermediate appellate courts be determined. Therefore, the issue could never be part of the ratio decidendi of a decision of this Court.[137] But the institutional importance of the issue makes it highly desirable that it be addressed by this Court.[138] The inclusion of this issue as a separate issue in the appellants' case no doubt reflects the "perception ... that [if] an intermediate court had erred in applying the rules of precedent [such error] would be a ready passport to the grant of ... special leave".[139] And, for the reasons below, it is necessary that this issue be resolved by this Court rather than by the expression of a potential variety of different views in intermediate appellate courts.

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134 (2020) 102 NSWLR 199.

135 (2022) 291 FCR 116.

136 *Pallas v Lendlease Corporation Ltd* (2024) 114 NSWLR 81 at 90 [23], 113 [127], 116 [138], [139], 120 [160].

137 See *Attorney-General of St Christopher, Nevis and Anguilla v Reynolds* [1980] AC 637 at 659.

138 *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 279 CLR 148 at 184-185 [111].

139 *Green v The Queen* (2011) 244 CLR 462 at 491-492 [87].

113 For many years, the approach taken by this Court has been to treat the development of institutional and systemic rules that relate to national rules and principles of law as a role for this Court, and not merely for the court which applies those rules.[140] That is so even if the rules concerning that national law address the extent to which a court is free to depart from its own previous decisions.[141] It is the role of this Court, recognised by s 73 of the *Constitution* as being "at the apex of [the Australian] judicial hierarchy",[142] to superintend the development of rules of law, particularly the rules of the "one common law in Australia",[143] and Commonwealth or uniform national legislation. The adjacent role of this Court in expressing the systemic rules for that development, including the institutional rules of precedent,[144] is necessary to ensure the performance of "the duty of all courts to recognize that it is one system which should receive a uniform interpretation and application".[145] In the performance of that role, the seriously considered obiter dicta of this Court concerning the rules of precedent in lower courts is not merely of "persuasive authority";[146] it is binding.[147]

114 Some confusion has arisen in intermediate appellate courts due to the language employed by this Court in 2007 when expressing the institutional rule that a trial judge or an intermediate appellate court should not depart from the decision of an earlier intermediate appellate court of another jurisdiction on the common law, Commonwealth legislation, or uniform national legislation, unless

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140 *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 492; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 151-152 [135]; *Hill v Zuda Pty Ltd* (2022) 275 CLR 24 at 34-35 [25]; *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 279 CLR 148 at 184-185 [111]. See also *Willers v Joyce [No 2]* [2018] AC 843.

141 Compare *Nguyen v Nguyen* (1990) 169 CLR 245 at 268.

142 *Lipohar v The Queen* (1999) 200 CLR 485 at 505 [45].

143 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 563. See also *Lipohar v The Queen* (1999) 200 CLR 485 at 506 [46].

144 See *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631 at 667-668 [125].

145 Dixon, "Sources of Legal Authority", in *Jesting Pilate and Other Papers and Addresses* (1965) 198 at 199.

146 *Attorney-General of St Christopher, Nevis and Anguilla v Reynolds* [1980] AC 637 at 659.

147 *Hill v Zuda Pty Ltd* (2022) 275 CLR 24 at 34 [25].

convinced that the earlier decision is "plainly wrong".[148] The expression "plainly wrong" was not newly created.[149] It was very similar to language used by the House of Lords, after the announcement of the *Practice Statement (Judicial Precedent)*,[150] when deciding whether to overrule one of its earlier decisions.[151] It was also very similar to language sometimes used in this Court when deciding whether this Court should overrule its earlier decisions.[152] It was the same, or similar to, language that had been used for a long time by Australian intermediate appellate courts.[153] And it was the language used by this Court nearly 15 years earlier when expressing the same rule in relation to uniform national legislation.[154] But it is language that is not without difficulty.

115 One difficulty with an expression such as "plainly wrong" arises if a later intermediate appellate court considers that an earlier intermediate appellate court has misapplied a common law rule stated by this Court. In that circumstance, the later intermediate appellate court is bound by its understanding of the common law rule set out by this Court, even if the later intermediate appellate court considers that the understanding of the earlier intermediate appellate court was not plainly

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148 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 151-152 [135].

149 See Heydon, "How Far Can Trial Courts and Intermediate Appellate Courts Develop the Law?" (2009) 9 *Oxford University Commonwealth Law Journal* 1 at 24-26.

150 [1966] 1 WLR 1234.

151 *O'Brien v Robinson* [1973] AC 912 at 930; *Fitzleet Estates Ltd v Cherry* [1977] 1 WLR 1345 at 1350; [1977] 3 All ER 996 at 1000.

152 *Australian Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australasia* (1913) 17 CLR 261 at 278-279; *R v Commonwealth Court of Conciliation and Arbitration (The Tramways Case [No 1])* (1914) 18 CLR 54 at 58, 69; *Cain v Malone* (1942) 66 CLR 10 at 15; *Geelong Harbour Trust Commissioners v Gibbs, Bright & Co* (1970) 122 CLR 504 at 516; *Babaniaris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1 at 13.

153 *Daniell v Robotham* (1883) 9 VLR (L) 215 at 216; *Lord v Still* [1962] SR (NSW) 709 at 716; *R v White* [1967] SASR 184 at 202; *Transurban City Link Ltd v Allan* (1999) 95 FCR 553 at 560 [29]; *S v Boulton* (2006) 151 FCR 364 at 370 [27].

154 *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 492.

wrong.[155] On that view, the same might be said to be the case in circumstances where the issue for determination concerns the understanding of a decision of this Court interpreting a legislative provision of uniform national application which is expressed "in such wide terms as to leave the circumstances for its application as a matter of judicial development".[156]

116 Another difficulty with the expression "plainly wrong" arises in relation to judicial decisions of intermediate appellate courts concerning similarly or identically worded State legislation but where the context in, or purpose for, which those words were enacted might have been different. That different context or purpose could be a compelling reason to depart from a decision of another intermediate appellate court interpreting the same or similar words in the legislation of a different State, even if the interpretation of that other court was not considered to be plainly wrong. In a passage that was later referred to with apparent approval by this Court,[157] McHugh J said:[158]

> "The duty of courts, when construing legislation, is to give effect to the purpose of the legislation ... Judicial decisions on similar or identical legislation in other jurisdictions are guides to, but cannot control, the meaning of legislation in the court's jurisdiction. Judicial decisions are not substitutes for the text of legislation although, by reason of the doctrine of precedent and the hierarchical nature of our court system, particular courts may be bound to apply the decision of a particular court as to the meaning of legislation."

117 Perhaps the most significant difficulty with the expression "plainly wrong" is that it might be taken to suggest (incorrectly) that an assessment of whether a decision is "wrong" is a matter that can be addressed solely as a matter of justification of the decision. Such an approach would entail addressing the justification for the decision independently of the fit of the decision with other precedent in that area and in related areas, and independently of any consequences of departing from the earlier decision, including any reliance upon the earlier

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155 *Hasler v Singtel Optus Pty Ltd* (2014) 87 NSWLR 609 at 631-632 [97]-[100]; *Commonwealth Bank of Australia v Kojic* (2016) 249 FCR 421 at 457 [149]. See also Leeming, "Farah and its progeny: comity among intermediate appellate courts" (2015) 12 *The Judicial Review* 165 at 180-182.

156 *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 at 363 [81].

157 *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259 at 270 [31].

158 *Marshall v Director General, Department of Transport* (2001) 205 CLR 603 at 632-633 [62].

decision by Parliament.[159] Sometimes an obvious lack of justification for a decision will be a sufficient basis not to follow an earlier decision. Examples are decisions that apply the wrong statute or the wrong version of a statute, or decisions which overlook a crucial legislative provision.[160] But just as an assessment of whether this Court should re-open one of its earlier decisions should not exclude the second-order considerations of those so-called *John* factors[161] concerned with the consequences of departure, the same is true of an intermediate appellate court considering departure from an earlier intermediate appellate court decision.

118 Even independently of these difficulties, as Leeming JA observed in the Court of Appeal in this case, echoing the statements of Lee J and of other judges,[162] a more constructive formulation of the rule of precedent is that the relevant departure from an earlier decision should only occur where "there is a compelling reason to do so".[163] There is flexibility in the formulation of "a compelling reason" that accommodates the issues above. Relevantly to this case, a compelling reason might be "the strong conviction ... that the earlier [second intermediate appellate court] judgment was erroneous and not merely the choice of an approach which was open"[164] in any aspect of the dispositive reasoning of the second intermediate appellate court.

119 In this case, where the New South Wales Court of Appeal was presented with directly conflicting results of intermediate appellate courts, it was open to the Court of Appeal to depart from the decision in *Parkin* if it reached the conclusion that there were compelling reasons to do so. The issue of whether there were such compelling reasons was not merely a matter of principle but also a matter of the consequences of departure. An important aspect of the approach of Bell CJ (with whom three other members of the Court agreed on this point) was that the Full

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159 Compare *Vunilagi v The Queen* (2023) 279 CLR 259 at 317 [178], 331-332 [221].

160 *BHP Billiton Iron Ore Pty Ltd v National Competition Council* (2007) 162 FCR 234 at 253 [83].

161 After *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438-439.

162 *Pallas v Lendlease Corporation Ltd* (2024) 114 NSWLR 81 at 116 [140], referring to *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631 at 668 [126] and other cases. See also *R v XY* (2013) 84 NSWLR 363 at 373 [34].

163 *Hill v Zuda Pty Ltd* (2022) 275 CLR 24 at 34-35 [25].

164 *Pallas v Lendlease Corporation Ltd* (2024) 114 NSWLR 81 at 88 [19], quoting *Totaan v The Queen* (2022) 108 NSWLR 17 at 35 [73], in turn quoting *Gett v Tabet* (2009) 109 NSWLR 1 at 15 [294]. See also *Fairfax Digital Australia & New Zealand Pty Ltd v Kazal* (2018) 97 NSWLR 547 at 577 [147].

Court in *Parkin* was considered to have failed in its dispositive reasoning to address whether there were compelling reasons to depart from the decision in *Wigmans*.[165] That aspect of the approach of Bell CJ to the rule of precedent was correct. It was an approach which did not require any weight to be given to the fact that the decision in *Wigmans* was also a decision of the New South Wales Court of Appeal.

120 Whether or not there is an exception to the rule of precedent which could have permitted the Court of Appeal to depart from the decision in *Parkin* in favour of its own earlier decision, even if the Court of Appeal had considered that there was no manifest error or omission in the reasoning of the Full Court in *Parkin*, was not fully argued in this Court.[166] Among the issues that an assessment of such an exception would need to consider are: (i) whether the rule of precedent remains, as initially stated by this Court, a rule concerned only with the effect on trial judges and intermediate appellate courts of decisions of intermediate appellate courts in *other* jurisdictions[167] and, if so, the relationship between the rule and an analogous rule where an intermediate appellate court is considering whether to depart from one of its earlier decisions;[168] and (ii) the tension if, on the one hand, a trial judge is bound to follow decision A of an intermediate appellate court of the same jurisdiction ("intermediate appellate court A") even if decision B of an intermediate appellate court of a different jurisdiction had departed from decision A[169] but, on the other hand, intermediate appellate court A is itself required to follow decision B unless there are compelling reasons not to do so.

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165 *Pallas v Lendlease Corporation Ltd* (2024) 114 NSWLR 81 at 89 [21], 116 [138], [140], 120 [160]. Compare 113 [127], 115-116 [137].

166 Compare Hynard and Slobedman, "Intermediate Appellate Courts and the Doctrine of Precedent: *Lendlease Corporation Ltd v Pallas*" (2024) 46 *Sydney Law Review* 483.

167 Compare *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 151-152 [135] and *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390 at 412 [49] with *Hili v The Queen* (2010) 242 CLR 520 at 538 [57] and *Hill v Zuda Pty Ltd* (2022) 275 CLR 24 at 34-35 [25]-[26].

168 *Gett v Tabet* (2009) 109 NSWLR 1 at 13 [285]-[287].

169 See *R v Hargraves* (2010) 79 ATR 406 at 424 [63]; *Lo Pilato v Kamy Saeedi Lawyers Pty Ltd* (2017) 249 FCR 69 at 114 [234]; *Chel v Fairfax Media Publications [No 6]* [2017] NSWSC 230 at [37]; *R v Eckl* [2023] QSC 178 at [68]-[72]. See also *Favelle Mort Ltd v Murray* (1976) 133 CLR 580 at 591.

121 BEECH-JONES J. The background to these proceedings and the relevant legislative provisions are set out in the other judgments, which I respectfully adopt.

122 The substantive proceedings are representative proceedings brought under Pt 10 of the *Civil Procedure Act 2005* (NSW) ("the CPA"). The appellants, who are the defendants to those proceedings, and the representative parties, are proposing to participate in a mediation. They have foreshadowed that, if an agreement to settle the proceedings is reached at the mediation, one or more of the parties will seek an order that those group members who have neither opted out of the proceedings nor registered to participate in the proceedings will not be able to receive the benefits of the settlement without the leave of the court ("the proposed order"). If the proposed order is made and any settlement is approved, it is likely that any such group member's claims would be extinguished.

123 The issue of principle raised by this appeal is whether s 175 of the CPA empowers the Supreme Court of New South Wales to order that notice of one or more of the parties' intention to seek the proposed order in the event that a settlement is reached be given to group members ("the proposed notice").[170]

124 The Court of Appeal of the Supreme Court of New South Wales (Bell CJ, Ward P, Gleeson, Leeming and Stern JJA) answered a separate question posed to that effect in the negative.[171] In doing so, the Court of Appeal followed one of its earlier decisions to the same effect ("*Wigmans CA*")[172] and declined to follow a contrary decision of the Full Court of the Federal Court of Australia concerning certain of those provisions of the *Federal Court of Australia Act 1976* (Cth) ("the FCA") that are not materially different to Pt 10 of the CPA.[173]

125 For the reasons that follow, s 175(5) of the CPA empowers the Supreme Court to order that the proposed notice be given to group members.

The Court of Appeal's reasoning

126 In concluding that there was no power for the Court to order that the proposed notice be given, the Court of Appeal construed the power conferred on the Supreme Court by s 175(5) of the CPA as being constrained or "informed by" s 175(6), such that it is a power that arises only in respect of an "event" that has already happened. The Court of Appeal found that one or more parties' intention

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170 The precise wording of the notice is set out in the judgment of Gordon and Steward JJ at [52].

171 *Pallas v Lendlease Corporation Ltd* (2024) 114 NSWLR 81.

172 *Wigmans v AMP Ltd* ("*Wigmans CA*") (2020) 102 NSWLR 199.

173 *Parkin v Boral Ltd* (2022) 291 FCR 116.

to seek the proposed order is not such an event.[174] This construction of s 175(5) was said to be supported by the circumstance that the proposed notice "places non-registered group members in a position that would be contrary to the opt out legislative scheme" of Pt 10 of the CPA by effectively "requiring group members to opt in to the group prior to any settlement or judgment based on any such settlement".[175] The Court of Appeal also reasoned that s 175(5) could not authorise the issue of a notice to group members "that was apt to give apparent judicial blessing to a representative plaintiff engaging in what would inevitably be a conflict of interest",[176] being a conflict between the interests of registered group members and those of unregistered group members.

127 Each of these strands of the Court of Appeal's reasoning will be addressed in turn: first, the restricted construction of the text of s 175(5); second, the opt out nature of the legislative scheme; and, third, the "blessing" said to be given implicitly to a conflict of interest, on the part of the representative parties, by permitting the proposed notice to be given to group members. However, two matters should be noted at the outset.

128 First, it was common ground that the giving of the proposed notice to group members was conducive to the settlement of the proceedings in that, amongst other reasons, it would enable the parties to estimate more accurately the appellants' potential exposure. The scheme of registration involved the provision by a group member of basic information which would enable the quantum of each group member's potential claim to be estimated.[177]

129 Second, the Court of Appeal referred with approval to its earlier decision in *Haselhurst v Toyota Motor Corporation Australia Ltd t/as Toyota Australia*,[178] in which the Court of Appeal held that a form of "class closure order", such as the proposed order, could not be made prior to settlement or judgment but could be made as part of the approval of a settlement or a judgment after a hearing.[179] If that is so, then it is difficult to understand the rationale for the Supreme Court not

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174 *Pallas* (2024) 114 NSWLR 81 at 92 [32], 111 [112], 112 [119].

175 *Pallas* (2024) 114 NSWLR 81 at 109 [104].

176 *Pallas* (2024) 114 NSWLR 81 at 110 [107].

177 See reasons of Gordon and Steward JJ at [53].

178 (2020) 101 NSWLR 890.

179 *Haselhurst v Toyota Motor Corporation Australia Ltd t/as Toyota Australia* (2020) 101 NSWLR 890 at 903 [53].

having the power to order that, prior to settlement discussions, group members be given notice that such an order would be sought if a settlement was reached.

The text of s 175

130 Section 175 of the CPA provides:

"(1) Notice must be given to group members of the following matters in relation to representative proceedings—

(a) the commencement of the proceedings and the right of the group members to opt out of the proceedings before a specified date, being the date fixed under section 162(1),

(b) an application by the defendant in the proceedings for the dismissal of the proceedings on the ground of want of prosecution,

(c) an application by a representative party seeking leave to withdraw under section 174 as representative party.

(2) The Court may dispense with compliance with any or all of the requirements of subsection (1) if the relief sought in the proceedings does not include any claim for damages.

(3) If the Court so orders, notice must be given to group members of the bringing into Court of money in answer to a cause of action on which a claim in the representative proceedings is founded.

(4) Unless the Court is satisfied that it is just to do so, an application for approval of a settlement under section 173 must not be determined unless notice has been given to group members.

(5) The Court may, at any stage, order that notice of any matter be given to a group member or group members.

(6) Notice under this section must be given as soon as practicable after the happening of the event to which it relates."

131 Section 176(1) provides that the form and content of a notice under s 175 must be approved by the Court. The balance of s 176 largely addresses the form, content and manner of delivery or publication of such a notice.

132 In the Court of Appeal, Bell CJ, with whom the other members of the Court agreed on this point, accepted that, "[v]iewed in isolation, s 175(5) of the CPA is

a provision of great apparent breadth".[180] However, his Honour concluded that s 175(5) was "informed" or constrained by s 175(6) so that the exercise of the power must be related to an "event" and the "event" must have occurred prior to the giving of the notice.[181]

133 There is no textual (or other) reason to treat the power conferred by s 175(5) to order notice of any "matter" as confined by the concept of an "event" as referred to in s 175(6). Section 175(1) specifies three steps in the proceedings that must be notified to group members, namely: (1) the commencement of proceedings and the right of group members to opt out;[182] (2) the making of an application for the dismissal of the proceedings on the grounds of want of prosecution;[183] and (3) the making of an application by the representative party for leave to withdraw under s 174.[184] Section 175(3) specifies another step that, if the Court orders, must be notified to group members, namely the bringing into Court of money in answer to a cause of action. Section 175(4) identifies a further step in proceedings, namely the making of an application for approval of a settlement, and provides that, unless the Court is satisfied that it is just to do so, the application cannot be determined unless notice has been given to group members. None of those provisions address when such notice must be given. That issue is addressed by s 175(6); ie those five steps are the "events" that s 175(6) specifies must be notified "as soon as practicable" after the event occurs.

134 Section 175(5) does not use the word "event" but instead a word of wider import, namely the word "matter". Given the function of the Supreme Court under Pt 10 of the CPA in ensuring the protection of the interests of group members, s 175(5) confers a broad power on the Court to order that notice of any "matter" relating to the proceedings is given to group members, including the intention of a party to seek an order that may affect group members' rights and interests. Generally, legislative provisions which confer powers on a court such as s 175(5) should not be construed "by making implications or imposing limitations which are not found in the express words".[185]

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180 *Pallas* (2024) 114 NSWLR 81 at 92 [32].

181 *Pallas* (2024) 114 NSWLR 81 at 92 [32].

182 *Civil Procedure Act 2005* (NSW) ("CPA"), s 175(1)(a).

183 CPA, s 175(1)(b).

184 CPA, s 175(1)(c).

185 *Owners of the Ship "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421.

135 This construction of s 175 is supported by the legislative history of the provision. Part 10 of the CPA was modelled on the group proceedings provisions included in the FCA.[186] Section 175 is in substantially identical terms to s 33X of the FCA. Section 33X has not been altered since the group proceedings provisions were enacted in 1991.[187]

136 The origins of the group proceedings provisions of the FCA are to be found in the report of the Australian Law Reform Commission, "Grouped Proceedings in the Federal Court" ("the ALRC Report"),[188] although the ALRC Report recommended a scheme for the approval of fee agreements that was rejected.[189] Allowing for that and other differences between the scheme that was recommended and that which was enacted, the ALRC Report can be used as an aid to the interpretation of the group proceedings provisions of the FCA[190] and, in turn, s 175 of the CPA.

137 In relation to the Federal Court of Australia's power to order that group members be given notice of the existence and conduct of the proceedings, the ALRC Report recommended providing the Court with "a *general power* to order notice at any time" and that "*[i]n addition*, as a general rule notice, as approved by the Court, should be given to group members advising them" of five particular steps in the proceedings, namely: (1) the commencement of proceedings and the ways in which a group member can assume conduct of the proceedings; (2) "an application for the approval of a fee agreement"; (3) "the bringing of money into Court"; (4) "an application to approve a settlement"; and (5) an application to dismiss the proceedings on the ground of want of prosecution.[191] The ALRC Report recommended that notification in relation to the commencement of the

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186 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 24 November 2010 at 28066-28067.

187 *Federal Court of Australia Amendment Act 1991* (Cth), s 3.

188 Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988) ("ALRC Report"); Australia, Senate, *Federal Court of Australia Amendment Bill 1991*, Explanatory Memorandum at 2 [4]; Australia, Senate, *Parliamentary Debates* (Hansard), 12 September 1991 at 1448.

189 ALRC Report at 121 [293], 165 cl 33.

190 *Acts Interpretation Act 1901* (Cth), s 15AB(2)(b).

191 ALRC Report at 81 [189] (emphasis added).

proceedings should be given as soon as practicable after the first directions hearing.[192]

138 These recommendations were reflected in cl 18 of the draft Bill that accompanied the ALRC Report. Clause 18(5) was in similar terms to s 175(5) (and s 33X(5)). There was no direct equivalent to s 175(6) (and s 33X(6)) because the requirement in the draft Bill to notify as soon as practicable was only attached to the obligation to notify group members that proceedings had been commenced. When it was enacted in 1991, s 33X differed from cl 18 in that the steps that were required to be notified were those set out above,[193] which did not include the approval of a fee agreement. Section 33X also differed from cl 18 of the draft Bill in that it included s 33X(6), which attached the obligation to provide notice to group members as soon as practicable to all five "events" rather than just the commencement of proceedings. Putting aside those differences, the ALRC Report supports the construction of s 33X and s 175 outlined above. The only remaining question is whether the other matters upon which the Court of Appeal relied warrant a reading down of s 175.

Contrary to opt out scheme?

139 In concluding that the proposed notice would be contrary to the legislative scheme, the Court of Appeal applied the reasoning in *Wigmans CA* to the effect that the issue of such a notice would be contrary to a "fundamental"[194] or "basic precept" of Pt 10 of the CPA; namely, that "group members may do nothing prior to a settlement and still reap its benefits".[195] In the Court of Appeal, Leeming JA characterised the use of the expression "fundamental precept" in *Wigmans CA* as not referring to an "absolute rule" but a "basic principle underlying the regime established by the statute".[196]

140 Whatever be the status of the "precept", its role as a factor constraining the construction of the power conferred by s 175(5) was said in *Wigmans CA*[197] to follow from the nature of the opt out legislative scheme as discussed in the joint

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192 ALRC Report at 81 [189].

193 See above at [133].

194 *Wigmans CA* (2020) 102 NSWLR 199 at 214 [79].

195 *Wigmans CA* (2020) 102 NSWLR 199 at 223 [131], quoted in *Pallas* (2024) 114 NSWLR 81 at 102 [75], 120 [157].

196 *Pallas* (2024) 114 NSWLR 81 at 120 [156].

197 *Wigmans CA* (2020) 102 NSWLR 199 at 214 [77].

judgment of this Court in *Mobil Oil Australia Pty Ltd v Victoria*,[198] specifically the following passage:[199]

> "So much follows from the fact that Pt 4A [of the *Supreme Court Act 1986* (Vic)] provides for what is sometimes called an 'opt out', rather than an 'opt in', procedure. That is, persons who are group members may opt out of the proceeding and, if they do, they are taken never to have been a group member (unless the Court otherwise orders) ... *Group members, however, need take no positive step in the prosecution of the proceeding to judgment to gain whatever benefit its prosecution may bring*." (emphasis added in *Wigmans CA*)

141 The Court of Appeal in *Wigmans CA* noted that this passage was cited with approval and applied to Pt 10 of the CPA in *BMW Australia Ltd v Brewster*.[200]

142 The emphasised portion of the above passage from *Mobil Oil* contrasts the passive position of group members who do not opt out of group proceedings with the active step that must be taken by group members who wish to opt out. Neither this passage nor anything else stated in *Mobil Oil* or *Brewster* enunciates any rule, precept or principle bearing on the construction of s 175 to the effect that, prior to settlement or judgment, no order can be made requiring a group member to take any step in proceedings, much less that no order can be made that only has the effect of (strongly) encouraging group members to take any step in proceedings, such as registering their claims. To the contrary, Pt 10 of the CPA expressly contemplates the Court making directions in relation to questions that are only common to some group members.[201] Of necessity, such directions will or may require group members to actively participate in the proceedings.

143 As Gordon and Steward JJ point out,[202] orders have regularly, although sparingly, been made by a variety of courts requiring group members to provide documents or particulars in advance of settlement or judgment.[203] The fact that first instance judges have from time to time made a practical judgment that such orders should be made bears out the caution that should be exercised before implying

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198 (2002) 211 CLR 1 at 31-32 [39]-[40].

199 *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at 32 [40].

200 (2019) 269 CLR 574 at 607 [73]. See *Wigmans CA* (2020) 102 NSWLR 199 at 214 [78].

201 CPA, s 168.

202 See reasons of Gordon and Steward JJ at [65].

203 See also *Lam v Rolls Royce PLC [No 3]* [2015] NSWSC 83 at [33]-[39].

restrictions on court powers based on a supposed "fundamental precept" or "basic principle".

Representative party's conflict of interest

144 It was not in dispute that a representative party has fiduciary obligations to group members in and about the conduct of the proceedings.[204] It was also not in dispute that, at the very least, for a representative party to seek approval of a settlement that differentiated between different group members according to whether or not those group members had registered their claims potentially places the representative party in breach of its fiduciary obligations by preferring the interests of one set of group members over another. In the Court of Appeal, Bell CJ appeared to suggest that such a conflict was "created by the giving of the notification contemplated" by the proposed notice[205] and that conflict was "insoluble",[206] whereas Ward P considered that, if group members were merely notified of a party's intention to seek the proposed order, an actual conflict would not crystallise and potentially become "insoluble" until an application was made for the exclusion of unregistered group members.[207] In so reasoning, Ward P noted that a party is not bound by their stated intention to seek such an order and the course of negotiations may result in that intention being abandoned.[208]

145 This dispute as to whether, at the time notice is given, the conflict is actual or only potential is related to the Court of Appeal's description of the conflict as "insoluble". It would follow from Bell CJ's reasons that the fact that the representative party is necessarily conflicted at the time such notice is given colours their participation in the settlement discussions that will follow.[209] If that view is accepted it would mean that a representative party could not propose or even countenance such an order as they would then be in breach of their fiduciary obligations.

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204 *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at 524 [40]; *Wigmans v AMP Ltd* (2021) 270 CLR 623 at 646 [44], 670 [117].

205 *Pallas* (2024) 114 NSWLR 81 at 110 [106].

206 *Pallas* (2024) 114 NSWLR 81 at 110-111 [110].

207 *Pallas* (2024) 114 NSWLR 81 at 114 [129].

208 *Pallas* (2024) 114 NSWLR 81 at 114 [129]

209 *Pallas* (2024) 114 NSWLR 81 at 111 [112].

146 The view of Ward P as to the timing of the possible conflict on the part of the representative party is to be preferred.[210] Moreover, any conflict that ensues is not necessarily "insoluble" from the perspective of the group members. While it may be unlikely, a representative party may apprehend that all group members will register if so advised, or that may turn out to be the case. In that event there will be no conflict. A more likely scenario is that alluded to in the judgment of Ward P, namely where the level of registration by group members may be so high that the parties can ascertain the extent of the defendant's overall exposure (and other matters relating to settlement) with such a degree of confidence that they no longer seek such an order.[211]

147 Leaving aside those possibilities, the scope and nature of the duties owed by the representative party is moulded by the circumstances in which they arise,[212] including the statutory context, Pt 10 of the CPA. Part 10 of the CPA expressly or implicitly contemplates the existence of such potential conflicts and expressly or implicitly contemplates that they will be managed and addressed. That is, the CPA provides for "procedures overseen by the court ... which guard against collateral risks of representation".[213] One means of addressing such a potential conflict at the time an order in the nature of the proposed order is sought would be the appointment of separate legal representatives to represent the interests of different sets of group members to address whether such an order should be made, whether the settlement should be approved and such other questions in relation thereto that might be formulated under s 168 of the CPA.

148 Neither Pt 10 of the CPA, nor the fiduciary obligations owed by a representative party, necessarily prevent such a party from considering a proposal to seek an order in the nature of the proposed order or notifying an intention to do so. The negotiations that lead to a settlement might be framed by reference to that intention, but that intention might be abandoned, as Ward P contemplated. Even if it is not, those negotiations will otherwise be pursued in a context whereby the parties to that negotiation are to be taken to be aware that settlement will be subject to a process of Court approval and scrutiny in which the interests of all group members must be considered.

149 It is unnecessary to consider this issue further because the ultimate issue raised by this appeal is not the actual or potential conflicts that the representative

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210 *Pallas* (2024) 114 NSWLR 81 at 114 [129].

211 *Pallas* (2024) 114 NSWLR 81 at 113-114 [128]-[130].

212 *Beach Petroleum NL v Kennedy* (1999) 48 NSWLR 1 at 45-48 [185]-[207]; *Cubillo v The Commonwealth* (2001) 112 FCR 455 at 577 [465].

213 *Tomlinson* (2015) 256 CLR 507 at 524 [40].

parties may be subject to and how they may be addressed, but the *power* of the Supreme Court to order that the proposed notice be given. That issue can be addressed by considering the circumstance that, irrespective of the representative parties' intentions, the appellants intend to seek the proposed order. The appellants do not owe fiduciary obligations to group members, and thus no potential conflict arises from the appellants forming that intention or seeking the proposed order. In fact, having been apprised of the appellants' intention to seek that order, the representative parties are under an obligation to inform group members of the appellants' intention. In those circumstances, there is no reason to read down the power conferred by s 175(5) of the CPA so that it would be beyond the power of the Court to make an order ensuring that notification occurred. Once it is accepted that the power conferred by s 175(5) allows notice of the proposed order to be given, the questions of whether notice should be given, and at whose behest, are only relevant to the question of whether the power should be exercised, not its existence.

Competing decisions of intermediate courts of appeal

150 I agree with the observations of Gordon and Steward JJ on this topic.[214]

Conclusion

151 Section 175(5) of the CPA empowered the Supreme Court to order that notice of the proposed order be given to group members. The orders proposed by Gordon and Steward JJ should be made.

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214 See reasons of Gordon and Steward JJ at [100]-[103].