HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 12 Sep 2024 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	S108/2024
File Title:	Lendlease Corporation Limited ACN 000 226 228 & Anor v. D
Registry:	Sydney
Document filed:	Form 27A - Appellants' submissions
Filing party:	Appellants
Date filed:	12 Sep 2024

Important Information

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

IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

ON APPEAL FROM
THE COURT OF APPEAL OF THE SUPREME COURT OF NEW SOUTH WALES

BETWEEN

Lendlease Corporation Limited ACN 000 226 228

First Appellant

Lendlease Responsible Entity Ltd ABN 72 122 883 185

as responsible entity for Lendlease Trust ABN 39 944 184 773 ARSN 128 052 595

10 Second Appellant

and

David William Pallas and Julie Ann Pallas

as trustees for the Pallas Family Superannuation Fund

First Respondent

Martin John Fletcher

Second Respondent

20

APPELLANTS' SUBMISSIONS

Part I: Internet publication

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

Part II: Concise statement of issues

1. Does Pt 10 of the *Civil Procedure Act 2005* (NSW) (**CPA**), in particular ss 175(1), 175(5) and 176(1), authorise the Court to approve a notice to group members in representative proceedings stating that, upon any settlement, the parties/ the defendant will seek an order that group members who have neither registered nor opted out shall not benefit from the settlement without leave? Yes. The order foreshadowed by the notice would be within power. Providing warning of the parties' intention to seek that order is consistent with the procedural fairness objectives underpinning the notice provisions. And, on the evidence, issuing the notice would help facilitate a just negotiated resolution of the matter.
2. How should an intermediate appellate court determine a question on which there is conflicting intermediate appellate court authority? At least where that court is interpreting uniform legislation or the common law, the most pressing imperative should be arriving at the correct legal conclusion. The "plainly wrong" test should not apply.

Part III: Section 78B of the *Judiciary Act 1903* (Cth)

3. No notices under s 78B of the *Judiciary Act 1903* (Cth) are required.

Part IV: Decision below

4. The decision below is *David William Pallas & Julie Ann Pallas as trustees for the Pallas Family Superannuation Fund v Lendlease Corporation Ltd* [2024] NSWCA 83 (**J**).

Part V: Background facts

5. ***The representative proceeding:*** The appellants are defendants to a shareholder class action brought by the respondent representative plaintiffs, which alleges misleading or deceptive conduct and breaches of continuous disclosure obligations: J [5]. The group members are defined to include persons who acquired an interest in the appellants' stapled securities, or American Depositary Receipts representing the securities, during the period 17 October 2017 to 8 November 2018 and who suffered loss or damage by reason of the alleged conduct.[1] These group members are unable to be sufficiently identified from the appellants' share register because, among other reasons, the register is underinclusive in not identifying persons who have merely an equitable interest in the securities and is

[1] Affidavit of Jason Lawrence **Betts** affirmed 30 August 2023 at [12]; ABFM 26.

overinclusive in identifying securityholders who will not have suffered loss.[2] The volume of the appellants' securities traded on the ASX during the relevant period was 444,877,832, indicating that the potential size of the class and variance between individual claims is likely significant: Betts [36]-[37]. At the time of these submissions: pleadings are closed, substantial discovery has been given, the parties have filed some but not all of their evidence, and no hearing date is fixed. In the ordinary course, following the close of written evidence, the matter would be set down for final hearing and referred to mediation. Opt out notices, as required in due course by CPA s 175(1), have not yet been sent.

6. ***Proposed notice to group members:*** The parties wish to include in the notice, which informs group members of their right to opt out, a request to register to participate in the distribution of any settlement sum which may be agreed between the parties: CAB 67. In addition, and critically, the notice seeks to inform group members of the parties', alternatively the defendants', intention to seek at the time of any settlement approval an order precluding group members who have neither registered nor opted out from benefiting from the settlement without the Court's leave. That foreshadowed order is described here as a **Settlement Order**, for convenience only.

7. The order the subject of these proceedings, which the Court below held there was no power to make, is *not itself* a Settlement Order. Rather, it is an order that *notice* be given to group members, prior to settlement discussions, of an *intention to seek* a Settlement Order at the time of any application for settlement approval, at which time the making of the order will be a matter for the Court's discretion. In ***Haselhurst*** *v Toyota Motor Corporation Australia Ltd* (2020) 101 NSWLR 890, the NSW Court of Appeal (**CoA**) held that it did not have power to make a different type of Settlement Order which in terms purported to bar group members' claims in advance of settlement approval, but accepted that such an order could be made at the time of settlement approval pursuant to the Court's power under s 173: at [53], [87], [105] and [108].

8. The evidence of the appellants' solicitor, Mr Betts, who has extensive experience in class action litigation (Betts [7]-[9]), is that notifying group members of an intention to seek an order excluding unregistered group members from any settlement scheme greatly assists the settlement negotiation process by providing an informed basis on which the parties can assess quantum and by allaying concerns regarding a lack of finality where the proceedings are concluded by way of settlement: Betts [28]-[39]. This is not because the parties have

[2] See the Court's explanation of the problem in another shareholder class action, *Wigmans v AMP Ltd (2020) 102 NSWLR 199 (**Wigmans CA**)* at [7], [44].

certainty that the Court will make the order, but because the data received from a registration process that forewarns of the intention to seek such an order is more reliable than data received from a registration process that is wholly voluntary: Betts [34]-[35].

9. The question of the Court's power to issue the proposed notice (set out at J[2]) was stated for separate determination by the list judge, and removed to the CoA. The CoA was constituted by five judges, because of the state of the existing authorities governing the question. The CoA had previously held, in *Wigmans CA*, that there was no power to approve a notice of the proposed kind. A Full Court of the Federal Court, in relation to the corresponding s 33X(5) of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**), had held to the contrary, deciding that *Wigmans CA* was "plainly wrong": ***Parkin** v Boral Ltd* (2022) 291 FCR 116.

Part VI: Argument

A. Overarching propositions

A.1 Statutory construction

10. ***The nature and limits of purposive construction:*** The task of statutory construction begins and ends with a consideration of the statutory text.[3] Whilst the text must always be considered in its context, there are important limits on the extent to which considerations of purpose can and should shape constructional choices.

11. First, it is an error to be guided in the first instance by *a priori* assumptions of legislative intent.[4] The surest guide to legislative intent is the language that Parliament has actually employed in a given provision. Legislative history and extrinsic materials cannot be relied upon to displace the clear meaning of the text.

12. Second, fixing upon legislative purposes at too high a level of generality carries with it the danger of "imput[ing] erroneously a statutory intention which destroys the effect of a clearly expressed" provision.[5] As the CoA observed in *Aurizon Operations Ltd v Australian Rail Tram and Bus Industry Union NSW Branch* [2024] NSWCA 24 at [63], "[i]t is not for a court to construe a statute in a way which furthers its objects to the greatest extent possible, since this may not have been the legislative intention".

13. Third, in some cases, the "general purpose" of a statute may say "nothing meaningful"

[3] *FCT v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at [39].
[4] *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249 at [28]; *Deal v Kodakkathanath* (2016) 258 CLR 281 at [37].
[5] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27 at [47], [51]-[52].

about a particular provision.[6] And while a construction that promotes the statutory purpose is to be preferred over one that does not, legislation rarely pursues a single purpose at all costs. Where the provision strikes a balance between competing interests, it may be unhelpful to use statutory purpose as a determinative touchstone. The question in that case is not what was the purpose or object underlying the statute, but rather: how far does the statute go in pursuit of that purpose or object?[7]

A.2 Part 10 of the CPA

14. ***Flexible powers accommodating the evolution of representative actions and the Court's supervisory role:*** First, the new procedure introduced by Pt 10, like Pt IVA of the FCA Act on which it was "substantially modelled",[8] was framed by Parliament with the objective of permitting the Court to adapt to the practical requirements of representative actions as they arose from time to time. As Wilcox J remarked in the context of Pt IVA, it was "impossible to foresee all the issues that might arise in the operation of" this "entirely novel procedure"; and "to avoid the necessity for frequent resort to Parliament for amendments to the legislation", it was "desirable to empower the Court to make the orders necessary to resolve unforeseen difficulties".[9]

15. Consistently with this, the powers conferred on the Court under Pt 10 afford "a large measure of significantly unguided discretion in making orders considered to be appropriate to do justice in all the circumstances of a given case";[10] and this Court has interpreted various of those powers to permit the taking account of practical or commercial realities affecting the administration of justice in representative actions.

16. One such challenge for the efficient and effective prosecution of class actions that has emerged in different guises over time, and to which Pt 10 has proven capable of responding, is the "free rider" problem: how to prevent a party from unfairly shouldering the burdens of the litigation in circumstances where the benefits are enjoyed by the whole class. So, for example, the Court's duty to fix a date before which a group member may opt out of a proceeding – which date "will usually fall before the outcome of the action is known" – addresses "the problem of free riding by group members who would seek to opt

---

[6] *R v A2* (2019) 269 CLR 507 at [35].
[7] *Carr v State of Western Australia* (2007) 232 CLR 138 at [5]-[7] approved in *Construction Forestry Mining and Energy Union v Mammoet Australia Pty Ltd* (2013) 248 CLR 619 at [40].
[8] See Attorney-General's Second Reading Speech on the Bill for the *Courts and Crimes Legislation Further Amendment Act 2010* (NSW): New South Wales, Legislative Council, *Hansard*, 24 November 2010 at p28066.
[9] *McMullin v ICI Australia Operations Pty Ltd* (1998) 84 FCR 1 at 4, quoted with approval in *BMW Australia Ltd v* ***Brewster*** (2019) 269 CLR 574 at [46].
[10] *Brewster* at [123]. See, eg, ss 166(1)(e), 170, 173, 175(5), 177, 183.

into the proceeding only after a favourable outcome is achieved".[11] Similarly, funding equalisation orders, which are permitted under the legislative scheme, are directed to avoiding inequity as between "funded" and "unfunded" group members.[12] Ultimately, "the concern to prevent 'free riding' is relevant to doing justice as between group members who are parties to the proceeding"[13] – and, as submitted at [59] below, also as between the parties more generally, including the defendant.

17. A related point in understanding the degree of play in the joints that Pt 10 affords to the Court is this: Pt 10 expressly confers on the Court a protective duty to supervise representative proceedings to make sure the scheme is operating fairly, and to intervene at appropriate stages of the process if it is not.[14] The Court must be attuned to group members' best interests, particularly where there is a real risk that these may diverge from the interests of a representative party or a litigation funder.[15] Whilst the principal applicant is typically a fiduciary for group members,[16] and has statutory authority to advance the class's common claims,[17] "[p]otential or actual conflicts of interest are an inevitable by-product of a regime where the self-appointed applicant's individual claim is the vehicle through which the common questions are to be tried".[18] For this reason, and much more so than in most other proceedings, the Court exercises responsibility for keeping representative actions within the statutory guardrails – ultimately, by deciding whether a settlement should be approved and on what terms, or, if the matter proceeds to a litigated determination, by deciding whether to grant any of the broad kinds of relief identified in s 177(1) and making any necessary directions concerning how monetary awards are to be worked out and distributed.

18. Moreover, nothing in Pt 10 denies the Court's powers under *other* provisions of the CPA,[19] or in its inherent jurisdiction. Part 10 forms part of the broader architecture of the Court's procedural toolkit, and must be read with the balance of the CPA as a harmonious whole.[20]

19. In light of these matters, the proposition stated in *Wong* (at [11]) assumes critical significance: "[l]ike other provisions conferring jurisdiction upon or granting powers to a

---

[11] *Brewster* at [73].
[12] *Brewster* at [45], [85], [168]-[169].
[13] *Brewster* at [86].
[14] See, eg, the provisions cited in fn 10 above and also ss 165, 168, 171, 172, 174, 176(1).
[15] *Wigmans v AMP Ltd* (2021) 270 CLR 623 (***Wigmans HCA***) at [82], [118], [119], [121].
[16] *Wigmans HCA* at [44], [117]; "*Grouped Proceedings in the Federal Court*", **ALRC Report** 46, 1988, at p77.
[17] ***Timbercorp*** *Finance Pty Ltd (in liq) v Collins* (2016) 259 CLR 212 at [53]-[54].
[18] ***Parkin*** at [126].
[19] See ***Wong*** *v Silkfield Pty Ltd* (1999) 199 CLR 255 at [9] (addressing Pt IVA of the FCA Act).
[20] *Wigmans HCA* at [77]; *BHP Group Ltd v Impiombato* (2022) 276 CLR 611 at [54].

court, Pt IVA" – and, equally, Pt 10 – "is not to be read by making implications or imposing limitations not found in the words used".

20. ***No absolute right to remain passive:*** Second, Pt 10 contemplates that group members will sometimes need to take steps to realise their interest or progress their claim, particularly when it comes to identifying themselves.

21. This is evident from the language of the scheme itself. If group members fail to exercise their right to opt out of representative proceedings before the date fixed by the Court (ss 162(1)-(2)), any subsequent judgment is binding on them (s 179(b)). If certain common questions are only common to some of the group members, the Court may establish a sub-group and "appoint[] a person to be the sub-group representative party on behalf of the sub-group members" (s 168(2)). A representative party continues to act for the class on the common issues unless and until he or she is granted leave to withdraw (s 174(2)) or the Court determines that the party "is not able adequately to represent" group members and substitutes another group member as the lead plaintiff – and one avenue for bringing about those results is an application by a group member (ss 171, 174(3)).

22. As to the identification of group members and their interests, it is clear that Pt 10 "envisage[s] the identification of all group members so far as that is possible", because this "facilitates the distribution of any proceeds of the proceedings, whether derived from a settlement or a favourable judgment".[21] The reality is that "group members will have to take action at some stage to obtain the actual payment of any monetary relief to which they have established an entitlement."[22] If the Court has constituted a fund for distributing money to group members, a group member must make a claim for payment out of the fund to receive part of that distribution (see s 178(3)), and may claim after the deadline stipulated by the Court if the fund has not already been distributed and it is just to do so (s 178(4)). If the Court makes an award of damages, a group member must "establish the member's entitlement to share in the damages" (s 177(4)(a)). The scheme also makes plain through s 177(3) that it is desirable for the Court to be able to make "a reasonably accurate assessment … of the total amount to which group members will be entitled under the judgment", as an essential precondition for awarding aggregate damages – and an important integer in assessing that total amount will in many if not all cases be the estimated number of group members.

23. The practical necessity of imposing burdens on group members to take certain steps in

[21] *Brewster* at [72].
[22] *Brewster* at [94].

certain circumstances is also recognised in the ALRC Report, which identified the objectives of Pt IVA[23] (and, by extension, of the coordinate regime in Pt 10) prior to its enactment. In particular, the Commission explained that:

a. a group member "will have to take action, at some stage, to obtain monetary relief", by "identify[ing] himself or herself and prov[ing] that he or she is in fact a member of the group" (at [109]); and

b. "fairness to respondents and group members indicates that" steps such as requiring a group member to provide discovery or further and better particulars "should be permitted where appropriate", upon the Court's weighing of the merits in each case (at [166]).

24. Further, whilst the ALRC endorsed an "opt-out" model, it justified the imposition of limits on opting out (as now reflected in ss 162 and 179 of the CPA) in a manner of some significance for the current appeal, stating (at [183]):

> If the right of group members to opt out was completely unfettered, there could be problems for the principal applicant and the respondent in dealing with the case as it approached a hearing. Settlement negotiations could be hampered if it was not known how many people were able to exclude themselves. The benefits of economy and of obtaining a uniform decision for all affected might be lost if people could withdraw at any stage. If there was a limited fund from which any settlement or judgment money could be obtained, the proceedings of group members opting out to pursue their claim individually may have to be stayed…

25. Finally, and consistently with this legislative history, lower courts have held that it "may be appropriate" to make discovery orders binding upon group members "in aid of mediation, for example, where the parties face asymmetric information which may lead to an unfair settlement",[24] or where that would "provide the defendants with sufficient information to formulate rational settlement offers".[25]

26. Against the foregoing backdrop, it is important not to overread the oft-cited dictum in *Mobil Oil* at [40], or to engraft it with a layer of absolutism that is inconsistent with the statutory language and context. This Court said there that group members "need take no positive step *in the prosecution of the proceeding to judgment*" in order to gain benefits from its prosecution (emphasis added). Properly understood, that is a statement that the

---

[23] *Brewster* at [82].

[24] *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd (No 2)* [2010] FCA 176 at [32] and *Boulos v MRVL Investments Pty Ltd (No 3)* [2022] FCA 307 at [9] (in each case relying on s 33ZF of the FCA Act); see also ***Wetdal*** *Pty Ltd atf the BlueCo Two Superannuation Fund v Estia Health Limited* [2021] FCA 475 at [90].

[25] ***Regent Holdings*** *Pty Ltd v State of Victoria* (2012) 36 VR 424 at [15], addressing Part 4A of the *Supreme Court Act 1986* (Vic), the Victorian class action regime the subject of ***Mobil Oil*** *Australia Pty Ltd v State of Victoria* (2002) 211 CLR 1.

statutory regime "does not contemplate group members having an active role in, or control over, *the conduct by the lead plaintiff* of a group proceeding".[26] Contra *Wigmans CA* at [131], the Court could not have been suggesting that group members may in all cases do *nothing* before settlement or judgment in a representative action "and still reap its benefits", because ss 162, 173(2) and 177(2) leave it up to the Court ("at some stage") to determine a point in the timeline at which the proceeding effectively transmutes from "opt out" to "opt in" (requiring group members to identify themselves and provide information concerning their claims so as "to obtain the actual payment of any monetary relief" [27]). Indeed, in the judgment below, Leeming JA acknowledged that there was "no absolute rule" (at J[157]).

27. More generally, in identifying and giving effect to binding principle, the Court is not concerned with "the ascertain[ing] of the meaning and the application of particular words used by previous judges, so much as with gaining an understanding of the concepts to which expression was sought to be given".[28] Thus, propositions in reasons for judgment must be read "in the context of the reasons as a whole" and "the facts and issues in the case".[29] It should be recalled that *Mobil Oil* concerned the Victorian scheme in Pt 4A of the *Supreme Court Act 1986* (Vic) (contra *Wigmans CA* at [77]). In contrast to Pt IVA and Pt 10, Pt 4A has since its enactment contained a provision (s 33ZG) which empowers the Court to make orders which "set out a step that group members or a specified class of group members must take" to be entitled to obtain any relief or "benefit arising out of the proceeding". Viewed in that light, the Court in *Mobil Oil* should not be read as laying down a blanket rule that group members cannot be required to take any steps prior to judgment or settlement.[30]

28. ***Representative proceedings may end by settlement or judgment:*** Third, Pt 10 provides that representative proceedings can end in two possible ways, each of which represents a legitimate means of resolving the underlying common dispute between group members and the defendant: settlement (which, in the context of Pt 10, means a court-approved settlement and not just an inter partes agreement), or judgment.[31] As one recognition of this, the principles governing the two routes are identical at the point when they culminate

[26] *Timbercorp* at [131] (emphasis in original).
[27] *Brewster* at [94].
[28] *Brennan v Comcare* (1994) 50 FCR 555 at 572, quoted with approval in *Comcare v PVYW* (2013) 250 CLR 246 at [16].
[29] Herzfeld and Prince, *Interpretation* (3rd ed, 2024) at [34.40].
[30] See *Regent Holdings Pty Ltd v State of Victoria* (2012) 36 VR 424 at [11]-[12].
[31] See *Parkin* at [26].

in a decision of the Court: the consequences described in s 179 apply to any "judgment given in representative proceedings", which phrase encompasses judicial approval of a settlement (s 173) as well as judicial determination of adversarial proceedings (s 177).[32] Thus, insofar as provisions such as s 183 are directed towards "ensur[ing] that the proceeding is brought fairly and effectively to a just outcome",[33] that just outcome can be a *settlement*;[34] and an interpretation of Pt 10 that facilitates the achievement of a fair, negotiated resolution is an interpretation that promotes the scheme's object and purpose within s 15AA of the *Acts Interpretation Act 1901* (Cth).

29. ***Settlement Orders are permitted at settlement or judgment:*** Fourth, and in accordance with the third point – just as the Court may determine who benefits from a *judgment* in representative proceedings (ss 177(1)(e), 179), in approving a *settlement*, the Court has extremely broad powers, including to give its approval on terms that settlement monies be distributed only to group members who have registered to benefit from the distribution scheme and not to other group members; and, in so doing, to extinguish those other group members' claims (ss 173(2), 179).[35] Put another way, s 173(2) would authorise the Court to make the Settlement Order upon settlement of these proceedings.

30. ***Notice mechanism in s 175 effectuates other components of the scheme:*** Finally, the power under s 175 to give notice to group members of certain "matters in relation to representative proceedings" should be viewed as an ancillary one, dedicated to achieving the broader objectives of Pt 10 in the context of a given action – relevantly, "to increase the efficiency of the administration of justice by allowing a common binding decision to be made in one proceeding",[36] and (drawing from s 183) to do justice in those proceedings. The instrumental role played by s 175 in this regard includes the provision of procedural fairness to group members in the making of orders.[37] Notices under s 175(5) are "not infrequently used to advise group members of a specific step, question or issue in relation to the proceedings and, on occasion, to seek group members' response".[38] To best effectuate that role of informing group members of what has occurred or may occur in the claim, it stands to reason that the Court's powers to order the giving of notice (s 175(5)),

---

[32] See *Haselhurst* at [105].
[33] *Brewster* at [47].
[34] See *Haselhurst* at [104].
[35] *Haselhurst* at [52]-[53], [87], [97], [105], [107]-[108]; *Findlay v DSHE Holdings Ltd* (2021) 150 ACSR 535 at [94]-[95]; *Parkin* at [129]. As to extinguishment through the statutory estoppel, see *Timbercorp* at [52].
[36] *Brewster* at [82].
[37] *Brewster* at [118] (Gageler J, in dissent in the result), [142].
[38] *Wigmans HCA* at [122].

and to approve the form and content of a notice (s 176(1)), should be liberally construed.

31. This is consistent with the ALRC Report, in which the Commission stated: that the existence of an opt out system (in which consent is not required) necessitated that notice be given "in certain circumstances when the interests of group members are affected" (at [188]); that, in addition to identified matters such as the commencement of proceedings, "[m]any other circumstances may arise in the course of conducting grouped proceedings where consideration should be given to notifying group members"; that "[i]n these, and in *any other appropriate cases*, the Court should have a discretion to order notice" (at [188], emphasis added); that "[t]he Court should have a general power to order notice at any time" (at [189]); and that "[n]otifying people of rights of which they may be unaware or which they are unable to pursue themselves is an important aspect of the procedure" (at [123]). The Commission also explained (in the context of responding to a particular criticism of opt out procedures, but the remark has broader relevance) that "[i]nforming people in this way so that they are able to decide whether or not to be involved is not to be equated with pushing people. On the contrary, it creates a choice which they might otherwise not have" (at [123]).

A.3 Conflicting decisions of intermediate appellate courts

32. This Court has held that, at least in the interpretation of uniform legislation or the common law, intermediate appellate courts should not depart from decisions of intermediate appellate courts in another jurisdiction unless they are convinced that the interpretation is "plainly wrong".[39] This rule seeks to advance the aims of coherence and uniformity in decisions within the Commonwealth and to promote comity between the coordinate jurisdictions of the Federation.

33. Unlike in the United Kingdom, Australian courts are not bound by their previous decisions. Whether an intermediate appellate court should revisit its own decision is a matter of practice for the court to determine, guided by competing considerations "in favour of certainty and against rigidity".[40] In New South Wales, the principles developed for overturning a previous decision of the same court reflect the "plainly wrong" test.[41]

34. However, an unsettled question is what an intermediate appellate court should do when faced with a conflict between its own previous decision *and* that of a court of coordinate

[39] *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 [135].
[40] *Nguyen v Nguyen* (1990) 169 CLR 245 at 268.
[41] See *Totaan v The Queen* (2022) 108 NSWLR 17 at [72]-[75].

jurisdiction, neither of which it considers to be "plainly wrong". In several instances where this has occurred, the court has reconsidered the matter for itself.[42]

35. In *Kinghorn*, for example, the NSW Court of Criminal Appeal concluded that, "where there are differing decisions on the issue by various intermediate appellate courts, the Court is not constrained by" the "plainly wrong" principle (at [113]).

B. <u>The judgment below</u>

36. The CoA took the approach that it should adhere to its own previously expressed view if it considered neither *Wigmans CA* nor *Parkin* to be "plainly wrong": at J[23]. It asked whether the decision in *Wigmans CA* was "plainly wrong" (or as Leeming JA preferred, whether there were compelling reasons to depart from it), and held that it was not: at J[93], [124], [127], [140]. The Court declined to follow the decision in *Parkin*, but did not find that decision to be "plainly wrong" either: see J[94], [127], [146], [157].

37. In the leading judgment, Bell CJ (Gleeson, Leeming and Stern JJA agreeing) reasoned as follows.

38. <u>First</u>, Bell CJ embraced the reasoning of the Court in *Wigmans CA* (at [79]) that a power to issue a notice in the proposed terms was contrary to a **"fundamental precept of Pt 10"**. That precept was derived from this Court's dictum in *Mobil Oil* at [40] ([26] above). Both Bell CJ and Leeming JA emphasised that the terminology "fundamental precept" meant statutory context or a basic principle underlying the statute, a construction contrary to which was not lightly to be preferred (Bell CJ at J[97]-[98]; Leeming JA at J[141]-[158]). Thus, Bell CJ explained at [104], "[o]ne would not readily construe a provision such as s 175(5) of the CPA as authorising the issuing of a notice which turned the statutory scheme on its head by, in practical terms at least, requiring group members to opt in to the group prior to any settlement or judgment based on any such settlement".

39. His Honour supported this conclusion by characterising the relevant notice as being animated by two purposes: an explicit purpose of exhorting group members to either opt out or register; and an "unstated" purpose of "arm[ing]" the defendants and the plaintiffs with an argument to be made upon any settlement approval that unregistered group members should not be permitted to participate in the fruits of the settlement: at J[12]. Thus it was said the notice conferred a "forensic benefit" on the defendants and/or the representative plaintiffs by enabling them to rely on an argument that group members should be treated as "forewarned" of the risks of failing to take action: at J[105].

[42] See eg *Joyce v Grimshaw* (2001) 105 FCR 232 at [45]-[48]; *R v* ***Kinghorn*** (2021) 106 NSWLR 322 at [113], [130].

40. Second, Bell CJ held that the power in s 175(5) should be construed as being subject to an implied limitation derived "by reference to an inferred legislative intent that the power would not be used in a [particular] way" (at J[96]), in this case, "as not extending to the giving of a notice that was apt to give apparent judicial blessing" to an inevitable **conflict of interest**: at J[107]; contra Ward P at J[128]-[135].

41. The prospect of an "insoluble conflict of interest" was first raised by the CoA in *Haselhurst* (at [120]), a case in which the order sought had the effect of barring unregistered group members' claims contingently upon an in principle settlement being reached. It was then elaborated on by the Court in *Wigmans CA* (at [79], [120]-[121]). Here, Bell CJ held that the conflict manifested in an attempt by the representative plaintiff, in the interests of registered group members, to secure a settlement at the expense of extinguishing unregistered group members' claims: J[113]. His Honour dismissed arguments concerning the ever present possibility of conflicts in class actions by distinguishing the conflict in the present case as one "*which is created by the orders being sought*": at J[115].

42. Third, Bell CJ concluded by considering the **statutory text**, finding that, on its proper construction, s 175(6) constrained s 175(5) in two respects: first, the notice referred to in s 175(5) "must relate to an 'event'" and, second, the 'event' "must have occurred prior to the giving of the notice", that is, it cannot be a "future event": at J[32] and [119]. The proposed notification, Bell CJ reasoned, "is *not* of any event" but rather of "a present intention… to participate in settlement negotiations in a particular way": at J[112]. This was asserted to provide an independent basis for the correctness of *Wigmans CA*: at J[119]. Ward P expressly disagreed on this point, reasoning that it would be unduly technical to restrict the meaning of "event" to exclude the formation of an intention: at J[137].

43. While Ward P agreed in the Court's orders, her Honour did so on the basis that she did not consider the decision in *Wigmans CA* to be "plainly wrong" and agreed that, where two intermediate appellate court authorities are in conflict and neither can be said to be "plainly wrong", a court should adhere to its own previously expressed view: at J[127].

C. The CoA's errors: Part 10 of the CPA

44. On the reasoning path reflected in the principal judgment, the question of power boiled down to four steps. The CoA articulated what in substance it considered the parties sought to achieve (in the event that they reached an in principle settlement) by issuing the notice: J[104], [105], [109], [113], [116]. It concluded that this identified objective was illegitimate: J[104], [116]. It reasoned backwards from that analysis to determine that the giving of notice to tell group members about that desired objective was itself beyond

power: J[104], [107], [112]. And it supported that conclusion through its construction of the language of ss 175(5)-175(6): J[119]-[122]. Each of these steps bespeaks error.

C.1 Reasoning on power proceeded from the wrong end

45. The CoA adopted the wrong starting point. The correct starting point is that the Court *has power* to make the order that the notice telegraphed would be sought upon settlement approval (see [29] above). Relatedly, it has power to make orders inviting group members to register their interest to participate in a settlement and provide claim information prior to mediation.[43] Viewed through that prism, it cannot be said that it is inconsistent with the legislative scheme for group members to be given fair warning of parties' intentions to seek orders that can lawfully be made at an application for a settlement approval.

46. Chief Justice Bell gave two main justifications for why there was no power to approve notification foreshadowing the parties' intentions to seek the Settlement Order.

47. First, his Honour explained, the notice itself "is apt to shape the negotiations at the mediation" (and the discharge of the representative plaintiffs' duties during those discussions): J[69], citing *Wigmans CA* at [86]. But the artificiality of that reasoning is exposed by considering the counterfactual where notices are issued prior to settlement providing an opt out date and simply "exhorting registration" (a form of notice recognised in *Wigmans CA* to be within power: at [86]). In this scenario, the parties may still approach settlement discussions with an intention (contingent or final) to seek a Settlement Order at settlement approval. A deal may be concluded on the basis of a calculated assessment by both parties as to the prospects of that application. The effect of the notice then is not to substantively change the conduct, motivations or interests of the parties at mediation but simply to mask the parties' intentions from unrepresented group members and compromise the quality of data that is used to achieve the settlement. How is this consistent with procedural fairness for group members or the just resolution of the proceedings?

48. As explained above, s 175(5) is an ancillary power designed to afford group members procedural fairness in the making of other orders under the statutory scheme. Starting from the correct premise, i.e. that the Court *does* have power on approving a settlement scheme to make the orders foreshadowed in the notice, it is difficult to conceive how the power in s 175(5) is incapable of being used to inform group members of an intention to seek the making of an order that is within power. By approaching the question of construction from the wrong premise, the CoA has produced an unworkable distinction that does not accord

[43] CPA s 183; *Haselhurst* at [104]; *Wigmans CA* at [86].

with the legislative purpose of s 175. The risk that group members who have had their claims extinguished by a Settlement Order may have a "legitimate grievance" because they were not forewarned of the possible consequence of their passivity is a risk that the broad notice provisions are designed to prevent: see Ward P at J[137].

49. Second, Bell CJ suggested that a notice telegraphing an application for a Settlement Order is outside power because the notice itself will improve the parties' prospects of success on the application. Specifically, it will "arm" them with an argument to be deployed on the application that group members have been "forewarned". So much may be accepted, but this assumes that reliance on the giving of notice, and subsequent failure to take action, is itself improper. If the exclusion of unregistered group members from participation in a settlement can be legitimate, it is unclear why the exclusion of unregistered group members, supported by the fact that they were notified of their possible exclusion, is illegitimate. Further, this ignores the Court's continuing supervisory role (see [14]-[19] above). If the Court determines that there is any injustice in the parties' reliance upon an argument that unregistered group members were "forewarned", it need not make the Settlement Order, or can tailor it as appropriate. The CoA's approach fetters the Court's discretion to decide whether it is fair and reasonable to accept such an argument, by deciding, in effect, that in all cases it will be contrary to the statutory scheme.

C.2 Erroneous conclusions about illegitimate purpose

50. ***Mistaken articulation of and reliance on "fundamental precept":*** The Court's erroneous reliance on what was described in *Wigmans CA* as the "fundamental precept" of Pt 10 (J[96]-[97], [104]; see also J[153], [156]-[157]) skewed its interpretive analysis. First, for the reasons given at [20]-[27] above, the Court's expression of that "precept" was overbroad. Second, its top-down methodology was inconsistent with the orthodox approach of anchoring the interpretive exercise in the statutory text and not using high level statements of statutory purpose to dictate the analysis (see [10]-[13] above). Whilst the CoA variously characterised this "fundamental precept" as an aspect of "statutory context" (J[97] per Bell CJ) or as the "basic idea of the statute" (J[150] per Leeming JA), its dominant focus on this matter masked other purposes that undoubtedly permeate Pt 10 (chiefly, to provide access to justice through a binding determination of common claims) and reflected a failure to consider how far the notification provisions actually sought to advance any such objective (see [13] above).

51. The CoA's approach in this regard echoes that overturned in *Australian Communications*

and Media Authority v ***Today FM*** *(Sydney) Pty Ltd* (2015) 255 CLR 352. There, the Full Federal Court's interpretation of ACMA's statutory powers was informed by a "general principle" the Full Court took from *Chu Kheng Lim v MILGEA* (1992) 176 CLR 1 at 27 (*Today FM* at [26]-[27], [62]), and which this Court held had been "expressed too widely" (at [32]). This Court explained that it was an error to construe the applicable statutory provision in light of that "posited principle" (at [34], [63]). Writing separately, Gageler J noted the danger of extrapolating from the principle of legality to "create a common law penumbra around constitutionally imposed structural limitations on legislative power" (at [67]). By analogy here, motherhood statements about Pt 10's opt out regime should not be used to erect a purposive penumbra around provisions that would otherwise allow – consistently with another imperative of the scheme – broad exercise of judicial discretion and evaluative judgment ([14]-[19] above).

52. ***An "insoluble conflict of interest"?*** The CoA also relied heavily upon the proposition, sourced from *Haselhurst*, that prior notification of an intent to seek a Settlement Order in the event of an in principle settlement gives rise to an "insoluble conflict of interest" between registered and unregistered group members. Neither that proposition, nor its suggested consequences for the interpretive question before the Court, is compelling.

53. First, unlike in *Haselhurst* (see at [59], [105]), the proposed notice does not effect a "contingent extinguishment" of the claims of unregistered group members. Group members' claims will only be considered and dealt with at the time the Court is asked to approve a settlement, at which point the court's protective power to only approve a settlement that is "fair and reasonable to *all* group members", is engaged.[44] As Ward P found, the "making of the notification itself" does not give rise to any perceived conflict of interest, and it is hard to see any perceived conflict of interest "as insoluble at least until … an application for the order excluding unregistered class members is made" (J[129]).

54. Second, the CoA's focus on the purported "diametrically opposed" interests of registered group members ("to achieve a settlement") and unregistered group members ("to oppose any settlement") (J[108], [113]) warrants closer analysis. Unregistered group members do not necessarily have an interest in the matter not settling, including because:

    a. Group members who received and reviewed the notice but decided not to take action have remained unregistered with knowledge of the possible consequences. They need not have an interest in the matter proceeding to trial. They may not care either way.

[44] *Brewster* at [89] (emphasis in original), citing *ASIC v Richards* [2013] FCAFC 89 at [55].

For these group members, the possibility of a conflict is the reason to provide the notice, as it enables them to take (or not take) action on an informed basis.[45]

b. Group members who, despite the parties' best efforts at distribution, never become aware of the notice (or become aware after settlement approval) are in no different position whether the notice includes the proposed notation or not.

c. Group members who became aware of the notice after the registration date but before settlement approval (at which point a Settlement Order may validly be made) may still benefit from the settlement. Their status has not been altered by the notice. Further, the fact that they did not receive the notice, and therefore did not have "forewarning" of the proposed order, would neutralise the argument which Bell CJ identifies at J[12] and [105], such that the group member may well have grounds to seek an order that they can participate in the settlement proceeds.

55. The CoA's concern appears to be that the parties will negotiate on terms that exclude unregistered group members' claims – as Bell CJ held that "one element" of securing the settlement would be that the claims of unregistered group members "are extinguished": J[113]. This relies on two unstable assumptions. First, that the parties will mediate on the basis that the Court *will make* the order that they intend to seek. That is a dangerous assumption for any litigant to make, particularly given that the courts have rejected or amended settlement proposals which they considered gave rise to conflicts (see J[135]). Rational parties would build contingencies into the settlement for the contrary possibility, both in terms of risks to quantum and finality. Second, that the parties are negotiating down from a starting point where the claims of all members falling within the definition of the class are otherwise included (see e.g. *Haselhurst* at [122]). However, the parties do not have the data to make that assessment; that is the purpose of the registration process. The purpose of including the proposed notation foreshadowing a Settlement Order is to encourage the maximum number of persons to come forward before mediation, which in practical terms may have the effect of *increasing* the number of claims that are used to ground settlement negotiations.

56. Third, if there *is* any divergence of interest between registered and unregistered group members, it is not "created by" the notice (cf J[115]), but by the registration process, which may validly occur before mediation. And, of course, the parties may intend to move the Court for a Settlement Order even if they do not telegraph that to group members.

[45] *Wetdal* at [94]; *Komlotex Pty Ltd v AMP Ltd* [2020] NSWSC 504 at [210]; *Parkin* at [134].

57. Fourth, it was wrong for the Court to assume that it was necessarily illegitimate for the notice power to operate against the backdrop of a perceived or possible conflict of interest between group members and the representative party, or between different categories of group members. Representative proceedings are not the only field in which the law seeks to *recognise and manage conflicts* on the pragmatic basis that it is not always possible to remove them completely from the picture (see [17] above). For example, the statutory covenant in s 52(2)(d) of the *Superannuation Industry (Supervision) Act 1993* (Cth) assumes that there *is* a conflict between the trustee's duties to beneficiaries and other interests, and regulates what the trustee must do in that scenario. Further, a fiduciary may be excused from the "no conflict" rule by obtaining the beneficiary's fully informed consent.[46] Within Pt 10, and having regard to the unique features of representative actions, the notice regime in conjunction with the Court's supervisory powers operates as an appropriate functional substitute for "fully informed consent".[47]

58. ***Facilitating just resolution of proceedings through settlement:*** Rather than assessing the proposed notice by reference to the "fundamental precept" and a possibility that the proposed notice would engender a conflict of interest, the Court should have examined whether the notice would help facilitate a just resolution of the proceedings through settlement (see [29]-[31] above). On the evidence below, it would (see [8] above). In the context of a notice exhorting group members to register before a mediation, informing those group members of the parties' intention to seek a Settlement Order in the event of a settlement gives group members fair warning of a "matter for which the Court's leave or approval is required" (s 176(6)): a foreshadowed application at the settlement approval stage to settle the proceeding on terms providing settlement benefits only to registered group members.

59. Further, by transparently informing group members of this prospect, and thereby creating a greater imperative on group members to register, that notice helps to facilitate more meaningful settlement discussions (and increase the prospect that a defendant is willing to resolve the claim). This is because it enables the parties to have a better understanding of the potential quantum of the claim,[48] and reduces the risk that there is some large residue of group members who may come out of the woodwork and seek to share in any settlement

[46] See, eg, *Maguire v Makaronis* (1997) 188 CLR 449 at 466.
[47] *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at [40].
[48] Note again, by comparison, the "accurate assessment" mandated by s 177(3) prior to making any award of aggregate damages (see [22] above).

reached (Betts at [32], [34], [38]). In this respect, the notice addresses a different manifestation of the "free rider" problem: the scenario where a settlement is negotiated on a basis that seeks to achieve a fair result for an identified class, but then becomes something less than a fair resolution (either for the defendant, in the case of a per-head settlement figure, or for other group members, in the case of an aggregate figure[49]) when large numbers of group members come forward only after a successful settlement is reached.

60. None of this jars with this Court's emphasis in *Brewster* (at [68], [73]) that the occasion for making orders *distributing benefits and burdens* between group members is the proceedings' conclusion.[50] Nothing in Pt 10 precludes orders being made at an earlier stage to put machinery in place that facilitates a possible future division – which is what the proposed notice does here. Further, whether there are other possible ways to try and achieve similar outcomes (see Betts [42], cf [43]) does not alter the analysis (cf J[117]). Pt 10 does not require parties to adopt any one framework for resolving representative claims.

C.3 Mistaken analysis of text and rationale of notice provisions

61. The CoA's narrow construction of s 175(5) (at J[118]-[123], contra [137] (Ward P)) is supported neither by the provision's language nor by its broader statutory context.

62. Section 175(5) empowers the Court to "*at any stage*, order that notice of *any matter* be given to a group member or group members" (emphasis added). The structure of s 175 is divided into specific matters of which the Court has power to give notice (ss 175(1), (3) and (4)), and "any [other] matter", deliberately left at large, of which the Court has discretion to give notice (s 175(5)). Parliament could not contemplate, and did not intend to prescribe, every matter on which group members would require notice. Where Parliament has reserved a discretion to the courts with respect to this subject, it should be taken to have expected that those courts would develop their own procedures to meet the practical needs, developing and changing over time, of complex litigation involving parties representing group members (see [14]-[19] above). The flexibility which the legislature built into s 175 is manifest in the preservation of the Court's discretion to "dispense with compliance" with notice under subsection (1) in certain circumstances (s 175(2)), or to not require the notice in s 175(4) if "satisfied that it is just to do so". This flexibility is also consistent with the legislative history of the provision (see [31] above).

63. Section 175(6) provides that "notice under this section must be given as soon as practicable

[49] See *Parkin* at [15](c).
[50] See also, and contrast with the proposed notice in these proceedings, *Haselhurst* at [105]-[108].

after the happening of the event to which it relates". Its evident purpose is to ensure group members are afforded procedural fairness as soon as possible concerning an event that may affect their interests. To suggest that s 175(6) confines to historical "events" the matters of which group members can be notified is contrary to the very aims it seeks to promote.

64. The immediate statutory context for ss 175(5)-(6) indicates that the matters on which the statutory scheme contemplates the giving of notice are not uniformly backwards-looking. For example, s 175(1)(a) requires notice to be given of "the right of the group members to opt out of the proceedings before a specified date"; s 176(6) contemplates a notice in respect of a matter "for which the Court's leave or approval is required" and "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"; and s 176(7) concerns notices containing conditions, which must specify the "period, if any, for compliance". Each of these provisions envisages a notice that informs group members of events that may or will happen in the future, and provides an opportunity for the group member to be heard or to take some other step in respect of that future event. The ability to inform group members of their potential costs liabilities in certain circumstances provides another example of where a notice concerns a future or contingent event of which it is desirable that group members have advance notice.

65. Section 175(6) should not, and need not, be construed as imposing a rigid distinction between historical and future events. Notice "must be" given as soon as practicable after the happening of any event, but the assumption that there must be an event being notified (J[32]) is one that is unanchored in the statutory text. Subparagraph (6) may equally be read as providing that, "*where*" the notice relates to an event that has already occurred, the notice must be given by the stipulated time. That is, subsection (6) does not condition every notice, and where the notice concerns a "matter" that is not a past "event", s 175(6) is simply not engaged. This construction makes logical sense given that, where a notice pertains to a future, contingent or intended matter, there is no need to introduce a timing condition to prevent delay. It is also supported by the fact that s 175(6) hinges upon a different term ("event") from that deployed in ss 175(1) and (5) ("matter"). The choice of different expressions should be construed as intending different meanings.[51]

66. Alternatively, if all notices issued under s 175(5) "must" relate to a past "event", the proposed notice of an intention to seek an order about the consequences of failure to register can properly be characterised as "relating" to one or more of the following

[51] See, eg, *King v Jones* (1972) 128 CLR 221 at 266; *Paul v Cooke* (2013) 85 NSWLR 167 at [44].

"events": the Court's order that the notice be given; the fixing of a registration date; or the formation of the intention to seek the order (as to the latter, see Ward P at J[137]).

D. The CoA's errors: conflicts between intermediate appellate court authorities

67. This Court should not endorse the CoA's manner of resolving conflict between intermediate appellate court authorities – specifically, applying the "plainly wrong" test to each decision and, where neither reaches that threshold, giving priority to the Court's own previous decision. The appropriate approach is that reflected in *Kinghorn* ([35] above): the court should reach its own view on what the right answer is and follow the dictates of that.

68. The "plainly wrong" test seeks to achieve comity and uniformity (where applied inter-jurisdictionally) and certainty and consistency (where applied intra-jurisdictionally). But where the test is applied to two *conflicting* authorities, these countervailing considerations are, in effect, neutralised. Intra-jurisdictional consistency is achieved only at the expense of inter-jurisdictional comity, and vice versa. On the CoA's approach of preferring the former, an intermediate appellate court is required to "double down" on its own decision, even if it may not be the preferable one. In this setting, the more pressing imperative is that of reaching the correct legal conclusion. The imperative is particularly acute where the intermediate appellate court is interpreting uniform legislation or the common law, because special leave to the High Court cannot be guaranteed, and so that court's decision may be the last word on these issues of national significance.

69. Here, the correct legal conclusion is that the notice was within power.

Part VII: Orders sought

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.

Part VIII: Estimate of time for oral argument

70. The appellants estimate 2.25 hours for their oral argument, inclusive of reply.

Dated: 12 September 2024

Elizabeth Collins SC
T: (02) 9223 8541
ecollins@sixthfloor.com.au

Celia Winnett
T: (02) 8915 2673
cwinnett@sixthfloor.com.au

Bronte Lambourne
T: (02) 8239 0248
bronte.lambourne@banco.net.au

IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

ON APPEAL FROM

THE COURT OF APPEAL OF THE SUPREME COURT OF NEW SOUTH WALES

BETWEEN: **Lendlease Corporation Limited ACN 000 226 228**
First Appellant

Lendlease Responsible Entity Ltd ABN 72 122 883 185
as responsible entity for Lendlease Trust
ABN 39 944 184 773 ARSN 128 052 595
Second Appellant

and

David William Pallas and Julie Ann Pallas as trustees
for the Pallas Family Superannuation Fund
First Respondent

Martin John Fletcher
Second Respondent

ANNEXURE TO THE APPELLANTS' SUBMISSIONS

Pursuant to paragraph 3 of the Practice Direction No. 1 of 2019, the Appellants set out below a list of statutes referred to in the Appellants' submissions.

No.	Description	Version	Provision
1.	*Acts Interpretation Act 1901* (Cth)	Compilation No 37 (in force on 12 August 2023 to date, accessed on 9 September 2024)	S 15AA
2.	*Civil Procedure Act 2005* (NSW)	Current version for 1 July 2024 to date (accessed on 9 September 2024)	S 162 Ss 165 – 166 S 168 Ss 170 - 179 S 183

No.	Description	Version	Provision
3.	*Federal Court of Australia Act 1976* (Cth)	Compilation No 57 (in force on 12 June 2024 to date, accessed on 9 September 2024)	S 33X S 33ZF
4.	*Superannuation Industry (Supervision) Act 1993* (Cth)	Compilation No 124 (in force on 10 July 2024 to date, accessed on 9 September 2024)	S 52
5.	*Supreme Court Act 1986* (Vic)	Authorised Version No 110 incorporating amendments as at 29 March 2024	S 33ZG