HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

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

CONTRADICTOR'S SUBMISSIONS

Part I: Certification

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

Part II: Statement of issues

2. The questions posed in paragraphs 1 and 2 of the appellants' (**Lendlease's**) submissions filed 12 September 2024 (**AS**) identify the issues raised by the ground of appeal.

Part III: Section 78B notices

3. Notice is not required under s 78B of the *Judiciary Act* 1903 (Cth).

Part IV: Facts

4. In addition to the matters identified by Lendlease (AS [5] – [9]), the following facts are relevant to this appeal.

5. Evidence before the Court below outlined established methods for settling open class actions that do not require the giving of a notice of intention to bind unregistered group members to a settlement in which they are unable to participate.[1]

6. Mr Betts's evidence was that there are techniques for structuring a settlement of an 'open' class proceeding in the absence of class closure orders whilst ensuring a defendant achieves a level of finality by precluding, to the extent possible, the need for the defendant to defend similar subject matter claims. These include: (i) two tiered settlements, which expressly provide for a notional settlement amount for unregistered group members; (ii) settlements which provide an overall pool from which registered and unregistered group members may draw equally; and (iii) aggregate settlements in which a minimum and maximum settlement range is set and the ultimate settlement sum is determined by the number of claims accepted by a settlement administrator as eligible to participate in the settlement.[2]

7. The proposed notice included[3] and supplemented in important respects the notation set out in the question to the Court of Appeal.[4] Notable features of the proposed notice are:

   a. the proposed notice is intended to serve as the compulsory notice, required pursuant to s 175(1)(a), informing group members of the commencement of the proceedings and their right to opt out of the proceedings. That "right" is identified as one of three options[5]: with "Option A" being to register "*to **participate** in the class action*" (emphasis added); "Option B" being opting out; and "Option C" being "*do nothing*";

   b. group members are told that "*Registering to **participate** will ensure*" (emphasis added) that they "*receive any money*" to which they "*may be entitled*",[6] that they should "*register*" their claim if "*you wish to participate in the class action and potentially receive some compensation*"[7] and they are "*strongly encouraged*" to register "*so as not to risk missing out on the benefit of any settlement*";[8]

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[1] Affidavit of Jason Lawrence **Betts** affirmed 30 August 2023 at [41] (Appellants' Book of Further Materials (**ABFM**) 33).
[2] Betts at [42] ABFM 33-34.
[3] Appendix A to Court of Appeal's reasons, Core Appeal Book (**CAB**) 77 [10].
[4] J[2] CAB 15.
[5] CAB 67.
[6] CAB 67.
[7] CAB 75 [1].
[8] CAB 77 [13].

c. group members are told that if they were to do nothing and a settlement occurs, they may or may not get another opportunity to register, which would be a matter for the Court, there can be no guarantee that a further opportunity to register will arise[9] and they will remain "*as Group Members … for all purposes, but may not be entitled to receive a distribution payment from any settlement*"; [10]

d. conversely, group members are told that the representative plaintiffs seek relief for them, including damages to compensate the group members for the loss which the representative plaintiffs allege group members suffered as a result of their investment in Lendlease Securities;[11] and

e. the notice refers to a mediation[12] and the possibility of settlement[13] but is silent as to any conflict the representative plaintiffs will confront at mediation in representing the interests of unregistered group members if Lendlease pursues its foreshadowed course of offering a settlement which will benefit registered group members only and bind unregistered group members to that outcome.

Part V: Argument

A. First Issue: The Proposed Notation is Beyond Power

8. There is no issue in these proceedings that **Part 10** of the *Civil Procedure Act* 2005 (NSW) (**the CPA**) and **Part IVA** of the *Federal Court of Australia Act* 1976 (Cth) contain only two express powers to bind group members to a final outcome: at the time of approving a settlement pursuant to s 173 (and s 33V of Part IVA); or by judgment following a hearing pursuant to s 177 (and s 33Z of Part IVA).

9. Lendlease accepts that s 183 of the CPA (s 33ZF of Part IVA), being the general power of the Court to make orders the Court thinks appropriate or necessary to ensure that justice is done in the proceedings, does not permit an order the effect of which is to bar a group member from participating in a settlement by reason of a failure to register their interest to so participate (AS[7]). Lendlease does not seek to challenge the correctness of ***Haselhurst*** *v Toyota Motor Corporation Australia Ltd t/as Toyota Australia* (2020) 101 NSWLR 890 (J[58] (CAB 33), AS[7]) which decided this point.[14]

10. That view was reached expressly on the basis that it accords with this Court's decisions in ***Mobil Oil*** *Australia Pty Ltd v State of Victoria* (2002) 211 CLR 1 at 32 [40] (per

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[9] CAB 67.
[10] CAB 77 [12].
[11] CAB 71 [17].
[12] CAB 68 [3], 76 [5] and 77 [12].
[13] CAB 67, 69 [5(b)], 69 [11], 72 [25(b)] and [26], 75 [2]-[5], 76 [8], 77 [10]-[13].
[14] Per Payne JA at [52], Bell P (as his Honour then was) agreeing (at [1]), Emmett AJA agreeing (at [138]), Leeming and Macfarlan JJA agreeing (at [19], [20]).

Gaudron, Gummow and Hayne JJ), that it follows from the "opt out" procedure of Part IVA that group members need take no positive step in the prosecution of a representative proceeding to judgment to gain whatever benefit its prosecution may bring; and *BMW Australia Limited v* ***Brewster****; Westpac Banking Corporation v Lenthall* (2019) 269 CLR 574 at 603 [59] (Kiefel CJ, Bell and Keane JJ) that it is incongruous to read a power into s 183 when other provisions of Part 10 provide for that power but operate at the conclusion of the proceedings.

11. That group members need not take any positive step in the prosecution of a proceeding to gain the benefits of its outcome is consistent with the role of the representative plaintiff as having the conduct of the proceeding on behalf of group members and owing fiduciary duties to them. Those duties exist throughout the life of the proceeding for so long as the representative plaintiff continues to pursue the litigation in a representative capacity. For that reason, the Court has power to replace a representative plaintiff if they are not able adequately to represent the interests of group members (s 171(1)) and can stay or declass a proceeding (ss 165 and 166), including because that is the solution contemplated under the statutory scheme if it transpires that the cost of identifying group members may be simply too high or too difficult compared to the value of the claims they seek to prosecute in a representative capacity.[15]

12. How, then, does s 175 – a provision concerned with notifying group members of events as soon as practicable after the event to which the notice relates – empower the Court to set the stage for approving a settlement which has been negotiated on the basis that those group members who have failed to register their interest prior to a mediation are barred from participating in the resulting settlement and bound to that outcome? That is a scenario in which an opt out scheme would be converted to one in which a group member must opt in to be compensated.

13. The text of s 175, the context of Part 10 and the purpose of the legislative scheme confirm that the Court is not empowered to issue a notice which would have that effect.

A.1 Text: the constraints contained in s 175

14. The Chief Justice correctly observed (J[32], J[119] (CAB 25, 53-54)), that all notices issued pursuant to s 175 are constrained by the two elements contained in s 175(6): *first*, the notice must be related to an "event"; *secondly*, the event must have occurred prior to the giving of notice.

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[15] *BMW Australia Ltd v* ***Brewster****; Westpac Banking Corporation v Lenthall* (2019) 269 CLR 574 at 604 [65] (per Kiefel CJ, Bell and Keane JJ).

15. Those constraints highlight that s 175 is fundamentally a pragmatic provision. It operates to enable communication to group members, sanctioned by the Court, which gives them notice, as soon as practicable, of "matters" which affect them.

16. Subsections 175(1), (3) and (4) are matters that may or must be the subject of notice. Each of those matters is in the nature of an event in the proceeding, prompt notification of which is desirable because they are matters which affect group members' claims. These include: the fact of commencement of a representative proceeding and a group member's right to 'opt out' of the proceeding by a specific date which has been fixed by the Court pursuant to s 162 (175(1)(a)); the fact of an application to have the proceeding dismissed for want of prosecution (175(1)(b)); that the representative plaintiff seeks leave to withdraw as representative (175(1)(c)); that money has been brought into Court in answer to a cause of action on which the representative proceeding is founded (175(3)); that application will be made to approve settlement of a proceeding (175(4)).

17. Subsection 175(5) then provides for notification of any other "matter". All of the preceding subsections of s 175, and subsection 175(6) which follows immediately thereafter, make plain that a "matter" that is to be notified is properly understood as an event which has occurred and which affects group members' claims.

18. The formation of an intention by one party to a representative proceeding, or perhaps both parties, that *if* a settlement is struck *then* they will apply for an order which *may* be granted and which would have the effect of binding unregistered group members to a settlement in which they cannot participate, is <u>not</u> a "matter" for the purpose of s 175. It is a state of mind of one or both parties, inherently subject to change (especially, it is to be expected, in the forum of mediation), to bring an application, the outcome of which is entirely contingent on facts not yet in existence (settlement quantum, number of participants, scheme of distribution).

19. The content of the proposed notation is contingent, hypothetical and, by reason that it is a prediction as to a future event, inherently uncertain. The proposed notation may properly be described as giving group members notice of a "non-event".

20. His Honour, Bell CJ was correct to conclude that s 175 does not empower the Court to sanction a notice on the terms sought by Lendlease: the proposed communication does not give notice of an "event". His Honour correctly identified that, in and of itself, this was reason enough to determine that s 175(5) does not empower a Court to issue a notice in the form urged upon it (J[119] CAB 54).

21. Her Honour Ward P expressed some concern that the Chief Justice's reasoning introduces a "*somewhat technical distinction*" between an "*event*" and the formation of

an intention (J[137] CAB 58-59). But the distinction is far from technical. It is practical. It differentiates between properly giving notice of matters or events, of which a group member might reasonably expect to be informed (being matters which in fact have occurred and can affect their claims), and impermissibly signalling a proposed and contingent forensic strategy which may be pursued by one or more of the parties as a method to "forewarn" (J[105] CAB 49) group members that Lendlease, and perhaps the representative plaintiffs, will seek to have unregistered group member claims extinguished in the event of settlement, merely because their claims are unregistered prior to mediation.

22. Lendlease seeks to expand the potential subject matter in respect of which a notice may be given pursuant to s 175(5) in a way which is unconstrained by suggesting that s 175(6) should not be understood to "confine to historical events" matters of which notice can be given (AS[63]–[64]). The difficulty with that submission is that is *precisely* the effect of s 175(6), in terms. It applies to all notices issued pursuant to s 175. It requires such notices to issue as soon as practicable *after* the event to which the notice relates.

23. It is not correct that s 176(6), which contemplates notice in respect of which Court approval is required, indicates that notices are not confined to matters or events which have happened (AS[64]). Plainly enough, s 176(6) is concerned with the giving of notice in respect of events which have happened in a representative proceeding (an application for settlement approval being filed, an application by a representative plaintiff to discontinue proceedings, etc) and in respect of which Court approval is required.

24. Putting to one side the detail of the proposed notice and its effect on the scheme created by Part 10[16] (which is dealt with below), to the extent the notice purports to effect the "notation" (at CAB 77 [10]), what is proposed by Lendlease and the representative plaintiffs is no more than a communication which lays down a marker as to Lendlease's current thinking in respect of steps it might take depending on whether an in-principle settlement is reached at a mediation that is yet to happen. The notice indicates that the representative plaintiffs may, or may not, share in that intention. The representative plaintiffs' indefinite position vis-a-vis unregistered group member participation in any settlement of the proceeding heightens the ambiguity as to the "matter" of which group members are to be notified.

25. What is clear, is that the purpose of laying down the marker is to facilitate the parties, prior to any mediation even being commenced, to go on to make the ultimate submission

[16] Adopting the language of Bell CJ at J[104] CAB 49 – by turning the statutory scheme on its head.

at a settlement approval application that it is fair and reasonable for unregistered group members to receive nothing upon settlement of the proceeding because those who failed to register were not, and need not have been, taken into account in arriving at a settlement figure at mediation.

26. To understand why s 175 does not empower the Court to sanction giving notice of Lendlease's, and, or, the representative plaintiffs', intention in respect of a hypothetical settlement, the context of the statutory regime in which s 175 resides must be considered.

A.2 Context: Lendlease's argument is inconsistent with the legislative scheme

A.2.1 The role and responsibilities of the representative plaintiff under Part 10

27. Part 10 establishes a scheme which permits one party – a representative plaintiff – to pick up the claims of 7 or more persons (group members) that are in respect of, or arise out of, the same, similar or related circumstances (s 157), and to proceed to prosecute those claims on behalf of the group members, provided the representative plaintiff has sufficient standing to bring their own claim against the nominated defendant (s 158).

28. The consent of group members to a representative plaintiff prosecuting their claim is not required (s 159).

29. This is why it is fundamentally important that a representative plaintiff, having taken on "a limited form of statutory agency"[17] in acting as the representative of group members *qua* common claims, act in the best interests of all group members. The representative plaintiff *elects* to represent the class by reason of the choice they make in defining the criteria for group membership at the time of commencing a class action, which they may subsequently apply to amend if they no longer wish to represent a subset of that class (as the Court of Appeal observed in ***Wigmans*** *v AMP Limited* (2020) 102 NSWLR 199 at 223 [130]).

30. Such is the nature of the opt-out scheme: it is the representative plaintiff who is active and group members who are passive at the point of commencement of a class action proceeding. On and from the moment of its commencement, to pick up the language of Gageler J (as his Honour then was), a representative proceeding:

> … is permitted to be continued by the representative party who commenced it so as to result in a judgment which, for better or for worse, binds all group members who have not exercised a right to opt out of the proceeding. The representative party takes the group members in tow, and they sink or swim together.[18]

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[17] ***Elliott-Carde*** *v McDonald's Australia Limited* (2023) 301 FCR 1 at 14 [54] per Beach J.
[18] *Brewster* at 619 [108].

31. Having picked up the risk of prosecuting the claims of group members, the representative plaintiff cannot shift that risk back onto the class as and when it suits the parties to do so over the life of the proceeding. The burden of prosecuting group member claims, for the benefit of group members, is an obligation which rests with the representative plaintiff. That is an inherent and necessary feature of an opt-out regime.

32. The Court of Appeal in *Wigmans* correctly described the opt-out premise of Part 10 as a fundamental precept of the legislative scheme.[19] It correctly identified *Mobil Oil* and *Brewster* as confirming that proposition.[20] None of the steps referred to at AS[20] – [25] suggests otherwise – they do not involve a representative plaintiff pursuing an outcome in which the claims of some group members are arbitrarily extinguished.

33. The obligation of a representative plaintiff under an opt out scheme, in picking up the common claims of others, is then to act in the interests of group members by pursuing those common claims. Necessarily, that requires the representative plaintiff not to adopt a position which engenders a conflict for them in the prosecution of common claims. Nothing in Part 10 empowers a representative plaintiff arbitrarily to trade in some of those claims for the benefit of others. This was the point emphasised by the Court of Appeal in *Wigmans*.[21]

34. The concept of "*free riding*" (AS[16]) forms no part of this debate: that is an issue which involves some group members bearing the burden of the costs of the class as a whole for the benefit of the whole. The cases addressing that concern are not authority for the proposition that legitimate group member claims may be extinguished if they are not registered.

A.2.2 Part 10: conflicts of interest

35. The Full Court of the Federal Court in ***Parkin*** *v Boral Ltd* (2022) 291 FCR 116 took the view that *Wigmans* was "*plainly wrong*".[22] Foundational to the reasons in the joint judgment is the belief 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.[23] (Emphasis added).

36. The respondents' submissions, filed 19 September 2024, (**RS**), likewise rest upon the view that it is permissible for a representative plaintiff to pursue claims under Part 10

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[19] *Wigmans* at 213 [79].
[20] Ibid.
[21] *Wigmans* at 221 [118] – [121].
[22] *Parkin* at 145 [109]-[110] (Murphy and Lee JJ, with whom Beach J agreed at 153 [156]).
[23] *Parkin* at 148 [126].

even when the representative plaintiff is saddled with a conflict between their own interests and those of a subgroup of the class they represent.[24]

37. The Full Court's decision in *Parkin* and the respondents' position in this Court is that such actual or potential conflicts are almost always present under the statutory scheme.[25]

38. The Full Court reasoned that the statutory regime contemplates that such conflicts are to be addressed by the representative plaintiff's duty not to act contrary to the interests of group members and "*critically, by the Court exercising its protective role in relation to group members' interests*" (*Parkin* at 148 [126]). Consistently with the Full Court's approach, the respondents submit that any conflict they may have as a result of issuing the proposed notice are to be managed by the Court (RS[10]).

39. The provisions of Part 10 (and their analogues under Part IVA) do not support those views. On the contrary, the provisions underscore the point that if a representative plaintiff cannot act in the interests of group members, they should cease to represent them. Commonality of interest between the representative plaintiffs', and group members' claims, not divergence, is key to the statutory regime.

40. *Section 166(1)(d)* (*s 33N*) empowers the Court, of its own motion, to order the discontinuance of a proceeding as a representative proceeding if it is satisfied that it is in the interest of justice to do so because the representative party is not able to adequately represent the interests of group members. A representative plaintiff whose interests conflict with the class, or part of the class, that they represent would be unable to adequately represent those persons' interests. It would be passing strange if the proposed notice could be issued, with its inherent assumption that it is permissible for the representative plaintiffs to attend a mediation the outcome of which will be to provide nothing for group members who failed to register, when the effect of the notice would be that the Court's power under s 166(1)(d) to discontinue the proceeding as a representative proceeding is then engaged.

41. *Section 171* (*s 33T*) empowers the Court, on an application by a group member, to substitute the representative party, and make such orders as it sees fit, if it appears to the Court that the representative party is not able to adequately represent the interests of the group members. This too contradicts the notion that a representative plaintiff may continue to act in a representative capacity in relation to the claims of group members whilst operating under a conflict in pursuit of those claims.

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[24] RS[9].
[25] *Parkin* at 148 [126], RS[9].

42. Contrary to the view expressed in *Parkin* and by the respondents, these are provisions which indicate it is not the role of the Court to *manage* ongoing conflicts of interest on the part of a representative plaintiff in relation to their prosecution of common claims. These provisions confirm that the Court is empowered to *terminate* a plaintiff's representative function where such conflicts exist.

43. *Section 173* (*s 33V*) belies the *Parkin* approach to the conflict engendered by the proposed notice. Section 173 empowers the Court, exercising its supervisory jurisdiction, to review the terms of a settlement to determine whether it is fair and reasonable as between the parties to a representative proceeding and as between group members such that settlement should be approved.[26] The provision cannot properly be construed as a tool for managing conflicts of interest on the part of a representative plaintiff during mediation (*contra* RS[10]). As a practical matter, on the hearing of a settlement approval application, it will be difficult for a Court to know how a conflict, as between registered and unregistered group members, affected the representative plaintiff at mediation. The Full Court in *Parkin* acknowledged that an aspect of the Court's role on hearing an application for settlement approval is to be alive to the possibility that a proposed settlement may reflect conflicts of interest.[27] That is a task which indicates that a Court will *refuse* a settlement which is infected by such conflict. It does not suggest that a Court will in some (unspecified) way *manage*, retrospectively, a conflict which was present during a mediation.

44. In *Parkin*, the Full Court focused upon the accepted view that a settlement may be approved even though it provides for differentiated outcomes as between group members.[28] The Full Court correctly identified that a representative plaintiff has authority (limited by the need for Court approval of any settlement) to settle a class action in a way which provides for a particular distribution of the settlement proceeds, and in a way which may result in some group members receiving nothing.[29] So much may be accepted. But, differentiated outcomes for the class must reflect a process in which the representative plaintiff has properly exerted themselves to obtain a proper outcome for all group members – that is, one which reflects the relative strengths and weaknesses of their position. To do otherwise would fail to ensure fairness *inter se*. That there may be

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[26] Authorities in support of this proposition are numerous but see, for example, *Australian Competition and Consumer Commission v Chats House Investments Pty Limited* (1996) 71 FCR 250; ***Darwalla*** *Milling Co Pty Ltd v F Hoffman-La Roche Limited & Ors (No. 2)* (2006) 236 ALR 322.
[27] *Parkin* at 149 [130].
[28] *Parkin* at 148 [127].
[29] *Parkin* at 148 [128].

differentiated outcomes under a settlement does not validate a representative plaintiff acting against the interests of a particular subset of group members. It is in the common interests of all group members that such an outcome be obtained where there is a proper basis for distinction between group member claims.

45. The mere fact that a group member has failed to register their interest to participate in a settlement is not, in and of itself, a proper basis for a representative plaintiff to seek to negotiate a settlement of their claim for no value. Unregistered group members in the proceeding below are, by definition, persons who have suffered loss or damage by reason of Lendlease's alleged conduct (AS[5]). For the representative plaintiffs to seek to negotiate an outcome for such group members at mediation under cover of a notice which, as a prelude to mediation, announces an intention that the outcome be that unregistered group members receive nothing but are bound to a settlement of their claims, indicates a conflict of interest that is "*real, immediate and direct*".[30] It delineates in a way between registered and unregistered group members which is unprincipled, with the effect that the claims of unregistered group members are made a bargaining chip to be used to gain a benefit for registered group members.

46. *Section 174* (*33W*) further reinforces the view that a representative plaintiff cannot bind a class to a final outcome vis-à-vis a defendant if the outcome has been obtained as a result of a conflict of interest between the representative plaintiff's own interests and those of group members. The provision requires that a representative plaintiff obtain the Court's leave if they are to settle their own claim, in whole or in part, at any stage of a proceeding. Notice must be given to group members of any application for leave and substitution orders may be made. The Court must be satisfied that sufficient time has been given to group members to bring a substitution application and must determine any substitution application brought by a group member, prior to approving settlement of the representative plaintiff's claim. This ensures, so far as possible, that where a representative plaintiff has acted in their own interest to settle their individual claim, the outcome is binding upon them but not on group members.

A.2.3 Absence of any express power in Part 10 facilitative of the parties' position

47. The absence of any provision in Part 10 which confirms that a representative plaintiff may act as representative for group members whose claims conflict with those of their representative (subject to the management of the Court or otherwise), also contradicts

[30] *Wigmans* at 221 [120].

the Full Court's approach in *Parkin* and that of Lendlease and the respondents on this appeal.

48. As does the absence of any provision which identifies how the legal practitioners for the representative plaintiffs can manage their own position in relation to such a conflict. As the Court of Appeal pointed out in *Wigmans*, the conflict that would confront the legal representatives of a representative plaintiff at mediation when it has been foreshadowed that any settlement will be predicated on the defendant (and possibly the representative plaintiff) seeking an order prohibiting unregistered group members from participating in, but binding them to, the settlement, cannot be resolved by appointing additional solicitors or counsel for unregistered group members. That is because the legal representatives will not have the informed consent of all group members to the legal practitioners so acting whilst subject to a conflict.[31]

A.2.4 Conclusion as to context

49. In the judgment below, the Chief Justice was correct to conclude, consistently with *Brewster*, that the apparently liberal language in s 175(5) which refers to giving notice of "*any matter*" at "*any time*", cannot be construed more liberally than the statutory context of Part 10, will permit (J[96] CAB 46).

50. Understood in context, s 175(5) does not permit Lendlease to arm itself with the forensic benefit of attending a mediation on the basis that all group members are on notice that any resulting settlement will be predicated on an application for orders mandating that unregistered group members obtain nothing from the settlement and their claims will be extinguished. Much less does it permit the representative plaintiffs to draw any comfort from such notice having been given to group members.

A.3: Purpose: the function of a notice issued pursuant to s 175

51. This conclusion is fortified when the purpose of Part 10 generally, and the issuance of a notice pursuant to s 175 specifically, are considered.

A.3.1 The purpose of Part 10 is to facilitate access to justice

52. The purpose of the class action regime is to facilitate access to justice by removing some of the barriers for persons who seek redress through the Courts by allowing their claims to be pursued by a representative plaintiff.[32] The "opt out" regime was selected in 1994 for Part IVA by the Commonwealth, acting on the recommendation of the Australian Law Reform Commission,[33] and implemented in New South Wales in Part 10 in 2011.

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[31] *Wigmans* at 221 [121].
[32] *Brewster* at 611 [82] – [84] per Kiefel CJ, Bell and Keane JJ, 615 [97] (Gageler J), 639 [177] (Edelman J).
[33] ALRC, Report No 46, *Grouped Proceedings in the Federal Court* (1988) at 55-56 [127].

The reasons for the recommendation included promoting consistency and efficiency[34] and protecting and preserving the rights of members of the group who may not have the opportunity to mount their own case because of cost and other barriers.[35]

53. It is anathema to that purpose to facilitate a representative plaintiff, who has drawn a class which they agree to represent so broadly that its members cannot be readily identified, to bargain away the claims of unregistered group members for no reward in order to settle a proceeding for the benefit of registered group members. To do so would be to impede rather than enhance access to justice for unregistered group members. Issuing the proposed notice would serve only to facilitate an exclusionary outcome. It would encourage the manipulation of a class definition to maximise the number of claims that may be extinguished for no value, in order to obtain an outcome for a select few.

54. That conclusion can be drawn all the more confidently by reason of the evidence below that there are recognised ways of settling a class action without extinguishing unregistered claims.

55. As was recognised by Bell P (as his Honour then was) in *Haselhurst*, if difficulty in ascertainment of the identity of group members is truly an issue, a registration process can be harnessed not to extinguish the claims of unregistered group members' claims, but to amend the definition of group membership so that upon settlement unregistered group member claims are undisturbed.[36] That would be consistent with the purpose of Part 10. As his Honour correctly noted, it would avoid the risk of a defendant 'overpaying' for a settlement, if that is a genuine concern,[37] without impermissibly shifting the risk of overpayment on to the class.

56. If, on the other hand, the defendant's primary concern is certainty as to the finality of the litigation, then the defendant should pay a higher sum to settle the case adopting any one of the methodologies (a tiered settlement, a pooled settlement sum, settlement based on a range) which have been identified as available methods of achieving finality absent class closure. Plainly enough, obtaining settlement on that basis is likely to prove more expensive for the defendant. But that is the price to be paid *by a defendant* for finality. It is not a price to be borne by unregistered group members.

57. In this connection, the point is well made that if a class is so large that a class action cannot be settled, so be it. It is not the role of the Courts to act as "*mere dispute clearing*

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[34] Id at 50 [109].
[35] Id at 51 [110].
[36] *Haselhurst* at 895 [17].
[37] Ibid.

houses".[38] Nothing in Part 10 empowers the Court to issue a notice in the form proposed by the parties, including the perceived desirability of achieving a settled outcome by extinguishing unregistered group members' claims for no-compensation, on a basis that is arbitrary and unrelated to the value and merits of those claims.

58. Lendlease submits that it is unclear why the exclusion of unregistered group members, supported by the fact that they were notified of their possible exclusion, is illegitimate (AS[49]). There are several answers to that contention.

59. *First*, as has already been stated, in the primary proceeding group members *by definition* have suffered loss and damage. The quantum of the totality of the claims and each group member's claim is unknown – that is the trigger for seeking registration in the first place. The notice is preemptive of any mediation, let alone an in-principle settlement. Nothing in Part 10 empowers the Court to commence the process of filtering claims into those which will be compensated and those which will not by issuing a note of warning. It is not the purpose of Part 10 to have the Courts triage group members to facilitate a settled outcome through the shifting of risk. That is why it is illegitimate to issue a notice in the terms proposed and then to proceed to approve a settlement on the basis that group members were "informed" of the prospect of a settlement in which their failure to register is determinative as to whether they are to be compensated for their loss. The Court is not empowered to cause the issue of a notice that prophesizes that outcome.

60. *Secondly*, it runs counter to the purpose of Part 10, being to gain access to justice for group members, by setting the wheels in motion for the parties so that the prospect of compensation for a subset of group members can be removed on an arbitrary basis – that is not a just outcome for those group members who fail to register their interest to participate in the outcome mediation. A registration process can be a useful tool to assist a representative plaintiff properly to fulfil their duty to pursue group members' claims. But it cannot serve as a substitute for pursuing those claims. To illustrate the point: there is a readily appreciable difference between using a pre-mediation registration process as the basis for extinguishment of unregistered group member claims in a proposed settlement (being the latent purpose of the proposed notice), and conducting a post-settlement approval registration process in an effort to distribute a settlement fund which has been negotiated on the premise that something must be provided for group members whose claims are unknown or yet to be notified to the parties. The former involves the abandonment of unregistered group members' claims by their representative, whilst the

[38] *Haselhurst* at 896 [15].

latter is an attempt by the representative to compensate as many group members as possible. AS[56] ignores this distinction.

61. *Thirdly*, Lendlease adopts a series of assumptions as to the circumstances of unregistered group members which might result in an outcome consistent with the purpose of Part 10 (AS[54]). On examination, minor disruption to those assumptions result in an outcome that is contrary to the purpose of the legislative scheme:

    a. Contrary to AS[54(a)]: there may be group members who receive the proposed notice but take no action because they do not understand the notice (as to which see the submissions at A.3.2 below). They may care about the unfairness of the parties proposed course of action if they understood Lendlease's intention (and the representative plaintiffs' possible intention) but they do not glean from the proposed notice the real risk to them or other group members;

    b. Contrary to AS[54(b)]: assume there are group members who do not become aware of the parties' proposed notice, and that those group members do not become aware of a subsequent settlement notice. They *are* in a worse position by reason of the proposed notice for the very reason that they will be treated as though they have been forewarned of an outcome that destroys their claim for no value (as was the case in *Farey v National Australia Bank Limited* [2016] FCA 340);

    c. Contrary to AS[54(c)]: consider the case of a group member who receives the proposed notice after the registration date but before the proposed settlement approval. That is the very group member whose claims the parties seek to target by stating in the notice that "*there may, or may not, be another chance to register*" and that there could be "*no guarantee*" of an opportunity to participate in any settlement that is approved if their claim is unregistered prior to mediation. It would be fanciful to think that unregistered group members in that predicament are not at risk of facing an argument on a settlement approval application that they cannot participate in the putative settlement on the basis of the proposed notice.

A.3.2 The purpose of issuing a notice pursuant to s 175

62. As to the more specific purpose of the notice provision, the Full Court has held in respect of the cognate provision under Part IVA that the purpose of the provision is "*to find the most economical means of ensuring that the group members are informed of the proceeding and their rights*".[39]

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[39] *Femcare Limited v Bright* (2000) 100 FCR 331 at 349 [74]; ***King v GIO** Australia Holdings Limited* [2001] FCA 270 at [15].

63. The parties' proposed notice does not fulfil that statutory objective. It does not inform group members of any rights they have in respect of the parties' intention to seek a class closure order if a settlement is achieved. It equivocates, rather than confirms whether there will be a further opportunity for group members to register to participate in any resulting settlement. It simultaneously tells group members that the representative plaintiffs are pursuing group members' claims for damages, but that the representative plaintiffs may argue (at a time unknown) that group members should be bound to a settlement outcome that disentitles them to any compensation and extinguishes their claims if they have failed to register their interest prior to mediation.

64. It has been suggested that in order for a notice to achieve the purpose of s 175, the Court must eschew complacency in issuing a notice on the assumption that sending complex information in written form is the best way of communicating information to group members, noting that the issue is one which merits further consideration and debate (***Lenthall*** *v Westpac Banking Corporation* ***(No 2)*** (2020) 144 ACSR 573 at 588 [49] – [50] (per Lee J)).

65. *Lenthall (No 2)* was a consumer class action, which brings with it particular concerns as to the ability of the group member audience to digest the contents of a complex notice to be issued under the Part IVA equivalent of s 175.[40] But the concern that a notice may be misleading or confusing to group members has arisen in at least one shareholder class action.[41] In *King v Gio*, the very cause of the Full Court's concern was that a notice which had issued would be misconstrued as indicating that the representative plaintiff's solicitors would act for the group members in respect of their own individual damages claims. It was accepted that a concern of that type had the potential to affect a group member's decision as to their right to opt out and required prompt correction.[42]

66. The Court of Appeal correctly held that there is an inferred legislative intent that the power of the Court to cause a notice to be issued pursuant to s 175 of the CPA could not be used to authorise, for example, a misleading notification (J[96] CAB 46). That proposition was accepted by Lendlease during the hearing of the appeal below: it is beyond the power of the Court to issue a notice that is misleading either in express terms or by omission.[43]

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[40] *Lenthall (No 2)* at 587 [45] – [48] (Lee J).
[41] *King v GIO* at [14].
[42] *King v Gio* at [15] – [16].
[43] T13.7-11.

67. The proposed notice is misleading because, although the question to the Court of Appeal was put on the basis that inclusion of the proposed notation informs group members of the "*right to register to participate in any settlement*", the proposed notation in fact co-opts s 175 to convert the opt out regime to one which imposes a positive obligation on group members to opt in by registering "*to participate in the class action*" or risk extinguishment of their claims.

68. The proposed notice misleads because it does not tell group members of the argument that Lendlease and potentially the representative plaintiffs will make at the time of seeking approval of any settlement - that is, that those who did not choose Option 1 and did not opt out should not be permitted to participate in the settlement because they had been given the chance to opt in and had not taken it.[44]

69. Further, at the same time as it informs group members that it is the role of a representative plaintiff to seek damages on their behalf, it facilitates the representative plaintiff failing to do so for any group member who does not register their interest to be compensated through an agreed settlement. The proposed notice does not make plain the conflicting duties the representative plaintiffs will have vis-à-vis unregistered and registered group members. It does not make plain the conflict the representative plaintiffs' legal practitioners will have at mediation and subsequently. It does not disclose that the basis on which it could be determined that compensation is awarded under a settlement (ie, by reference to the act of registration) is arbitrary. It does not state that if the application intended by Lendlease, and perhaps the representative plaintiffs, if brought successfully, the parties will have shifted the settlement and finality risk of this litigation onto unregistered group members. It does not tell group members that there are other methods of achieving settlement of an open class action that do not require the abandonment of unregistered group members' claims.

70. The representative plaintiffs' contention that a failure to issue the proposed notice would deprive group members of information (RS[8]) does not grapple with any of these difficulties. Nor does it recognise the fundamental problem that the persons who are most likely to be adversely affected by the notice – unregistered group members – may well comprise a subset of the class who do not receive, read or understand the notice at all.

71. These are not drafting quibbles. The parties had a second opportunity at drafting the notice to arrive at agreed terms (J[9]–[10] CAB 17). The proposed notice was prepared by highly experienced class action lawyers. The very fact of difficulty, even for

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[44] See J[105] CAB 49.

practitioners with such significant class action experience, in finding a way clearly to communicate the intended effect of the proposed "notation" in the notice, points to the issue of such a notice being contrary to the purpose of Part 10 in improving access to justice.

72. The proposed notice is beyond power because it is misleading and does not serve the statutory purpose of s 175.

A.4 It is beyond power to issue the proposed notice

73. The textual constraints in s 175(6), the context of Part 10 – in particular the role of a representative plaintiff pursuing group members' claims under the legislative scheme – and the objective of enhancing access to justice, all confirm that it is beyond the Court's power to issue the proposed notice pursuant to s 175.

B Second issue: Conflicts between intermediate appellate courts

74. The Court of Appeal identified the question that a matter left unresolved on the authorities is the correct approach of an intermediate appellate court in circumstances where neither of two competing interpretations – one of its own earlier decisions, the other of another intermediate appellate court – can be said to be "plainly wrong". The Court of Appeal concluded that the correct approach is for an intermediate appellate Court to adhere to its previously expressed view (J[23] CAB 22-23).

75. The starting point is the desirability of certainty. If a Court is not persuaded that an earlier decision is plainly wrong, it is desirable that it adheres to its earlier views. Such consistency within a Court on its approach to a question of law upholds confidence in the law. The axiomatic relationship between consistency and confidence in the law is well recognised.[45] In the decision in *Totaan v R* (2022) 108 NSWLR 17 the Court of Criminal Appeal correctly emphasised (at 35 [74]) the important goals of fostering stability and predictability in the law and consistency and certainty in the administration of justice. This was adopted by the Chief Justice below at J[19] (CAB 20-21).

76. There is no dispute that an intermediate appellate court should not depart from a decision of *another* intermediate appellate court on the interpretation of Commonwealth legislation, uniform national legislation or the common law of Australia, unless convinced that the interpretation is plainly wrong or, put another way, there is a compelling reason to do so.[46]

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[45] *Hicks v Minister for Immigration & Multicultural & Indigenous Af*fairs [2003] FCA 757 per French J (as his Honour then was) at [74] – [76] and the cases there cited.
[46] ***Hill v Zuda*** *Pty Ltd* (2022) 275 CLR 24 at 35 [25].

77. That principle of inter-court comity must apply with even greater force in an intra-court context. To hold otherwise would be to introduce an element of unpredictability. It would invite an intermediate appellate court regularly to revisit its own decisions on points of principle "afresh", even where it has concluded that there are not cogent reasons to depart from its own earlier reasoning.

78. Lendlease's submission that the Court of Appeal erred in its manner of resolving conflict between intermediate appellate courts, because "*the court should reach its own view on what the right answer is*" (AS[67]), ignores the point that the earlier decision *is* that court's own view on what the right answer is. The submission points up the danger in failing to treat the same court, differently constituted, as being a single institution which is obliged to determine the law consistently, save in circumstances where there are compelling reasons to depart from one of its earlier decisions.

79. The intermediate appellate authorities concerning the desirability of adherence to their own earlier decisions absent compelling reasons to do otherwise were highlighted in *LCM Funding Pty Limited v Stanwell Corp Limited* (2022) 292 FCR 169 at 184 [71]. In particular:

    a. when asked to reconsider its earlier decision, an intermediate appellate court must balance the risk of perpetuation of error in too rigid a stance in reconsideration of earlier decisions *and* the importance of the stable operation of the doctrine of precedent and the predictability of the law;

    b. a decision to depart from earlier authority involves not only a consideration of the jurisprudential nature and character of the error that leads to the conviction of past error, but also other considerations such as, by way of example, whether the earlier decision rested on principle carefully worked out and whether the earlier decision had been otherwise acted upon; and

    c. caution should be exercised by an intermediate appellate court before departing from one of its earlier authorities. This should be reflected both in the task of appellate advocacy and in the intermediate appellate court's approach to calls and attempts to re-agitate questions of law (especially statutory construction), earlier decided by it. The power to depart from an earlier authority should be exercised cautiously, sparingly and with great care.

80. At J[140] (CAB 59-60), Leeming JA confirmed the desirability of expressing the test, when one intermediate appellate court departs from a decision of another, as whether there is a 'compelling reason' to do so, noting that expression to be a more constructive

articulation of the principle identified in *Hill v Zuda* than the deprecatory language of a decision being "plainly wrong".

81. This appeal illustrates a further reason why it is desirable that the test be articulated as one requiring "compelling reasons". The language of considering whether there are "compelling reasons" to depart from an earlier decision underscores that the reasoning task the intermediate appellate court undertakes involves a methodical and careful consideration of the law. Once the full care and complexity of that process of reasoning is understood, it is readily apparent that the task does not involve any mechanical "doubling down" on its earlier decision and the goal of reaching the correct legal conclusion is attained (*contra* AS[68]).

Part VI: Notice of contention or cross-appeal

82. None.

Part VII: Estimate of time required

83. The contradictor estimates 1 hour 30 minutes for her oral argument.

Dated 10 October 2024

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

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 CONTRADICTOR'S SUBMISSIONS

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

No.	Description	Version	Provision(s)
1	*Civil Procedure Act 2005* (NSW)	Current (in force 1 July 2024 to date)	Part 10 (namely, ss 157, 158, 159, 162, 165, 166, 171, 173, 174, 175, 176, 177 and 183)
2	*Federal Court of Australia Act 1976* (Cth)	Compilation No 57 (in force 12 June 2024 to 2 October 2024), noting that the commenced	Part IVA (namely, ss 33N, 33T, 33V, 33W, 33Z and 33ZF)

		amendment enacted by virtue of *Australian Human Rights Commission Amendment (Costs Protection) Act 2024* (Cth) are yet to be incorporated.	