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| Case Name: | David William Pallas & Julie Ann Pallas as trustees for the Pallas Family Superannuation Fund v Lendlease Corporation Ltd |
| Medium Neutral Citation: | [2024] NSWCA 83 |
| Hearing Date(s): | 29 November 2023, 15 and 20 December 2023 (further submissions) |
| Date of Orders: | 17 April 2024 |
| Decision Date: | 17 April 2024 |
| Before: | Bell CJ at [1]; Ward P at [127]; Gleeson JA at [138]; Leeming JA at [139]; and Stern JA at [160] |
| Decision: | Answer the separate question, stated by Ball J on 13 September 2023, pursuant to Uniform Civil Procedure Rules 2005 (NSW) r 28.2, in the negative. |
| Catchwords: | CIVIL PROCEDURE — Representative proceedings — Conduct of proceedings — Notices — Court’s power to order that notice be given to group members — Proposed notice referred to intention to apply for order excluding group members who had neither opted out nor registered from receiving potential prospective settlement sum   JUDGMENTS AND ORDERS — Court of Appeal — Where Full Court of Federal Court (Parkin v Boral Ltd (2022) 291 FCR 116; [2022] FCAFC 47) had held that previous decision of Court of Appeal (Wigmans v AMP Ltd (2020) 102 NSWLR 199; [2020] NSWCA 104) was “plainly wrong” — Where disagreement with that characterisation — Whether Court of Appeal should depart from Wigmans v AMP Ltd (2020) 102 NSWLR 199; [2020] NSWCA 104   STATUTORY INTERPRETATION — Context — Whether general words in statute should be read down to conform with surrounding provisions and purpose of the legislation |
| Legislation Cited: | Bankruptcy Act 1966 (Cth) ss 41, 306 Civil Procedure Act 2005 (NSW) ss 56, 155, 159, 162, 163, 173, 175, 176, 179, 183, Pt 10 Courts and Crimes Legislation Further Amendment Act 2010 (NSW) Federal Court of Australia Act 1976 (Cth) ss 25, 33V, 33X, 33ZB, 33ZF Motor Accidents Act 1988 (NSW) Federal Court Rules 2011 (Cth) r 30.01 Uniform Civil Procedure Rules 2005 (NSW) rr 1.21, 28.2 |
| Cases Cited: | Aussie Skips Recycling Pty Ltd v Strathfield Municipal Council (2020) 103 NSWLR 834; [2020] NSWCA 292 Bass v Permanent Trustee Co Ltd (1999) 198 CLR 334; [1999] HCA 9 BHP Group Limited v Impiombato (2021) 286 FCR 625; [2021] FCAFC 93 BHP Group Limited v Impiombato [2022] HCA 33; (2022) 96 ALJR 956 BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall (2019) 269 CLR 574; [2019] HCA 45 Brewster v BMW Australia Ltd [2019] NSWCA 35; (2019) 366 ALR 171 Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd (2020) 279 FCR 631; [2020] FCAFC 122 Earglow Pty Ltd v Newcrest Mining Ltd (2015) 230 FCR 469; [2015] FCA 328 Endeavour River Pty Ltd v MG Responsible Entity Ltd [2019] FCA 1719 Gett v Tabet (2009) 109 NSWLR 1; [2009] NSWCA 76 Haselhurst v Toyota Motor Corporation Australia Ltd (t/as Toyota Australia) (2020) 101 NSWLR 890; [2020] NSWCA 66 Hasler v Singtel Optus Pty Ltd (2014) 87 NSWLR 609; [2014] NSWCA 266 Hill v Zuda Pty Ltd (2022) 275 CLR 24; [2022] HCA 21 ICM Agriculture Pty Ltd v The Commonwealth (2009) 240 CLR 140; [2009] HCA 51 Independent Commission Against Corruption v Cunneen (2015) 256 CLR 1; [2015] HCA 14 Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd [2011] FCA 671; [2011] ATPR 42-361 Jones v Treasury Wine Estates Ltd (No 2) [2017] FCA 296 Kelly v Willmott Forests Ltd (in liq) (No 4) [2016] FCA 323; (2016) 335 ALR 439 Kelly v Willmott Forests Ltd (in liq) (No 5) [2017] FCA 689 Kleinwort Benson Australia Ltd v Crowl (1988) 165 CLR 71; [1988] HCA 34 Kirby v Centro Properties Ltd [2011] FCA 611; (2011) 84 ACSR 87 Kirby v Centro Properties Ltd, unreported, Federal Court of Australia, 8 February 2011 Komlotex Pty Ltd v AMP Ltd [2020] NSWSC 504 Madgwick v Kelly (2013) 212 FCR 1; [2013] FCAFC 61 Meaden v Bell Potter Securities Ltd [2011] FCA 136 Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd (2017) 252 FCR 1; [2017] FCAFC 98 Mobil Oil Australia Pty Ltd v State of Victoria (2002) 211 CLR 1; [2002] HCA 27 Money Max Int Pty Ltd v QBE Insurance Group Ltd (2016) 245 FCR 191; [2016] FCAFC 148 Muldrock v The Queen (2011) 244 CLR 120; [2011] HCA 39 Murphy v Overton Investments Pty Ltd [1999] FCA 1123 Owners of the Ship “Shin Kobe Maru” v Empire Shipping Co Inc (1994) 181 CLR 404; [1994] HCA 54 P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd (No 2) [2010] FCA 176 P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd (No 4) [2010] FCA 1029 Parkin v Boral Ltd (2022) 291 FCR 116; [2022] FCAFC 47 Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28 Regent Holdings Pty Ltd v State of Victoria (2012) 36 VR 424; [2012] VSCA 221 RJE v Secretary to the Department of Justice (2008) 21 VR 526; [2008] VSCA 265 Ross v The Queen (1979) 141 CLR 432; [1979] HCA 29 Russo v Aiello (2003) 215 CLR 643; [2003] HCA 53 R v XY (2013) 84 NSWLR 363; [2013] NSWCCA 121 Takata Air Bag – Class closure and registration [2019] NSWSC 1493 Thomas v Powercor Australia Ltd (No 1) [2010] VSC 489 Tomlinson v Ramsey Food Processing Pty Ltd (2015) 256 CLR 507; [2015] HCA 28 Totaan v R (2022) 108 NSWLR 17; [2022] NSWCCA 75 Weimann v Allphones Retail Pty Ltd (No 3) [2009] FCA 1292 Wetdal Pty Ltd as Trustee for the BlueCo Two Superannuation Fund v Estia Health Limited [2021] FCA 475 Wigmans v AMP Ltd (2020) 102 NSWLR 199; [2020] NSWCA 104 Wigmans v AMP Ltd (2021) 270 CLR 623; [2021] HCA 7 Wilde v The Queen (1988) 164 CLR 365; [1988] HCA 6 Williams v FAI Home Security Pty Ltd [1999] FCA 1771 Wong v Silkfield Pty Ltd (1999) 199 CLR 255; [1999] HCA 48 |
| Texts Cited: | Australian Law Reform Commission, Grouped Proceedings in the Federal Court (Report No 46, December 1988) Legg M, “Entrepreneurs and Figureheads – Addressing Multiple Class Actions and Conflicts of Interest” (2009) 32 University of New South Wales Law Journal 909 New South Wales Legislative Council, Parliamentary Debates (Hansard), 24 November 2010 |
| Category: | Principal judgment |
| Parties: | Lendlease Corporation Ltd (First Applicant) Lendlease Responsible Entity Ltd as responsible entity for Lendlease Trust (Second Applicant) David William Pallas and Julie Ann Pallas as trustees for the Pallas Family Superannuation Fund (First Respondent) Martin John Fletcher (Second Respondent) |
| Representation: | Counsel: E Collins SC with B Lim and B Cameron (First and Second Applicants) W Edwards KC with R May (First and Second Respondents) K Morgan SC with Z Hillman (Contradictor)  Solicitors: Herbert Smith Freehills (First and Second Applicants) Maurice Blackburn Lawyers (First and Second Respondents) |
| File Number(s): | 2023/00291528 |
| Publication Restriction: | Nil |
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[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

**[This headnote is not to be read as part of the judgment]**

In shareholder class action proceedings, the following separate question was stated and removed to the Court of Appeal:

“Notwithstanding the decision in *Wigmans v AMP Ltd* (2020) 102 NSWLR 199 and having regard to the decision in *Parkin v Boral Ltd* (2022) 291 FCR 116, does the Supreme Court of NSW have power pursuant to sections 175(1), 175(5) and 176(1) of the *Civil Procedure Act 2005* (NSW) (CPA) or otherwise to approve a notice to Group Members of the right to register to participate in any settlement of the proceedings or opt out of the proceedings for the purposes of CPA section 162 containing the following notation:

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

The Full Court of the Federal Court in *Parkin v Boral Ltd* (2022) 291 FCR 116; [2022] FCAFC 47 (**Parkin**) expressed the view that this Court’s decision in *Wigmans v AMP Ltd* (2020) 102 NSWLR 199; [2020] NSWCA 104 (**Wigmans**) was “plainly wrong” and should not be followed.

**The Court** (Bell CJ, Gleeson, Leeming and Stern JJA agreeing, Ward P agreeing in the orders), answering the separate question in the negative, held that:

1. Intermediate appellate courts should only depart from decisions of courts of co-ordinate jurisdiction, or their own previous decisions, if they determine that the impugned decision is “plainly wrong”, or, to use a different expression, where there are “compelling reasons” to depart from the impugned decision: [19]-[23] (Bell CJ); [138] (Gleeson JA); [139]-[140] (Leeming JA); [160] (Stern JA).

*Hill v Zuda Pty Ltd* (2022) 275 CLR 24; [2022] HCA 21 applied.

*Totaan v R* (2022) 108 NSWLR 17; [2022] NSWCCA 75; *Gett v Tabet* (2009) 109 NSWLR 1; [2009] NSWCA 76 referred to.

1. Observations by Leeming JA on the desirability of focusing on the existence of “compelling reasons” to depart from an earlier decision rather than the deprecatory language of “plainly wrong”: [140] (Leeming JA); [22] (Bell CJ); [138] (Gleeson JA); [160] (Stern JA).
2. Where there are “competing” decisions, neither of which can be said to be “plainly wrong” and one of those decisions is of the Court considering the question, that Court should adhere to its previously expressed view: [23] (Bell CJ); [138] (Gleeson JA); [139] (Leeming JA); [160] (Stern JA).
3. The reasons advanced in *Parkin* leading to the conclusion that *Wigmans* was “plainly wrong” were not, with respect to the Full Court, sufficiently persuasive as to justify that conclusion: [94]-[123] (Bell CJ); [138] (Gleeson JA); [139], [141]-[159] (Leeming JA); [160] (Stern JA).
4. *Wigmans* was not “plainly wrong” and there are no compelling reasons why a recent, closely reasoned decision of this Court, building on earlier decisions, should be departed from: [94]-[123] (Bell CJ); [138] (Gleeson JA); [139], [141]-[159] (Leeming JA); [160] (Stern JA).
5. The reasoning in *Wigmans* was underpinned by this Court’s recent decision in in *Haselhurst v Toyota Motor Corporation Australia Ltd (t/as Toyota Australia)* (2020) 101 NSWLR 890; [2020] NSWCA 66 (**Haselhurst**) and the High Court’s decision in *Mobil Oil Australia Pty Ltd v State of Victoria* (2002) 211 CLR 1; [2002] HCA 27 (**Mobil Oil**): [59]-[76], [95], [97] (Bell CJ); [138] (Gleeson JA); [139] (Leeming JA); [160] (Stern JA).
6. Reference in *Wigmans* to the “fundamental precept” of Pt 10 of the *Civil Procedure Act 2005* (NSW) (**CPA**) (of which the *Parkin* court was critical) was to the statutory context, just as the High Court’s observations in *Mobil Oil* relied on in *Wigmans* were also to analogous statutory context. Identification of fundamental precepts in the law is entirely orthodox: [97]-[101] (Bell CJ); [138] (Gleeson JA); [139], [141]-[158] (Leeming JA); [160] (Stern JA).

*Russo v Aiello* (2003) 215 CLR 643; [2003] HCA 53; *Muldrock v The Queen* (2011) 244 CLR 120; [2011] HCA 39; *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140; [2009] HCA 51; *Kleinwort Benson Australia Ltd v Crowl* (1988) 165 CLR 71; [1988] HCA 34; *Wilde v The Queen* (1988) 164 CLR 365; [1988] HCA 6 referred to.

1. Providing the proposed notification to group members would promote a conflict of interest for the representative party who would be constrained to participate in any mediation on the basis that registered group members would share in compensation obtained through settlement; but unregistered group members would not only not obtain any benefit from settlement, but would be likely to have their causes of action extinguished. Ward P, differing in emphasis, such conflicts would arise only upon application to the court to exclude the unregistered group members: [106]-[117] (Bell CJ); [138] (Gleeson JA); [139] (Leeming JA); [160] (Stern JA); cf [128]-[136] (Ward P).

*Wigmans v AMP Ltd* (2020) 102 NSWLR 199; [2020] NSWCA 104; *Haselhurst v Toyota Motor Corporation Australia Ltd (t/as Toyota Australia)* (2020) 101 NSWLR 890; [2020] NSWCA 66 referred to.

1. Section 175(5) of the CPA must be construed in the context of the CPA as a whole: [24]-[26], [47], [95] (Bell CJ); [138] (Gleeson JA); [139] (Leeming JA); [160] (Stern JA).

*BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall* (2019) 269 CLR 574; [2019] HCA 45; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28; *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1; [2015] HCA 14 applied.

*Ross v The Queen* (1979) 141 CLR 432; [1979] HCA 29; *Owners of the Ship “Shin Kobe Maru” v Empire Shipping Co Inc* (1994) 181 CLR 404; [1994] HCA 54 cited; *Aussie Skips Recycling Pty Ltd v Strathfield Municipal Council* (2020) 103 NSWLR 834; [2020] NSWCA 292; *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall* (2019) 269 CLR 574; [2019] HCA 45 referred to.

1. Section 175(6) of the CPA constrains s 175(5) in two respects: first, the notice must relate to an “event”, second, that is not a future event but rather, an event that has “happened”. The proposed notification is *not* of any event. It is of a present intention on the part of Lendlease and perhaps the representative plaintiff to participate in settlement negotiations in a particular way: [32], [112], [118]-[119] (Bell CJ), [138] (Gleeson JA), [139] (Leeming JA), [160] (Stern JA); cf [137] (Ward P).

JUDGMENT

BELL CJ:

Introduction

1. Following an approach that has been employed in the past to determine questions of statutory construction which affect class action procedure (see, eg *Brewster v BMW Australia Ltd* [2019] NSWCA 35; (2019) 366 ALR 171), this matter comes before the Court of Appeal by way of removal from the Equity Division, pursuant to an order made by Ball J on 13 September 2023 in accordance with *Uniform Civil Procedure Rules 2005* (NSW) (**UCPR**) r 1.21(1)(a).
2. Pursuant to UCPR r 28.2, Ball J also stated a separate question, at the request of both parties, for this Court to determine (**the separate question**):

“Notwithstanding the decision in *Wigmans v AMP Ltd* (2020) 102 NSWLR 199 and having regard to the decision in *Parkin v Boral Ltd* (2022) 291 FCR 116, does the Supreme Court of NSW have power pursuant to sections 175(1), 175(5) and 176(1) of the *Civil Procedure Act 2005* (NSW) (CPA) or otherwise to approve a notice to Group Members of the right to register to participate in any settlement of the proceedings or opt out of the proceedings for the purposes of CPA section 162 containing the following notation:

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

1. As is implicit in the formulation of the separate question, there is a divergence between the decision of this Court in *Wigmans v AMP Ltd* (2020) 102 NSWLR 199; [2020] NSWCA 104 (**Wigmans**), and the decision of the Full Court of the Federal Court in *Parkin v Boral Ltd* (2022) 291 FCR 116; [2022] FCAFC 47 (**Parkin**), in which *Wigmans* was considered by Murphy, Beach and Lee JJ to be “plainly wrong”.
2. The defendants in the underlying proceeding (who it is convenient to refer to compendiously as **Lendlease**) and for whom Ms Collins SC appeared, contend that the answer to the separate question should be “Yes”.
3. The underlying proceeding is a ‘shareholder’ class action. The representative plaintiffs, and other members of the class, were stapled securityholders of shares in Lendlease Corporation Ltd, an ASX-listed property and infrastructure company, which were stapled to units in the Lendlease Trust. Lendlease Corporation Ltd, and the responsible entity of the Lendlease Trust, are the defendants in the class action and the applicants in this separate question. The plaintiffs allege that Lendlease breached its continuous disclosure obligations and engaged in misleading or deceptive conduct during the period from 17 October 2017 to 8 November 2018 during which period, approximately 445 million shares were traded. In particular, the proceeding concerns pre-tax provisions which it is alleged that Lendlease should have taken, and certain reductions in after-tax profits it is alleged that Lendlease should have made, with respect to three projects which it was undertaking.
4. The plaintiffs in the underlying proceeding and for whom Mr Edwards KC appeared did not take a different position on the question of the power of the Court to make a notation of the kind formulated in the separate question to that taken by Lendlease. They expressly reserved, however, their position on the question of discretion, that is to say whether the Court should exercise its discretion to issue a notice of the kind contemplated in the separate question if there was power to do so.
5. Both parties accepted that the decision in *Wigmans* would compel a negative answer to the separate question.
6. Although the plaintiffs’ carefully expressed position of non-opposition on the question of power falls short of positive support for the arguments advanced by Lendlease, it was both necessary and desirable that a contradictor be appointed in order to ensure that this Court had the benefit of full argument. The Court is grateful to Ms Morgan SC who, with Ms Hillman, appeared as contradictor.
7. One difficulty that emerged during the course of oral argument was that the notation referred to in the separate question was detached from any agreed form of proposed notice to group members. Lendlease had submitted a form of notice which became Exhibit A on the hearing of the separate question but there was no agreement between the parties as to the form of that notice. This led the Court to raise a serious concern at the end of the oral hearing about the artificiality and undesirability of answering a question divorced from the context of an agreed form of proposed notice to group members, therefore rendering any answer to the question vulnerable to the criticism of hypotheticality: cf *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334; [1999] HCA 9.
8. Following the hearing and with a view to curing the objection that any answer to the separate question may be hypothetical, the parties reached agreement on a form of notice which it was proposed would be sent to group members prior to any mediation, and forwarded it to the Court on 8 December 2023 (**the Amended Notice**). Supplementary written submissions were also filed by the Contradictor and Lendlease on 15 and 20 December 2023 in relation to the Amended Notice. The proposed agreed form of Amended Notice is reproduced in Appendix A to these reasons. The notation set out in the separate question was retained but was supplemented in important respects. It was as follows:

***Option C – Do Nothing***

10.   Upon any settlement of this proceeding the parties, alternatively, Lendlease, will seek an order, which, if made, has the effect of providing that any Group Member who by a registration date:

a.   has not registered; or

b.   has not opted out in accordance with the orders made by the Court,

   will remain a Group Member for all purposes of this proceeding but shall not, without leave of the Court, be permitted to seek any benefit pursuant to any settlement (subject to Court approval) of this proceeding that occurs before final judgment.

11.   The Court will then decide whether to approve the settlement on that basis. As stated above, if a settlement occurs, then a further notice will be distributed, or advertised, advising of the settlement, and there may or may not be another opportunity to register (this will be a matter for the Court and there is no guarantee any further opportunity will arise).

12.   Group Members who do nothing (i.e. do not register in accordance with Option A and do not opt out in accordance with Option B before the deadline of [TBC]) will remain as Group Members in the Lendlease Class Action for all purposes, but may not be entitled to receive a distribution payment from any settlement that may be agreed to at the forthcoming mediation, or at any time prior to final judgment being delivered if the parties, alternatively, Lendlease, are successful in obtaining an order that only those Group Members who have registered can obtain compensation received through the settlement. As stated above, if a settlement occurs, then a further notice will be distributed, or advertised, advising of the settlement, and there may or may not be another opportunity to register (this will be a matter for the Court and there is no guarantee any further opportunity will arise).

13.   Further, Group Members who do nothing will be bound by the ultimate outcome of the Lendlease Class Action, and will therefore not be able to pursue the same claims, and may not be able to pursue related claims, against Lendlease in other legal proceedings in the future. **Thus, if you do wish to remain a Group Member in the class action, you are strongly encouraged to register your claim (Option A above) before [TBC] so as not to risk missing out on the benefit of any settlement which might be agreed before final judgment. As noted above, there is no cost to register your claim.** (Emphasis as in form of proposed notice submitted by the parties)

An opening observation

1. In the ordinary course, class action proceedings of the apparent magnitude of those in the current case would be referred to mediation and, if any mediation was unsuccessful, a trial date would be set. Prior to the matter going to trial and other than with the leave of the Court, an opt out notice must be sent to group members advising of their right to opt out of the group prior to the hearing of the representative proceedings: *Civil Procedure Act 2005* (NSW) (**CPA**) ss 162(1), 162(4) and 175(1)(a). It is not uncommon that such a notice will also request that interested group members register with the law firm for the plaintiff. This is to aid in the distribution of proceeds of the litigation (whether by settlement or a judgment). It is common for many group members to have registered with the plaintiff’s law firm prior to the opt out notice having been sent. An opt out notice may be sent prior to any mediation and the form of the proposed notice in the present case is of this kind.
2. It is plain that there are at least two purposes that inform and underpin the proposed notation. First, and most explicitly, to encourage currently unregistered group members either to opt out of the group prior to any mediation or to opt in to avoid “the risk [of] missing out on the benefit of any settlement which might be agreed before final judgment”: see [10] above. The second, unstated, purpose of the notation is to arm Lendlease (and also the plaintiffs as the representative parties) with an argument to be made to any judge called upon to approve any settlement pursuant to s 173 of the CPA that non-registered group members should *not* be permitted to participate in the fruits of any settlement on the footing that they had been given the choice of opting out or opting in prior to the settlement and had not availed themselves of that opportunity.
3. From a commercial perspective, it is tolerably clear that Lendlease wishes to go into any mediation having an appreciation of the number of group members who would be bound by any settlement reached by reference to the universe of group members, and the value of their individual claims (a function of the number of securities held). That motivation lay behind the form of order which this Court held in *Haselhurst v Toyota Motor Corporation Australia Ltd (t/as Toyota Australia*) (2020) 101 NSWLR 890; [2020] NSWCA 66 (**Haselhurst**), applying *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall* (2019) 269 CLR 574; [2019] HCA 45 (**Brewster**), was *not* authorised by s 183 of the CPA. The form of that proposed order was as follows:

“Pursuant to s 183 of the Act, any Group Member who neither opts out in accordance with Order 12 nor registers in accordance with Order 15 on or before the Class Deadline shall remain a Group Member for the purposes of any judgment or settlement but, in the event that an in-principle settlement is reached before the commencement of the trial on the common issues and that settlement is ultimately approved by the Court, shall be bound by the terms of the settlement agreement and barred from making any claim against the Defendant in respect of or relating to the subject matter of this proceeding, including participating in any form of compensation or otherwise benefiting from any relief that might be ordered or agreed.”

The reasoning in *Haselhurst* is discussed later in this judgment, at [48]-[58].

1. Such an order is a species of what is commonly known as a “class closure order”, that is, an order by which the class or group in a representative proceeding is wholly or partially restricted, and the rights of certain group members (generally, those who are unregistered) are extinguished irrespective of the fact that they do not participate in the fruits of any settlement.
2. In *Wigmans*, a judgment of Macfarlan, Leeming and White JJA, an order of the kind foreshadowed in the proposed notation in the current proceedings was held not to be authorised by ss 175-176 of the CPA. As noted above, Lendlease, in its written submission in this Court, frankly concedes that the decision in *Wigmans* would compel a negative answer to the separate question in the current case.
3. Subsequent to the decision in *Wigmans*, the Full Court of the Federal Court in *Parkin* purported to distinguish *Haselhurst* and held that *Wigmans* was “plainly wrong” and should not be followed. Lendlease submits that *Wigmans* should be overruled and *Parkin* applied to yield the affirmative answer sought.
4. This is the background against which the separate question came to be stated.
5. Before turning to the key statutory provisions and statutory context in which the separate question falls to be determined, it is first necessary to note the principles which apply when an intermediate appellate court is asked to depart from a prior decision.

Departing from previous authority

1. In *Totaan v R* (2022) 108 NSWLR 17; [2022] NSWCCA 75 (**Totaan**), I summarised the approach to be followed when intermediate appellate courts are asked to depart from the authority of courts of co-ordinate jurisdiction as well as their own previous decisions, a subject that had previously been considered at some length by this Court in *Gett v Tabet* (2009) 109 NSWLR 1; [2009] NSWCA 76 (**Gett**). In *Totaan*, I said (in observations with which Gleeson JA and Harrison, Adamson and Dhanji JJ agreed):

“***When should an intermediate appellate court depart from its own earlier decisions, and those of courts of co-ordinate jurisdiction*?**

[72]  Before turning to a consideration of whether the prevailing case law in relation to s 16A(2)(p) is “plainly wrong” within the meaning of that expression as used in *Marlborough Gold Mines* and *Farah*, reference should also be made to the cognate cautionary principle articulated in the New South Wales Court of Appeal’s decision in *Gett* at [273], [277]–[278], [281] and [286]. That principle is to the effect that, whilst intermediate appellate courts are not legally bound by their own earlier decisions, they should only depart from such authority or the authority of courts of co-ordinate jurisdiction within the national system if they are of the view that the decision in question is “plainly wrong” and, such an error having been identified, there are “compelling reasons” to depart from the earlier decision or decisions. The fact that reasonable minds might differ on the interpretation of a statutory provision will generally be insufficient to warrant a conclusion that an earlier or existing interpretation of the provision or provisions in question was “plainly wrong”: *Transurban City Link Ltd v Allan* (1999) 95 FCR 553; [1999] FCA 1723 at [29]; JD Heydon, “How Far Can Trial Courts and Intermediate Appellate Courts Develop the Law?” (2009) 9 *Oxford University Commonwealth Law Journal* 1 at 26.

[73]   It was said in *Gett* at [294]–[295], in a passage applied in *Fairfax Digital Australia & New Zealand Pty Ltd v Kazal* (2018) 97 NSWLR 547; [2018] NSWCA 77 at [147], that:

“[294]   The phrases “plainly wrong” or “clearly wrong” can be understood to focus on at least one or more of the following attributes of a ruling:

(a)   the fact of error is immediately […] apparent from reading the relevant judgment;

(b)   the strong conviction of the later court that the earlier judgment was erroneous and not merely the choice of an approach which was open, but no longer preferred (cf *Chamberlain* and *Clutha*), and

(c)   the nature of the error that can be demonstrated with a degree of clarity by the application of correct legal analysis.

[295]   In our view, the first possibility is liable to be highly subjective and should not be required, where the other two possibilities are satisfied. The existence of (b) and (c) is a precondition to the exercise of the power to depart from earlier authority.”

[74]   Underpinning language such as “a strong conviction” or “compelling reasons” (see *Clutha Developments Pty Ltd v Barry* (1989) 18 NSWLR 86 at 100) employed in this area of discourse are the important goals of fostering stability and predictability in the law and consistency and certainty in the administration of justice: *Gett* at [286], [300]. Neither of those considerations should be lightly gainsaid, perhaps especially so when the intermediate court is exercising federal jurisdiction as this Court is doing in the present case: see *Wong v The Queen* (2001) 207 CLR 584; [2001] HCA 64 at [46]–[51]; *Hili v The Queen* (2010) 242 CLR 520; [2010] HCA 45 at [56].

[75]   Such considerations do not, however, preclude departure from an established position if the Court considers the earlier position to have been “plainly wrong”. As has been said, “[i]n essence, the Australian position rests on a compromise between the desirability of achieving uniformity and the undesirability of repeating gross error”: Heydon at 27; see also and generally M Leeming, “Farah and its progeny: Comity among intermediate appellate courts” (2015) 12 *The Judicial Review* 165.

[76]   Considerations that may bear upon an intermediate court’s approach to departing both from its own earlier decisions (including earlier decisions not to depart from still earlier decisions) and those of courts at a similar level of the federal judicial hierarchy include whether the challenged decision(s) are closely reasoned, whether the principle for which the decision stands has been worked through in a series of cases, and whether the decision(s) challenged have been unanimously followed or whether there is some tension between decisions of courts of coordinate authority in relation to the challenged decision(s).”

1. The parties proceeded on the basis that these principles were applicable to the present case and the separate question removed for determination by this Court was argued on the basis that intermediate appellate courts should only depart from decisions of courts of co-ordinate jurisdiction if the decision was “plainly wrong” *and* there were “compelling reasons” to depart from the earlier decision. That stance was reflected in Lendlease’s written submissions in chief at [16], without demur from the plaintiffs who chose not to engage with this aspect (or most aspects) of the debate. The stance was positively embraced by the contradictor (written submissions, [9]). In oral submissions, Lendlease confirmed the position, with Ms Collins SC adding:

“And may I say candidly there’s some reason to be somewhat critical of that in that respect. That’s one of the reasons why I said insofar as we rely upon *Parkin*, we will rely upon what, specific parts of *Parkin*, but I otherwise don’t seek to rely upon in any way the basis on which - what they seem to have done, the Full Court in *Parkin* seem to have done, is just literally stated that they considered that *Wigmans* to be plainly wrong. They then gave some reasons for that, but they didn’t deal with matters such as the matter your Honour the Chief Justice has just raised with me as to compelling reasons.”

1. Lendlease was correct to note that in *Parkin*, the Full Court focussed only on the issue of whether it considered *Wigmans* to be “plainly wrong”, and did not separately or independently address whether there were “compelling reasons” to depart from it (at [97] and [109]).
2. Subsequent to *Totaan*, the High Court said in *Hill v Zuda Pty Ltd* (2022) 275 CLR 24; [2022] HCA 21 at [25] that:

“*Farah Constructions* identified two decision-making principles. The first is that an intermediate appellate court should not depart from seriously considered dicta of a majority of this Court. The second is that neither an intermediate appellate court nor a trial judge should 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, to use a different expression*, unless there is a compelling reason to do so.” (emphasis added)

Fully accepting this statement of principle, there is much force in the observations referred to by Leeming JA at [140] below as to the desirable form of language to be employed in this area of discourse where considerations of judicial comity in a federal judicature are engaged.

1. This judgment does not treat considerations of whether an earlier decision was “plainly wrong” and whether there are “compelling reasons” to depart from it as separate limbs of a test, as opposed to two sides of the same coin. To that extent, the statement of principles summarised in *Totaan* at [72] should be qualified insofar as it suggested two independent limbs would need to be satisfied before any such departure could occur. If a decision is “plainly wrong” in the sense identified by this Court in *Gett* (namely, that there is a strong conviction that the earlier judgment was erroneous, as opposed to being a choice of approach which was open and the nature of the error can be demonstrated with a degree of clarity by the correct legal analysis), then there will often be compelling reasons to depart from the earlier decision. Conversely, one compelling reason to depart from an earlier decision is that the judgment is clearly demonstrated to be erroneous. One matter left unresolved on the authorities concerns what a Court is to do in circumstances where neither of two competing interpretations can be said to meet the onerous threshold of being “plainly wrong”. Where one of those decisions is that of the same Court which has previously expressed a view on the matter, that Court should adhere to its previously expressed view.

Statutory context

1. One very important point to emerge from the majority decision of the High Court in *Brewster* was the danger and indeed illegitimacy of looking at one statutory provision in isolation from others, especially in circumstances where the statutory provision in question forms part of a body of statutory provisions on a particular topic or, in that case as in the present case, part of a statutory regime for the hearing and determination of class action or representative proceedings.
2. In New South Wales, that statutory regime is contained in Pt 10 of the CPA entitled “Representative proceedings in the Supreme Court”. That Part was enacted by the *Courts and Crimes Legislation Further Amendment Act 2010* (NSW), the second reading speech for which made clear that Pt 10 was “substantially modelled” on Pt IVA of the *Federal Court of Australia Act 1976* (Cth) (**the FCA Act**): New South Wales Legislative Council, *Parliamentary Debates* (Hansard), 24 November 2010 at p 28066. The relevant sections of Pt 10, extracted below, contain reference to their cognate provisions in the FCA Act. It was not in dispute that the CPA and FCA Act cannot be meaningfully distinguished in order to resolve the separate question.
3. Whereas the particular statutory provision upon which attention was focussed in *Brewster* was s 183 of the CPA (cf s 33ZF of the FCA Act), the particular statutory provision which falls for consideration in the present case is s 175(5) of the CPA (cf s 33X(5) of the FCA Act). However, to repeat, particular statutory provisions must be construed in the context of the Act in which they appear as a whole: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28 at [69]; *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1; [2015] HCA 14 at [31]. As will be seen, various arguments advanced in the present case unduly focus on s 175(5) without proper regard to the overall statutory context, the very technique of interpretation deprecated by the majority in *Brewster*.
4. Turning to key provisions in Pt 10 of the CPA, s 159 provides that “the consent of a person to be a group member is not required” (other than in limited circumstances, where “group member” is defined by s 155 of the CPA to mean “a member of a group of persons on whose behalf representative proceedings have been commenced”).
5. In this respect, s 162 of the CPA provides for the right of a “group member” to opt out of proceedings:

“**162   Right of group member to opt out** (cf s33J FCA)

(1)   The Court must fix a date before which a group member may opt out of representative proceedings in the Court.

(2)   A group member may opt out of the representative proceedings by written notice given under the local rules before the date so fixed.

(3)   The Court may, on application by a group member, the representative party or the defendant in the proceedings, fix another date so as to extend the period during which a group member may opt out of the representative proceedings.

(4)   Except with the leave of the Court, the hearing of representative proceedings must not commence earlier than the date before which a group member may opt out of the proceedings.”

1. Another provision germane to the argument is s 173 of the CPA which provides that:

“**173   Approval of Court required for settlement and discontinuance** (cf s 33V FCA)

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

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

1. Although the separate question refers to ss 175(1), 175(5) and 176(1) of the CPA, the principal provision upon which argument centred was s 175(5). Section 175 provides:

“**175   Notice to be given of certain matters** (cf s33X FCA)

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

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

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

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

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

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

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

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

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

1. Section 176(1) simply provides that the form and content of a notice under s 175 must be approved by the Court.
2. Viewed in isolation, s 175(5) of the CPA is a provision of great apparent breadth but so, too, was s 183 which was considered by the High Court in *Brewster*. Section 175(5) is informed by s 175(6) in at least two respects. First, it must be related to an “event” and that “event” is one that must have occurred prior to the giving of the notice. So much was initially accepted by Ms Collins SC who also eschewed any suggestion that the relevant event was the commencement of the proceedings in 2019.
3. It is also necessary to note s 183 of the CPA, sometimes called the “gap-filling power”, and equally necessary to note that the separate question does not, by Lendlease’s admission, turn upon it:

“**183   General power of Court to make orders** (cf s33ZF FCA)

In any proceedings (including an appeal) conducted under this Part, the Court may, of its own motion or on application by a party or a group member, make any order that the Court thinks appropriate or necessary to ensure that justice is done in the proceedings.”

Authorities leading to Wigmans and Parkin

1. The order approving the notice in this case must be seen against prior authority concerning “class closure” orders, as well as other decisions concerning class action procedure. The following cases were the principal authorities referred to by the parties.

Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd

1. In *Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd* (2017) 252 FCR 1; [2017] FCAFC 98 (**Melbourne City**), the Full Court of the Federal Court considered s 33ZF(1) of the FCA Act, the cognate provision to s 183 of the CPA. In that case, an order was sought at first instance requiring all class members either to register or opt out prior to mediation commencing; the order sought would also have barred any class member who failed to register or opt out from sharing in the proceeds of any settlement or any judgment sum.
2. The primary judge in that case (Foster J) made an order requiring class members to register or opt out, but limited the consequence of non-registration to non-participation in any settlement, as opposed to judgment: see *Jones v Treasury Wine Estates Ltd (No 2)* [2017] FCA 296. Melbourne City Investments Pty Ltd (**MCI**), which had been the representative plaintiff in a competing class action, appealed, arguing that the class closure order was misleading in its terms. MCI had initially contended that the primary judge’s decision to make a class closure order prior to settlement or judgment, and before the terms and consequences of settlement were known, operated improperly to exclude class members, but subsequently withdrew that contention. As such, the decision did not squarely address the point raised in the present case. However, the Full Court (comprising Jagot, Yates and Murphy JJ) remarked in an obiter passage generally supportive of the commercial rationale underlying class closure orders prior to mediation:

“[74]   Having said this, if a class closure order operates to facilitate the desirable end of settlement, it may be reasonably adapted to the purpose of seeking or obtaining justice in the proceeding and therefore appropriate under s 33ZF of the [FCA] Act. The courts have accepted on numerous occasions that, in order to facilitate settlement, it is appropriate to make orders to require class members to come forward and register in order to indicate a willingness to participate in a future settlement, and to make orders that class members be bound into the settlement but barred from sharing in its proceeds unless they register: see for example, *Matthews v SPI Electricity Pty Ltd* *(No 13)* (2013) 39 VR 255 at [22]-[80] (*Matthews v SPI No 13*) (J Forrest J) and the authorities there referred to; *Farey v National Australia Bank Ltd* [2014] FCA 1242 at [11]-[16] (Jacobson J); *Inabu Pty Ltd v Leighton Holdings Ltd* [2014] FCA 622 at [17]-[22] (Jacobson J); *Newstart 123 Pty Ltd v Billabong International Ltd* (2016) 343 ALR 662 at [67]-[68] (Beach J). An important aspect of the utility of a class proceeding is that they may achieve finality not only for class members but also for the respondent.

[75]   The rationale behind such class closure orders is that a requirement for class members to register their claims will facilitate settlement, because it allows both sides to have a better understanding of the total quantum of class members’ claims, permits the settlement amount to be capped by reference to the number of class members, and assists in achieving finality (to the extent the Pt IVA regime permits): see Grave D, Adams K and Betts J, *Class Actions in Australia* (2nd ed, Lawbook Co, 2012) at [14.410]. *A class closure order that precludes class members, who neither opt out nor register, from sharing in a subsequent settlement may facilitate settlement, and therefore be reasonably adapted to the purpose of seeking or obtaining justice in the proceeding*.

[76]   However, we share the views expressed by the primary judge in relation to a class closure order that also precludes class members from sharing in a subsequent judgment. In our view the Court should be cautious before making a class closure order that, in the event settlement is not achieved, operates to lock class members out of their entitlement to make a claim and share in a judgment. That is, the facilitation of settlement is a good reason for a class closure order but, if settlement is not achieved, an order to shut out class members who do not respond to an arbitrary deadline is not.” (emphasis added)

1. It should be noted that such an order as approved in *Melbourne City* would now be prohibited by the decision of this Court in *Haselhurst* which concluded that those passages were inconsistent with the High Court’s decision in *Brewster*: see below at [41] ff.

Takata Air Bag – Class closure and registration

1. In *Takata Air Bag – Class closure and registration* [2019] NSWSC 1493 (**Takata**), Sackar J made a similar order to that in *Melbourne City*, pursuant to ss 163 and 183 of the CPA. This order was termed a “soft” class closure, namely that the class be “closed” such that only group members who had registered with the solicitors for the representative plaintiff eight weeks prior to mediation could be permitted to share in the fruits of any settlement (which, if approved by the Court, would extinguish any claim they might otherwise have had unless they had already opted-out of the representative proceeding) subject to further order of the Court, and, if settlement was not reached by a given date, the class would “re-open”, such that unregistered group members would be able to share in the fruits of any judgment given by the Court: see *Takata* at [11], [52]. The relevant order, entered on 3 February 2020, was as follows:

“16. Pursuant to s 183 of the Act, any Group Member who neither opts out in accordance with Order 12 nor registers in accordance with Order 15 on or before the Class Deadline shall remain a Group Member for the purposes of any judgment or settlement but, in the event that an in-principle settlement is reached before the commencement of the trial on the common issues and that settlement is ultimately approved by the Court, shall be bound by the terms of the settlement agreement and barred from making any claim against the Defendant in respect of or relating to the subject matter of this proceeding, including participating in any form of compensation or otherwise benefiting from any relief that might be ordered or agreed.”

1. Pausing there, the use of terminology such as “hard” and “soft” class “closure” has been justifiably deprecated: see, eg, *Haselhurst* at [2], [45]; *Parkin* at [8]. For completeness, “hard” class closure is similar to the above, but without the “re-opening” of the class in the event that mediation fails to achieve a settlement. Generally, in cases of “hard” class closure, those group members who fail to register by the appointed date have their cause of action extinguished for no monetary (or other) benefit.
2. *Takata* was overturned by *Haselhurst*, but it is necessary to be aware of it in order to understand the nature of the decision in *Haselhurst*.

BMW Australia Ltd v Brewster

1. In *Brewster*, the High Court considered s 183 of the CPA (and s 33ZF of the FCA Act), and whether it empowered the Supreme Court to make a “common fund order” at an early stage of the proceeding. A “common fund order” is an order that provides for the quantum of a litigation funder’s remuneration to be fixed as a proportion of any moneys ultimately recovered in the proceedings, for all group members to bear a proportionate share of that liability, and for that liability to be discharged as a first priority from any moneys recovered.
2. In their joint judgment at [3], Kiefel CJ, Bell and Keane JJ (in a majority which included Nettle J and Gordon J with Gageler J and Edelman J dissenting) began by noting the purposes of s 183 and its cognate provision, s 33ZF, in the FCA Act):

“While the power conferred by these sections is wide, it does not extend to the making of a CFO [common fund order]. These sections empower the making of orders as to *how* an action should proceed in order to do justice. They are not concerned with the radically different question as to whether an action *can* proceed at all. It is not appropriate or necessary to ensure that justice is done in a representative proceeding for a court to promote the prosecution of the proceeding in order to enable it to be heard and determined by that court. The making of an order at the outset of a representative proceeding, in order to assure a potential funder of the litigation of a sufficient level of return upon its investment to secure its support for the proceeding, is beyond the purpose of the legislation.”

1. A key element of their Honours’ reasoning, under the heading “Textual considerations”, was that the commercial viability of the proceeding, from the perspective of a litigation funder, was not a matter that supported the making of an order under s 183 of the CPA. Their Honours said:

“[49]  The orders contemplated by s 33ZF and s 183 are orders which may be thought to make certain that justice is done in the proceeding. An order the purpose of which is to ensure that the proceeding is able to go forward is not such an order…

[50]   The focus of the power conferred on the court by the text is upon ensuring, that is, making certain by the order, that justice is done in the proceeding as between the parties to it. As a matter of the ordinary and natural meaning of these words, they authorise an order apt to advance the effective determination by the court of the issues between the parties to the proceeding. Whether or not a potential funder of the claimants may be given sufficient financial inducement to support the proceeding is outside the concern to which the text is addressed.

[51]   The text of each of s 33ZF and s 183 assumes that an issue has arisen in a pending proceeding between the parties to it, and that the proceeding will be advanced towards a just and effective resolution by the order sought from the court… *Nor does* [the making of a CFO] *assist in doing justice between group members in relation to the costs of litigation*.” (emphasis added)

As will be seen below, the italicised consideration above, namely the importance of doing justice *between group members* is of relevance to this case.

1. Their Honours then relevantly considered the role of the gap-filling power at [70], omitting footnotes:

“It was submitted on behalf of the first respondent in the BMW appeal that the topics addressed in ss 168, 169, 170 and 177 of the CPA (which are to the same effect as ss 33Q, 33R, 33S and 33Z of the FCA respectively) also fall within the scope of s 183. According to this submission, Pt 10 of the CPA is “redundant where it is convenient”. That submission is not helpful in seeking to come to grips with the meaning to be given to the words of limitation “appropriate or necessary to ensure that justice is done in the proceeding”. Further, it exalts the role of s 183 (and s 33ZF) above that of a supplementary or gap‑filling provision, to say that it may be relied upon as a source of power to do work beyond that done by the specific provisions which the text and structure of the legislation show it was intended to supplement. The work which the respondents require s 183 (and s 33ZF) to do is beyond the scope of the other provisions of the scheme. As will be seen, those other provisions are engaged upon a different occasion and address materially different circumstances from those that are involved in the making of a CFO. Section 183 (and s 33ZF) cannot be given a more expansive construction and a wider scope of operation than the other provisions of the scheme. To accept this submission would be to use s 183 (and s 33ZF) as a vehicle for rewriting the scheme of the legislation.”

1. Their Honours continued before considering the importance of the opt out nature of the regime created by Pt 10 of the CPA (at [73]):

“Under s 33J of the FCA [Act and s 162 of the CPA], the court must fix a date before which a group member may opt out of a representative proceeding. Because that date will usually fall before the outcome of the action is known, the problem of “free riding” by group members who would seek to opt in to the proceeding only after a favourable outcome is achieved is addressed. As this Court has noted, the opt out model adopted by Pt IVA of the FCA [Act] and Pt 10 of the CPA is designed so that a representative proceeding may continue even if group members are unaware of it [citing *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at 31-32 [38]-[40]]; and group members “are under no obligation to identify themselves” [citing *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd [No 2]* [2010] FCA 176 at [31]]. That said, both legislative schemes do allow identification of all group members (as far as is possible) in order to distribute any proceeds. That this is so is apparent from ss 33V, 33X(3)-(4), 33Z and 33ZA of the FCA [Act]. *Reference to the terms of these provisions confirms that the legislative scheme contemplates that the occasion for the making of orders in relation to distribution of the proceeds of the action is its successful completion.*” (emphasis added)

1. In the contradictor’s submission, this Court should place great weight on these remarks of the High Court, and in particular the emphasised text. Nettle J made similar observations at [125]. The contradictor also emphasised the observations of Gageler J (as the Chief Justice then was) at [108] as to the role of a representative plaintiff and the nature of group proceedings more generally:

“… a representative proceeding once commenced 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.”

The contradictor submitted that the proposed order would mean that the group members would no longer “sink or swim together”, at odds with Gageler J’s (dissenting) view.

1. It should be noted that the Court in *Brewster* considered only the making of an order pursuant to s 183 of the CPA, and in that respect Lendlease emphasised the distinction between s 183 and the order in this case which is sought to be sustained in the present case by s 175(5) of the CPA. The contradictor’s response to this was to emphasise the view of Nettle J at [125] to the effect that the limits of a particular power under the CPA “must be determined by the text of the Act read as a whole”: see also the authorities cited above at [26].

Haselhurst v Toyota Motor Corporation Australia Ltd (t/as Toyota Australia)

1. In *Haselhurst*, this Court considered a “soft class closure” order, which purported to have been made pursuant to s 183 of the CPA. The text of the order itself has been set out at [38] above.
2. Under the order that was sought, unregistered group members’ claims were, contingently on settlement, barred, but if settlement was not reached, unregistered group members were entitled to participate in any judgment. Separate judgments in that proceeding were given by Payne JA and me with Macfarlan and Leeming JJA and Emmett AJA agreeing with both judgments.
3. Payne JA relevantly noted at [44], in a statement that is equally applicable in this case:

“The starting point is the construction of the only order sought to be challenged, namely Order 16. Until the legal and practical effect of that order is understood, it is not possible to address the questions of power and miscarriage of discretion.”

1. Payne JA pointed out, again relevantly for the present case, that “closure” of a class was not necessary in order to achieve settlement “as a matter of demonstrable historical fact” (at [63]). His Honour also noted the alternative approach to “closing” the class, being of altering the class, at [71]:

“The availability of the technique of altering a class so as to confine it to persons with a claim against the defendants and who had retained the firm of solicitors and/or had entered into a litigation funding agreement was confirmed by *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275; [2007] FCAFC 200.”

1. Key to Payne JA’s reasoning, however, was that the order sought in *Haselhurst* was inconsistent with the reasoning of the High Court in *Brewster* at [70] (see above at [44]), namely that, in Payne JA’s words (at [106]), “s 183 was not a source of power to do work beyond that done by the specific provisions which the text and structure of the legislation show the section was intended to supplement”. That “incongruity” (as his Honour termed it at [105] and [108]) was said to be fatal to the argument in that case that the order was within the Court’s power pursuant to s 183 of the CPA. As his Honour put the matter at [105]:

“It is, so the plurality in *Brewster* explains, incongruous to read a power into s 183 when other provisions of Pt 10 make specific provisions apt to accommodate that task but which operate at the conclusion of the proceeding.”

1. The ultimate thrust of his Honour’s judgment was as follows:

“[114]   Nevertheless, Order 16 in the present case is beyond the power conferred by s 183. This is not because settlement of proceedings is not a desirable aim. Plainly it is. I do not, however, accept as the respondents submitted that the “supplementary” power in s 183 was intended to provide a power of contingently extinguishing group members’ claims so that “realistic settlement discussions may take place” by “seeking to crystallise the outer sum being claimed”.

…

[122]   Order 16 strikes at the heart of the Pt 10 regime, by setting up an alternative regime of extinguishment of group members’ rights of action for the purpose of encouraging the parties towards a pre-trial settlement. Self-evidently, the fewer people the respondents need to compensate, the less they believe they will need to pay to settle the proceedings. Whilst Order 16 makes settlement more likely, it does so in a manner contrary to the scheme established by the legislature.”

1. Payne JA’s view that a class closure order would occasion an “insoluble conflict of interest” should also be noted, as it was a point subsequently elaborated on by the Court in *Wigmans*. In his Honour’s view (at [120]), a closure order would have:

“…the effect that the appellants and their legal advisors will necessarily face an insoluble conflict of interest in any mediation or settlement discussion. It is in the interests of all group members who have registered to achieve a favourable settlement. It is in the interests of group members who have not registered for the proceedings not to settle regardless of the terms offered. This is because Order 16 has the effect that they will recover nothing should the matter settle but should the matter proceed to hearing they may be entitled to damages.”

1. In the same case, I agreed with Payne JA’s leading judgment and added the following observations:

“[12]   Returning to the order under consideration in the present case, it is difficult to conceive of how an order which destroys a person’s cause of action within the limitation period, without a hearing and with no guarantee that the person will necessarily know of the outcome or consequences of their failure to register, is an order that could be thought to be “necessary to ensure that justice is done in the proceedings”. To ask whether such an order could be thought to be “appropriate … to *ensure* that justice is done in the proceedings” is, for the reasons explained by Beach J in *Earglow* (at [33]), to ask essentially the same question.

[13]   Whilst a mediation of the proceedings may well be desirable and no doubt should be explored and encouraged, it is not an end in itself and is not, in my opinion, something which is required to ensure that justice is done in the proceedings. If a mediation can only occur in circumstances where group members who do not register to participate in it will lose their causes of action (an assertion which must underpin the respondents’ position and which I consider dubious), I do not consider that that outcome is something that can be described as either “appropriate or necessary” to “ensure that justice is done in the proceedings”.”

1. I further noted that a successful mediation was far from an inevitable outcome in the proceedings, and that parties cannot be forced to settle. The thrust of that point was the observation at [15] that:

“If that means that the Court has to deal with, manage and hear a complex proceeding, so be it. Courts exist to resolve disputes, however complex those disputes may be, not to act as mere dispute clearing houses or mediation referral agencies.”

1. In particular, I noted at [10] the risk of “illegitimate glossing” of s 33ZF of the FCA Act (the cognate to s 183 of the CPA) when the analysis is undertaken from the standpoint of what is “necessary”, as was the position taken by the Full Court of the Federal Court in *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191; [2016] FCAFC 148 at [165] (**Money Max**).
2. While Lendlease was understandably desirous of confining *Haselhurst* to considerations of power pursuant to s 183 of the CPA, the contradictor emphasised this Court’s unanimous holdings in *Haselhurst* as to the nature of Pt 10 of the CPA and its operation. Lendlease did not challenge the correctness of *Haselhurst*.

Wigmans v AMP Ltd

1. In *Wigmans*, this Court (comprising Macfarlan, Leeming and White JJA) considered an appeal from an order made by Ward CJ in Eq (as the President then was) which noted the following:

“In the event that the proceedings settle at any time between the first day of the mediation (being the mediation referred to in Order 19 above) and the first to occur of the following:

a.   the date which is 6 months after the first day of that mediation; and

b.   the first day of the hearing on liability in these proceedings,

then the parties intend to apply to the Court for an order that any Group Member who by the Class Deadline does not opt out and who is not a New Registered Group Member or Existing Registered Group Member will not receive any benefit pursuant to the settlement.”

Notification of the intention referred to in the above order was to be distributed to group members: see *Wigmans* at [26].

1. That notification in terms was set out at [32] of *Wigmans*:

“The Plaintiffs and AMP intend to seek an order that any Group Member who does not register for the AMP Shareholder Class Action by **4:00pm (AEDT) on 4 September 2020** should be excluded from receiving a benefit from any settlement that may be agreed to … at the forthcoming mediation ...”

1. Ward CJ in Eq had held that a notice containing the foregoing could be approved pursuant to s 176(1) of the CPA conformably with *Haselhurst*: *Komlotex Pty Ltd v AMP Ltd* [2020] NSWSC 504 at [206]-[208] (**Komlotex**). It is worth noting that the appeal by Ms Wigmans came about as Ms Wigmans was the representative plaintiff of a competing class action, which had been permanently stayed, and had successfully sought special leave to appeal in relation to that order at the time of her appeal, although the appeal had not yet been heard: *Wigmans* at [11].
2. In any case, the basis for Ward CJ in Eq’s orders was set out after a detailed consideration of *Haselhurst*. Her Honour identified the ratio of the decision in *Haselhurst* as “ly[ing] in the barring effect of the impugned order”: *Komlotex* at [200]. Her Honour then noted that the order sought in *Komlotex* raised a different issue, and in her Honour’s view, was not “inconsistent with the statutory regime under which a group member is able to take the benefit of judgment or settlement even without taking any positive step in the proceeding”: *Komlotex* at [206].
3. Further, her Honour held that the “insoluble conflict of interest” which Payne JA noted in *Haselhurst* would not necessarily arise in *Komlotex*, holding at [208]:

“Without being in any way prescriptive, it seems to me that there is ample scope for negotiation of potential outcomes that might depend on the ultimate size of the class and/or its composition without there being an inevitable or insoluble conflict of interest. Further, there would be ways, if necessary, in which separate interests could be independently pursued within the course of the same mediation (perhaps with separate representation within the same firm of solicitors or with separate Counsel at the mediation).”

1. Her Honour further noted the risk that an opt out notice lacking the proposed notation would be misleading (at [210]) and suggested that the appropriate time for the consideration of issues of conflict of interest was if a settlement was reached at mediation, thereby making the objection to the notice somewhat premature (at [211]):

“Similarly, I consider that issues as to a potential conflict of interest are more likely to arise, or perhaps even will only arise, at a time when (assuming an in principle settlement has been achieved) there is an application to restrict participation in the distribution of settlement funds only to those who have registered as part of the opt out process. That, arguably, would also arise if there were an application to amend the class (which, again, the Court of Appeal noted was a permissible way to affect closure of the class at that stage). In this way, and for these reasons and others, to my mind it is premature for the Court now to consider such issues and, even more so, effectively to stay the proceeding because of them. Put differently, commencement of the opt out process at this stage does not, to my mind, mandate the outcome of any application that might later be made (as presently intended to be made) nor does it mandate how any settlement that might be able to be achieved could be structured in the interests of all the group members. The proposed opt out notice does no more than alert group members to the intention (or present intention, and hence only the possibility) that the parties may move in the manner described in the notice.”

1. Finally, her Honour noted that she considered that *not* making an order of the impugned kind would be inconsistent with the overriding mandate for the just, quick and cheap resolution of the real issues in dispute: *Komlotex* at [212]; CPA s 56(1).
2. On appeal, the Court (writing jointly and allowing the appeal) held that the proposed order was beyond power. The Court noted at [77] that:

“The opt-out nature of the regime has long been recognised to be an important aspect of the legislative regime. In *Mobil Oil Australia Pty Ltd v State of Victoria* (2002) 211 CLR 1; [2002] HCA 27 at [39]-[40], Gaudron, Gummow and Hayne JJ said of the materially equivalent federal regime:

“[39]  …There is, therefore, a real possibility that some group members would remain ‘perfectly ignorant of the proceedings, and of what is really going on’. That is, some of those who would benefit from success in the proceeding (but thereby lose the opportunity to pursue their individual claim in some way, or to some effect, different from the group proceeding) may have their rights affected without their knowing or consenting to that being done.

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

As their Honours noted, this passage was approved by Kiefel CJ, Bell and Keane JJ in *Brewster* at [73].

1. The Court in *Wigmans* noted at [79] that what was proposed was “prima facie contrary to a fundamental precept of Pt 10, as confirmed by the joint judgments in *Mobil Oil* and *Brewster*, and inherent in the legislative choice of an opt-out regime.” The Court continued at [79]:

“If what is contemplated by Komlotex and AMP comes to pass, group members who take no positive step will gain no benefit from any settlement and will have their rights extinguished. Indeed, it is reasonable to expect that the extinction of passive or unregistered group members’ rights would be one of the drivers of any settlement between registered group members and AMP. This prima facie gives rise to a conflict between group members who are registered and those who are not.”

1. Their Honours then considered *Haselhurst* in some detail, noting at [102] that although s 183 of the CPA was not in issue in *Wigmans*, Pt 10 was still central to the analysis:

“Ms Wigmans recognised that s 183 was not relied on to sustain the orders the subject of the appeal. She nonetheless submitted that the power to issue notices must nonetheless conform with the basic precepts of the scheme established by Pt 10. That submission is sound. Sections 175 and 176 do not sustain orders which are contrary to basic precepts of Pt 10. Nor do the case management powers in Pt 6 (ss 56-61) extend to the making of orders in representative proceedings under Pt 10 that are inconsistent with those precepts.”

1. The Court accepted at [86] that “if all that had occurred were orders and notices concerning an opt out date and exhorting registration, what occurred would have been within power.” Their Honours continued, however, by observing (at [86]) that:

“If there is a vice in the orders and notices, it lies in the joint present and communicated intention to apply for orders extinguishing the claims of group members who do not register if a settlement takes place. That is no small thing. The present intention has a large practical effect on the content of the notice and the decision to be made by group members, and it is apt to shape the negotiations at the mediation.”

1. The Court also accepted as sound the submission that the power to issue notices must “conform with the basic precepts of the scheme established by Pt 10”: at [102].
2. Their Honours also observed that, although the orders sought did not, in form, contingently extinguish any rights, there was a need to consider the “practical effect” of the orders: at [104].
3. In the context of the orders sought being necessary to facilitate settlement, the observation was fairly made that the representative plaintiff and its advisers had “chosen to draft an enormous class, in respect of which they freely and very properly accept they are unable presently to have any meaningful idea of the number of group members or the value of their claims”: at [108]. It was in this context that the Court dealt with and rejected the submission that the orders sought were necessary to achieve settlement:

“[109]  First, there is no reason why, if those advising Komlotex wish not to progress the litigation to trial, but would prefer to compromise Komlotex’s claims, they may not apply to alter the class definition, or alternatively to convert the proceeding to one that no longer falls within Pt 10, and effect a compromise on behalf of all those known members for which they act.

[110]   Secondly, and even if Komlotex desires to maintain the breadth of the class in the Commercial List Statement, that does not preclude useful steps being undertaken at a mediation. There is no reason that the so-called “event studies” which seek to convert particular non-disclosures into hypothetical share price premiums may not be developed and exchanged and, perhaps, agreed as between the parties, as counsel for Komlotex candidly acknowledged. That information and analysis which is central to the case is independent of the group. There is obvious benefit to all group members and to AMP in seeking to reach agreement, if agreement can be reached, as to the premium, if any, at which AMP shares were trading at any particular time resulting from particular alleged non-disclosures. The exchange of information may lead all parties to focus on the particular alleged non-disclosures which matter, and thereby promote attention to the real issues in the litigation.

[111]   Nor is there any reason why, in principle, agreement could not be reached to settle the entire claim by providing a sum, in accordance with s 178, to be followed by a process of identifying group members who would then participate in that judgment through a claims process.

[112]   We do not accept that the submission based on what is necessary to facilitate settlement is an answer to orders which are contrary to the legislative scheme and give rise to a conflict of interest.”

1. Their Honours also took issue with Ward CJ in Eq’s suggestion that the “insoluble conflict” (as it was put by Payne JA in *Haselhurst*) did not necessarily arise: see [63] above. This conflict of interest lay in the fact that, under the regime suggested by the proposed order, the representative plaintiff would be, practically speaking, bargaining away the claims of unregistered group members in order to give AMP the necessary reassurance to settle the proceeding, for the benefit solely of the registered group members. Their Honours said in this regard:

“[120]  The interests of the representative plaintiff (and all other registered group members) are served by promoting the settlement. So too are the interests of the defendant. But the representative plaintiff is –– at the same time it asks for the settlement to be approved –– meant to be representing unregistered group members, who, by reason of the very settlement which the representative plaintiff is propounding, will receive nothing and whose rights will be extinguished. The conflict is real, immediate and direct. The interests of the representative plaintiff are diametrically opposed to those of group members who have not registered.

[121]   The primary judge considered […] that the conflict might be capable of being managed by the separate interests of group members being separately represented at a mediation by different solicitors of the same firm or different counsel retained by the plaintiff’s solicitors. That observation recognises the conflict but provides no solution. It would not be possible to obtain the informed consent of all group members to the solicitors so acting.”

1. Their Honours also rejected the submission that the objection to the order was premature, in this context emphasising the practical impact of receipt of the proposed notice by an unregistered group member: “in a matter of days, hundreds of thousands of group members are to be asked to make a choice based on notices sent pursuant to orders which proceed on the basis that their rights to participate in any settlement may be extinguished if they do not register”: at [126].
2. Finally, their Honours returned to the issue of necessity:

“[129]  More generally, insofar as Komlotex and AMP invoke necessity in order to justify the direct conflict of interest in which the representative plaintiff is placed, following a settlement which divides the group into two subgroups, those who will be paid something and those who will be paid nothing, we disagree. There are alternatives, and we do not regard them as unsatisfactory. One reflects the practice of the Federal Court for many years, which was to effect a class closure including by class redefinition before any settlement was achieved. True it is that that may involve cost to those standing behind the representative plaintiff, in advertising and recruiting members, but the history of representative proceedings in the Federal Court demonstrates that that is no insuperable obstacle. Another is to run a trial of the test case, which was after all the model on which these provisions were based, and thereafter notify group members of what has been determined on the issues common to group members.

[130]   It is important to bear steadily in mind that these difficulties are a direct consequence of the broad class definition chosen by Komlotex and those acting for it. The difficulties would evaporate if the class were confined to AMP shareholders who had registered with Komlotex’s solicitors, or some other narrower class.

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

1. The Court’s conclusion was expressed as follows at [132]:

“The orders are based on the idea that group members should be prevailed upon to register lest they lose rights to participate in a settlement, and have any rights they might have against AMP extinguished. This is contrary to a basic premise of Pt 10, and engenders an immediate conflict of interest. The fact that it occurs in a two-step process, rather than in a single order, does not remove the inconsistency. The fact that it is contingent, in the sense that the threat is conditional upon an in principle settlement being achieved, does not make it hypothetical or premature, because group members who are entitled to take no active step are being threatened, in the next fortnight, with the sanction of possible extinguishment of their rights unless they take a positive step and register with Komlotex’s lawyers or opt out.”

Parkin v Boral Ltd

1. In *Parkin*, the Full Court of the Federal Court (Murphy and Lee JJ, Beach J agreeing) considered the same question as in *Wigmans* by way of a separate question and stated case: see FCA Act s 25(6); *Federal Court Rules 2011* (Cth) r 30.01. Their Honours reached the opposite conclusion to this Court in *Wigmans*, holding that *Wigmans* was “plainly wrong”: see [109]-[110].
2. *Parkin* was run along similar lines to *Wigmans* (and, indeed, to this case): a contradictor was appointed, evidence was given by experienced solicitors to the effect that the proposed order would facilitate settlement of the matter by quantifying the number of group members and providing finality for the defendant, and the cognate provisions in the FCA Act (to ss 175-176 of the CPA) were said to be engaged. However, in *Parkin*, Murphy and Lee JJ emphasised the following:

“[29]   We are about to enter upon our fourth decade of modern class actions. Particularly in securities class actions, experience demonstrates that, by an overwhelming margin, Court-approved settlements are the most common way group members claims are resolved in Pt IVA class actions. As was noted in *Perera v GetSwift Ltd* (2018) 263 FCR 1 (*GetSwift*) (at [30] per Lee J), this characteristic of this type of litigation is both striking and singular. The result of all of this is that there is a potential procedural contradiction in the way in which securities class actions are often conducted and managed. On the one hand, one goes through the solemnity of making orders on the basis that the litigation will be the subject of an initial trial at which contested issues will be determined, while on the other hand, one recognises that this rarely happens. As was noted in *GetSwift* (at [34]) “the time has come for the Court to recognise the reality” that securities class actions “are overwhelmingly likely to resolve by a bargain, subject to Court approval”.

[30]   One of the ways by which this reality is recognised is the focus of the docket judge, consistently with the requirement in Pt VB of the [FCA] Act to facilitate the just resolution of claims as efficiently and inexpensively as possible, on assessing when a mediation should be ordered to take place. This important case management decision is primarily informed by an evaluation of when the prospects of a successful outcome of settlement discussions are at their maximum. In this context, it is now common for the Court to make orders requiring provision of information by respondents, the applicant or group members to allow those mediating to be apprised with sufficient information to form a conscientious view as to a proposed settlement.”

1. Their Honours analysed *Haselhurst* in some detail, in particular the holding in that case that s 183 of the CPA did not provide a power to make a soft class closure order, on the authority of *Brewster*. Their Honours described this as “depart[ing] from” a “widely accepted understanding” as to the ambit of s 33ZF, the cognate provision of s 183: *Parkin* at [45]. It should be noted that in the present case, senior counsel for Lendlease expressly accepted the correctness of *Haselhurst*.
2. Considering *Wigmans*, their Honours adopted the reasoning of Beach J in *Wetdal Pty Ltd as Trustee for the BlueCo Two Superannuation Fund v Estia Health Limited* [2021] FCA 475 (**Wetdal**) at [82]-[94], in which his Honour took issue with *Wigmans*. Murphy and Lee JJ in *Parkin* noted at [55] that the Full Court of the Federal Court in *BHP Group Limited v Impiombato* (2021) 286 FCR 625; [2021] FCAFC 93 at [95] (Middleton, McKerracher and Lee JJ) had said that there was “much to be said for Beach J’s observations”.
3. After setting out lengthy submissions from the contradictor, their Honours turned to the consideration of the matter. They first noted that the correctness of *Haselhurst* did not arise for consideration as it could be distinguished from the orders sought in *Parkin* (at [105]). By contrast, their Honours accepted that the orders rejected in *Wigmans* were materially indistinguishable from those relevantly sought by Boral in *Parkin*. Their Honours expressed the view that the reasoning in *Wigmans* was “plainly wrong”, for the following reasons:
4. The text of s 33X(5) of the FCA Act (the cognate to s 175(5) of the CPA) in terms empowered the Court to make an order “at any stage” that notice be given to group members “of any matter”. Their Honours cautioned against reading down words of generality, especially in regard to jurisdiction: *Parkin* at [111];
5. Criticising what was identified in *Wigmans* as the “fundamental precept” derived from *Mobil Oil Australia Pty Ltd v State of Victoria* (2002) 211 CLR 1; [2002] HCA 27 (**Mobil Oil**) and *Brewster* as a proper basis for considering the question of power. Their Honours said at [117]:

“Deciding whether s 33X(5) is a source of power for the Court to make an order in the terms of the second question involves consideration of the text and purpose of the section in the context of Pt IVA as a whole. It does not involve ascertaining (or purporting to ascertain) a “fundamental precept” of the Act, at least to the extent that the phrase is intended to identify something other than a conclusion reached as to the operation of a statutory provision by reference to well-established rules of statutory interpretation. The scope of the general power in s 33X(5) is not identified by: (a) observing that the statutory scheme is an opt out scheme; (b) identifying that as a “fundamental precept”; and then (c) using that generalised phrase as a controlling concept to identify what may or may not be consistent with such a scheme; that is, by searching for the meaning of s 33X(5) by reference to that extra-statutory expression, rather than by reference to text, context and purpose.”

Instead, their Honours adopted the explanation of *Mobil Oil* given by the Victorian Court of Appeal in *Regent Holdings Pty Ltd v State of Victoria* (2012) 36 VR 424; [2012] VSCA 221 at [10]-[12] (**Regent Holdings**) which was said to confine its significance: *Parkin* at [115]-[123];

1. Contrary to the “fundamental precept”, there had been many decisions in which group members had been compelled by court order, prior to settlement or the first stages of trial, to take a positive step in the proceeding, including as to the giving of discovery, provision of particulars of group members’ claims, contributing towards security for costs and providing particular or group members’ identities to facilitate service of subpoenas. Their Honours referred to the examples given by Beach J in *Earglow Pty Ltd v Newcrest Mining Ltd* (2015) 230 FCR 469; [2015] FCA 328 at [47] (**Earglow**) which had been repeated in Beach J‘s decision in *Wetdal* at [90] and rejected the contradictor’s submission that these were to be seen as exceptions to the “fundamental precept” as they were not directed to the “fundamental substantive rights” of group members: *Parkin* at [124]-[125]. The cases Beach J referred to in *Earglow* at [47]-[52] were as follows: *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd (No 2)* [2010] FCA 176 (**P Dawson Nominees**); *Thomas v Powercor Australia Ltd (No 1)* [2010] VSC 489 (**Powercor**); *Regent Holdings*; *Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd* [2011] FCA 671; [2011] ATPR 42-361 (**Jarra Creek**); *Kirby v Centro Properties Ltd* [2011] FCA 611; (2011) 84 ACSR 87; *Meaden v Bell Potter Securities Ltd* [2011] FCA 136 (**Meaden**); *Weimann v Allphones Retail Pty Ltd (No 3)* [2009] FCA 1292 (**Weimann**); *Murphy v Overton Investments Pty Ltd* [1999] FCA 1123 (**Overton**); *Williams v FAI Home Security Pty Ltd* [1999] FCA 1771 (**Williams**); *Madgwick v Kelly* (2013) 212 FCR 1; [2013] FCAFC 61; *Kirby v Centro Properties Ltd*, unreported, Federal Court of Australia, 8 February 2011.
2. Conflicts of interest were an “inevitable by-product” of the existence of a representative plaintiff, which could be addressed through the duty on the representative plaintiff not to act contrary to the interests of the group members and through the Court’s protective function. Their Honours noted Beach J’s explanation in *Wetdal* (at [94]) of the representative plaintiff as a fiduciary: *Parkin* at [126];
3. The Court already has the power under ss 33V and 33ZB of the FCA Act (pursuant to the equivalents of ss 173 and 179 of the CPA, respectively) to approve a settlement pursuant to which unregistered group members receive nothing but are bound by the settlement (a position which had prevailed in the Federal Court after *Haselhurst*), and the risks attaching thereto were factors which the Court can assess when approval is sought: *Parkin* at [129]-[132]. This was essentially the prematurity argument that the Court of Appeal had addressed and rejected in *Wigmans*;
4. Concluding (at [134]) that the “insoluble conflict” identified in *Haselhurst* and *Wigmans* was not relevant to the question of power:

“What this shows is that, to the extent that a conflict of interest may exist, it does not demonstrate that there is no power under s 33X(5) to make the proposed order. Indeed, it may be that the existence of a conflict of interest is a reason why the Court decides that it is appropriate to order that group members be given notice of the applicant’s intention to seek an order which, if made, may or will adversely affect Unregistered Group Members’ interests. That is, however, an issue of discretion, not one of power, and the question of discretion is not before us.”

Competing contentions

1. Having set out many of the above authorities, Lendlease emphasised the following three points.
2. First, that the text of s 175(5) conferred an unconfined power on the Court, which was very broadly expressed, in light of the use of the phrases “any matter” and “any stage”. Lendlease drew the Court’s attention to the observations of the High Court in *Owners of the Ship “Shin Kobe Maru” v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421; [1994] HCA 54 (**Shin Kobe Maru**) to the effect that the Court should not construe legislative provisions which confer jurisdiction or powers on a court “by making implications or imposing limitations which are not found in the express words.” Such dicta has been applied to representative proceedings involving Pt IVA: see *BHP Group Limited v Impiombato* [2022] HCA 33; (2022) 96 ALJR 956 at [15]; *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255; [1999] HCA 48 at [11]. In that respect, Lendlease submitted that Parliament must be taken to have comprehended the need for courts to develop their own procedures, and thus legislated Pt 10 of the CPA in a broadly worded way, which can take into account commercial reality.
3. Second, Lendlease submitted that the “fundamental precept” identified in *Wigmans*, formulated by Lendlease as “that group members may do nothing prior to settlement and still reap its benefits” was an *a priori* assumption about legislative purpose, and that *Mobil Oil* was not intended to be a statement of legislative intent, and that even so, it did not, on its own terms, support such a broad conception of a “fundamental precept”. Lendlease also argued that the acceptance of *Mobil Oil* in *Brewster* was qualified, to the effect that the opt out model was designed to allow representative proceedings to continue even if group members were unaware of the proceeding.
4. Third, Lendlease argued that *Wigmans* incorrectly considered the potential for conflicts between registered and unregistered group members as relevant to determining the ambit of the Court’s power to approve notices under s 175(5) of the CPA. The Court was taken to several mechanisms to obviate and mitigate such conflicts, including that all settlements must be approved by the Court.
5. By contrast, the contradictor embraced this Court’s decision in *Wigmans*. In particular, the contradictor emphasised that the occasion for excluding group members from the benefits of a settlement or a judgment “is its successful completion”, picking up the observation in *Brewster* at [73] quoted at [45] above.
6. The contradictor also emphasised the risk-shifting nature of the proposed form of notation, from the representative party or the defendant to unregistered group members, and further argued that such an order as proposed would give rise to a “real, immediate and direct” conflict, including on the part of the legal representatives for the representative plaintiff. The representative plaintiff, after agreeing to the form of order, would know that it would be negotiating henceforth on the basis that the non-registered group members would not be intended to benefit from any ultimate settlement.
7. The contradictor further noted that the absence of class closure orders (of any kind) does not prevent settlement, a matter that was ultimately accepted by Lendlease in the course of argument. It was conceded by Lendlease that there were other ways of structuring a settlement which can take into account variance in the class.
8. The contradictor also emphasised the nature of Pt 10 of the CPA as a whole, including its many controls and protections for the benefit of group members in representative proceedings, including duties on the representative plaintiff, the power to replace the representative plaintiff, powers to stay or “de-class” the proceeding and supervision of a settlement fund. The contradictor, in light of the nature of Pt 10, argued that s 175(5) could not be seen as an unconfined power. The contradictor put this in terms of risk, arguing that unregistered group members cannot be saddled with the risk of being excluded from the settlement before one is actually achieved:

“…although group members can be asked to participate in steps leading to mediation and a hearing, those steps cannot involve a transfer of the risk unless and until the proceedings have reached the point in the legislative scheme for orders in relation to the approval of the settlement or judgment and the necessary distribution of the proceeds.”

1. The contradictor further supported the Court’s analysis in *Wigmans* that a group member could, as an integer in the scheme of Pt 10, do nothing and still reap the benefits of the proceeding, as well as agreeing with the Court’s analysis in *Wigmans* as to the conflict of interest, both for the representative plaintiff and its legal representatives.
2. In the course of oral argument, on 29 November 2023, the following relevant exchange occurred:

“BELL CJ: Is another way of putting it, or perhaps thinking about it, that given for example the approach taken by Beach J in *Farey*, namely people being given an opportunity once, the Court is not going to be sympathetic to them not acting, then this procedure transmutes what is an opt out procedure effectively, or de facto, into an opt in procedure, ie you opt in by registration by a particular date prior to any settlement et cetera, and unless you've done so you're likely to lose your rights?

MORGAN: That’s the point we make in our written submissions, yes. We would adopt that. That's why [section] 173 is the point at which one can be forced to opt in. It's an opt out process until completion, and that's all that *Mobil* says at 40. That's what was adopted by *Brewster*, and again by this Court we say in *Wigmans*, and it's nothing more than that.”

1. In supplementary submissions, the contradictor adopted an argument that had been raised in the course of oral hearing, namely that s 175(5) was constrained or to be read by reference to the language of s 175(6), with the consequence that the notice had to relate to an “event”, and one that had happened prior to the issuing of any notice.

Consideration

1. The starting point of the analysis is not whether s 175(5) of the CPA confers power on this Court to include a notification of the kind sought to be included in the opt out and registration notice that the parties seek to be issued in the present case. It is whether this Court’s recent unanimous decision in *Wigmans* (which both parties accepted compelled a negative answer to that question) is “plainly wrong” and should not be followed.
2. I do not consider that it is plainly wrong although it may be accepted that the question is one upon which opinions might differ (as illustrated by the decision at first instance in *Wigmans* and the decision of the Full Court of the Federal Court in *Parkin*). Having said that, and as will be explained, I do not find aspects of the reasoning in *Parkin* persuasive and certainly not sufficiently persuasive as to justify a conclusion that *Wigmans* was “plainly wrong”.
3. *Wigmans* was a decision which built carefully on earlier authority, especially the decision of a five-judge bench in *Haselhurst*, a decision which was accepted by Lendlease to have been correctly decided. The Court in *Wigmans* was conscious, of course, of the then very recent decision of the High Court in *Brewster* which, as observed above at [24]-[26], emphasised, on the one hand, the danger of looking at a single provision of a statutory scheme in isolation, and, on the other hand, the importance of statutory context.
4. The majority of the High Court in *Brewster* must be taken to have accepted the appellant’s submission in that case, namely that the principle of construction identified in *Shin Kobe Maru* (which Lendlease relies on in the present case, as did the Court in *Parkin*), cannot be deployed to construe provisions of the respective class action regimes established in the FCA Act and Pt 10 of the CPA more liberally than their text and context permit: *Brewster* at [36]. Apparently general words in a statute may need to be read down or at least in a way that conforms with other provisions of the statute or with the purpose of the Act: *Ross v The Queen* (1979) 141 CLR 432 at 440; [1979] HCA 29. Moreover, notwithstanding that it is true that there is a general principle of statutory construction associated with *Shin Kobe Maru* which militates against reading implied limitations into a conferral of power on a superior court, some powers will contain inherent limitations which may be derived from statutory purpose or a detailed statutory scheme (see, eg, *Aussie Skips Recycling Pty Ltd v Strathfield Municipal Council* (2020) 103 NSWLR 834; [2020] NSWCA 292 at [48]-[52] and, of course, *Brewster* itself) or by reference to an inferred legislative intent that the power would not be used in a way which authorises, for example, a misleading or deceptive notification.
5. When this Court in *Wigmans* was referring to the “fundamental precept” of Pt 10 of the CPA at [79], it was referring to nothing more and nothing less than that statutory context which was considered in detail in *Haselhurst* in passages picked up and quoted extensively in *Wigmans*. It was that equivalent scheme of provisions that was being referred to by Gaudron, Gummow and Hayne JJ in *Mobil Oil* in the passage picked up with approval by Kiefel CJ, Bell and Keane JJ in *Brewster*. The key aspect of the passage in *Mobil Oil* which renders the conclusion that *Wigmans* was “plainly wrong” a surprisingly ambitious one was that “[g]roup members, however, need take no positive step in the prosecution of the proceeding to judgment to gain whatever benefit its prosecution may bring” (at [40]).
6. The *Parkin* Court’s attack at [115] on the use of the language of “fundamental precept” in *Wigmans* and its attempt to read down the critical passage in *Mobil Oil* by what was said by the Victorian Court of Appeal in *Regent Holdings* is, with respect, unconvincing. First, as a shorthand way of describing the architecture of the statutory scheme, the use of the language “fundamental precept” was entirely consistent with the need to construe the statute as a whole. Second, reference to this “fundamental precept” was precisely what Gaudron, Gummow and Hayne JJ were doing in *Mobil Oil.* Third,as Leeming JA has illustrated at [151]-[155] below, the language of “fundamental precept” is entirely orthodox, and regularly employed by the High Court in a range of different contexts. Fourth, the discussion in *Regent Holdings* was by reference to an entirely different kind of class or group when compared to the vast open class or group in the present case and in *Parkin*. In *Regent Holdings*, in the context of considering the central observation in *Mobil Oil*, the Court observed at [14] that:

“…the group is limited and in effect closed; all members of the group are represented by the one firm of solicitors; and the litigation is maintained by a single litigation funder for the benefit of the representative party and group members alike, the prosecution of the representative party’s claim is more akin to a joint enterprise in which the representative party and the group members are engaged together with a view to maximising recovery. *In such a case*, it is not inappropriate for a judge to make procedural orders consummate with that paradigm.” (emphasis added)

1. There is a world of difference between what is already a closed class and an open class of the kind with which the High Court in *Mobil Oil* was dealing. Where a class has closed in the way the class was closed in *Regent Holdings*, no question of members of the class being required or strongly incentivised to “opt into” the class or group arises. The Court in *Regent Holding* noted the importance of reading the observations in *Mobil Oil* “in context, and […] against the background of the case with which the High Court was concerned”: at [12].
2. Interestingly, almost all of the cases relied upon by Beach J in *Earglow*, as picked up by his Honour in *Wetdal* and by Murphy and Lee JJ in *Parkin* at [124], and relied upon to undermine what was identified in *Wigmans* as the fundamental precept and the centrality of the observation of Gaudron, Gummow and Hayne JJ in *Mobil Oil*, were also cases where the class or group had already been closed. They all also pre-dated *Brewster* which was significant because the orders made in some of those cases relied upon s 33ZF of the FCA Act, held in *Brewster* not to have the amplitude previously assumed: see, eg, *P Dawson Nominees*; *Powercor*.
3. Unregistered class or group members were not in fact required to do anything proactive in any of the cases relied upon in *Earglow* and *Wetdal.*  Orders were directed either to the applicant in respect of existing group members (see, eg, *Overton* and *Williams*) or to group members who had already opted in by entering into retainers and funding agreements (see *Meaden*; *Regent Holdings*), or who agreed to act as sample group members and who had provided evidence for a forthcoming trial: see *Jarra Creek*. None of those cases, on my review, required any unregistered group member to take any proactive step prior to a settlement or judgment. Another decision relied upon in *Earglow*, namely *Weimann*, does not, with respect, appear to stand for the proposition for which it is cited.
4. In one of the cases relied upon, *P Dawson Nominees*, Finkelstein J referred to the essentially passive role of non-representative group members at [17], having observed at [16] that:

“The starting point is that the class actions regime under Part IVA of the Federal Court Act is designed to require little or no active involvement by group members. A group member is a group member principally for the limited purposes of taking the benefit, or suffering the burden, of findings on common questions (ie questions that are common to the claim brought by the named applicant and claims that may be pressed by group members). In an action where money relief may be sought by a group member, the group member will generally only be required to provide specifics about the quantum of his or her claim after the common questions have been resolved and that may be in a separate action.”

1. As the contradictor submitted in supplementary submissions, the structure and consequences of the Options presented in, and the language of, the Amended Notice indicate that a purpose of the notice is to pass the risk that the parties otherwise would bear onto Group Members who do not select Option A or B. The contradictor also submitted that that conclusion could also be inferred from the prioritisation of registration (Option A), the repeated statement that “there may or may not be another opportunity to register” (Amended Notice p 1 at [3], Section 2 p 9 at [4], Section 2 p 10 at [5], Section 2, p 11 at [11]-[12]) and the emphasised advice that group members who do not wish to opt out are instead “strongly encouraged” to register “so as not to risk missing out on the benefit of any settlement”: Amended Notice p 11 at [13].
2. Looked at in substance, the proposed notification places non-registered group members in a position that would be contrary to the opt out legislative scheme enshrined in Pt 10 of the CPA and its analogue in the FCA Act. One 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.
3. I agree with the contradictor’s submission that, properly construed, the statements in the Amended Notice referred to in [103] above are intended to provide Lendlease, and possibly the representative plaintiffs, with the forensic benefit of being able to argue – on an application to bind unregistered group members to a settlement in which they receive no compensation – that the unregistered group members should be treated as “forewarned” of the risk of an outcome that is wholly unfavourable to them. While the proposed notification warns non-registered group members of a risk they face if they do not register, the notification is in fact silent in terms of articulating the argument that it would be expected Lendlease and potentially the representative group member would make at the time of seeking approval of any settlement, namely that non-registered group members should not be permitted to participate in any settlement because they had previously been given the chance to opt in and had not taken it.
4. Next, in considering the force or otherwise of the criticism of *Wigmans* in *Parkin*, it is necessary to consider how the *Parkin* Court responded to the observation made in *Wigmans*, building upon what Payne JA had held in *Haselhurst*, about the conflict of interest that would be created by the giving of the notification contemplated in the Amended Notice. The relevant passages in *Haselhurst* and *Wigmans* are those set out at [54] and [73] above respectively, and the *Parkin* response is set out at [81(4) and (6)] above.
5. In short, the *Parkin* Court viewed the matter as one going to discretion and not power but, just as Ms Collins SC accepted that one would not construe s 175(5) as authorising the giving of a notice that was misleading or deceptive, it is scarcely heterodox to interpret a power to issue a notice to group members for their benefit as not extending to the giving of a notice that was apt to give apparent judicial blessing to a representative plaintiff engaging in what would inevitably be a conflict of interest. Nor was or is it correct to say that conflicts are inevitable – no conflict on the part of a representative party would arise where a class is closed. A defendant may engage in settlement negotiations in this context without the representative plaintiff being placed in a conflict of interest.
6. The notification proposed to be included in the Amended Notice to group members was evidently framed by reference to the acceptance in *Haselhurst* at [120]-[122] that one reason why order 16 in that case was beyond power was that it gave rise to “an insoluble conflict of interest” in any mediation or settlement discussion. That was because the order itself had the effect that group members who neither opted out nor registered before the “Class Deadline” would be “barred” from participating in any settlement. It was not necessary to address what precisely was the legal nature of the “barring” effected by that order (see *Haselhurst* at [52]-[59]), because, whatever it meant, the consequence was that the interests of *registered* group members would be to achieve a settlement, and the interests of *unregistered* group members would be to oppose any settlement.
7. The goal to which the proposed notification is directed is the same: a settlement in which registered group members will share in an amount of compensation, while unregistered group members will not obtain any benefit and will be prevented from suing the defendant. The proposed notification seeks to avoid the conflict in three ways. The first is that, rather than an order being made of which notification is then given to group members, instead the notice comes first and advises of an intention to seek an order in the event that a settlement is achieved. The second is that the notice advises that “the parties, alternatively, the defendant” will seek an order. The third is that what is sought is the qualified exclusion of unregistered group members from participating in any compensation, because the prohibition is “without leave of the Court”.
8. The second and third points of distinction are readily addressed. They are mere matters of form, and were rightly relegated to subordinate status in submissions to this Court. If the representative plaintiff and defendant are jointly seeking an order which results in registered group members obtaining compensation, and unregistered group members receiving nothing and being barred from receiving any compensation, the same insoluble conflict is present. How can the representative plaintiff be adequately representing the interests of all group members at that time? And the position is identical if the application is being made solely by the defendant, and not opposed by the representative plaintiff. The representative plaintiff acting in the interests of unregistered group members would properly oppose the orders sought by Lendlease, and acting in the interests of registered group members would support the same orders. Another way of putting this is that the representative plaintiff cannot resolve the conflict merely by failing to oppose orders sought by the defendant which will extinguish rights of all unregistered group members but yield compensation to registered group members.
9. The third point adds nothing. The orders are interlocutory, no different from those considered in *Haselhurst*. They may be varied or set aside by subsequent application in a proper case. The fact that the notice states this expressly is neither here nor there.
10. The first point tends to highlight why what is proposed subverts the scheme. The point of notification is to advise group members of *events* in the litigation, so that they may exercise their rights in an informed way. The proposed notification is *not* of any event. It is of a present intention on the part of Lendlease and perhaps the representative plaintiff to participate in settlement negotiations in a particular way.
11. Those considerations confirm that what is really happening is an attempt in the interests of the defendant and a subset of group members (namely, those who register prior to any in principle settlement being reached) to secure a settlement one element of which is the claims of remaining group members (namely, those who have not registered) are extinguished. Whether or not there is a conflict is determined as a matter of substance, not form. Ms Collins SC, with characteristic and appropriate candour, acknowledged the benefit to her clients of avoiding “tail risk”. As observed at [13] above, it is entirely rational that a defendant would seek to achieve that outcome. But a representative plaintiff who has chosen to act on behalf of all members cannot adequately represent all when it is in that party’s own interest, and those of registered members, to achieve a settlement, which result is diametrically opposed to the interests of unregistered members.
12. Submissions were made concerning the ever present possibility of conflicts within a class. Of course, some group members may have stronger claims than others. Some may face limitation defences to which other class members are not exposed. Some may have claims for actual physical loss while other have only claims for economic loss. There are many other ways in which those acting for group members may assess that group members’ claims are of different strengths. The conflicts arising in such circumstances are familiar. They arise in all civil litigation where a legal practitioner acts for more than one party. Indeed, the Act recognises that in some cases it may be desirable for subgroups to be identified.
13. But it is important to bear steadily in mind that the conflict which was addressed in *Haselhurst* and *Wigmans* and whichis a conflict driven by the desire to avoid or minimise “tail risk” is a conflict *which is created by the orders being sought*. There is nothing inherent in the underlying claims of group members, or in the structure of the legislation, that involves a group members’ registration status as affecting the outcome, thereby dividing the group members into two classes with divergent interests.
14. In reality, what is sought to be achieved is a form of “opt in” mechanism, whereby only those group members who agree to registration will participate in a settlement, coupled with the extinction of claims of all other group members. There are examples of opt in mechanisms in other legal systems, which the Australian Law Reform Commission (**ALRC**) rejected, as pointed out by the High Court in *Mobil Oil* at [83] and by Payne JA in *Haselhurst* at [94], [119]: Australian Law Reform Commission, *Grouped Proceedings in the Federal Court* (Report No 46, December 1988). But opt in mechanisms of the kind referred to in the ALRC report do not carry with them the consequence that persons otherwise falling within the definition of the group or class who do not opt in by registering have their claims extinguished.
15. If there were an insoluble conflict in being able to address the difficulty that some group members had agreed to be represented by the law firm and funder and others had not, then the submissions about “management” of conflict would have greater force. But there is a ready solution to the difficulty. That is for an application to be made to alter the class definition, so that the representative plaintiff represents solely group members who have registered, leaving other group members unaffected by the outcome of the representative proceeding (save that the limitations periods had been stopped for the time they were group members). There are other mechanisms too, as explained in *Haselhurst* at [69]-[75].
16. There is one statement in *Wigmans* with which I respectfully do not agree, but the nature of that disagreement tends in support of the result in that case and against the position reached in *Parkin*. The statement in *Wigmans* is that which appears at [100] as follows:

“It may be seen that the power to issue notices under s 175(5) is unqualified. In contrast, the power conferred by s 183 is qualified by the words “that the Court thinks appropriate or necessary to ensure that justice is done in the proceedings”.”

1. Whilst their Honours were correct to contrast the language of s 175(5) and s 183 of the CPA which was the subject of consideration in *Brewster*, I would respectfully question the statement that “the power to issue notices under s 175(5) is unqualified”. As explained at [32] above, s 175(6) constrains s 175(5) in two respects: first, the notice must relate to an event, and, second, that is not a future event but rather, an event that has “happened”. So much follows from the language of s 175(6): “[n]otice under this section must be given as soon as practicable after *the happening* of the event *to which it relates*” (emphasis added). As observed at [112] above, the proposed notification the subject of the separate question is not of any event. This alone supplies a reason why the notification the subject of the separate question is not authorised by s 175(5), and also supplies an additional reason why, in my view, far from being “plainly wrong”, *Wigmans* is correct. *Parkin* does not explain why this textual analysis is not correct.
2. As noted above, the contradictor in its supplementary submissions unsurprisingly embraced this point of textual construction which had been raised in the course of the oral hearing. In response, Lendlease gave the following “threefold” response:

“***First***, CPA section 175(6) does not constrain section 175(5). Section 175(6) deals with the timing of notices that are given after an event (see, e.g, section 175(1)). It does not preclude notices that are not preceded by an event. Thus, the Court may, at any stage, order that notice of any *matter* be given. ***Second***, even if s 175(6) contemplates an “event to which [notice under this section] relates”, a notice under s 175(5) would relate to the event of the order that the notice be given, and to which section 175(5) refers. In that case, the effect of section 175(6) is to require that notice be given as soon as practicable after the order. ***Third***, the “event” to which the Amended Notice relates is, alternatively, the fixing of the date on which group members are to register. The Contradictor expressly accepts that there can be a registration procedure, and that necessitates the fixing of a date for registration.”

1. As to the first point, s 175(6) is stated in general terms: “[n]otice under this section must be given as soon as practicable after the happening of the event to which it relates”. It is not a provision confined to questions of timing (although it undoubtedly addresses that) but makes clear that the notice must relate to an “event” and one that has “happened”. The second point involves artificial reasoning and tends towards circularity.
2. The third response is more finely balanced. Fixing a date by which group members are to register arguably constitutes an “event” but the subject matter of the proposed notification is not the event at all. It is referring to something which has *not* happened and is simply a present intention.
3. Even if this analysis is not correct, it does not in my view undermine the correctness of *Wigmans*.

Conclusion

1. For the above reasons, I am not satisfied that this Court’s recent decision in *Wigmans* is plainly wrong, or that there are compelling reasons to depart from it.
2. I would not grant leave, to the extent that leave is necessary, to overrule *Wigmans*.
3. Accepting the correctness of that decision, the answer to the separate question must be in the negative.
4. **WARD P**: I have had the advantage of considering the draft reasons of Bell CJ in this matter. I agree with the orders that his Honour has proposed. I should make clear that the reason I agree with the orders is that I do not consider that the decision of the Court of Appeal in *Wigmans v AMP Ltd* (2020) 102 NSWLR 199; [2020] NSWCA 104 (*Wigmans*) is “plainly wrong”. Had I been so persuaded, then I would have concluded that there was compelling reason (namely, for uniformity in this area) to depart from that decision, having regard to the different conclusion reached by the Full Court of the Federal Court in *Parkin v Boral Ltd* (2022) 291 FCR 116; [2022] FCAFC 47 (*Parkin*), which I am also not prepared to say is plainly wrong. I accept that my conclusion that neither of the two intermediate appellate court decisions meets the threshold of being plainly wrong would, of course, give rise to the dilemma identified by Bell CJ (at [23]); and in those circumstances I would agree with the view expressed by his Honour in the last sentence of [23].
5. Where I respectfully differ from the Court in *Wigmans* is the proposition that notification to group members of an intention (or possible intention) at a later point in time to seek an order from the Court excluding unregistered group members from participation in a settlement reached at mediation gives rise to an insoluble conflict of interest at the time that the notice is issued. I pause here to note that the proposed notification in the present case, insofar as it appears to speak to a firm present intention of the plaintiff to seek an order of that kind (using the positive language “will seek”) may come closer to giving rise to a conflict of interest than a notification of the possibility that such an order might later be sought; though the fact that the proposed notification in the present case is drafted with the alternative that the application might only be made by the defendant might suggest that there is not yet such a firm intention at present on the part of the representative plaintiff.
6. I consider that the temporal aspect of the process is significant in this regard; and that a statement of intention to seek an order of that kind at a later time does not give rise to an insoluble conflict of interest at the time of notification. Thus, I do not accept that the making of the notification itself is what gives rise to the perceived conflict of interest. I accept that it might be suggested that there is a conflict of interest arising merely from the formation of the intention on the part of the parties but that would seem to be predicated on the parties being wedded to the stated intention (as opposed to it being something that might or might not later be pursued, depending on the negotiations at the mediation). From a practical view, it is hard to see the conflict of interest as insoluble at least until such time as an application for the order excluding unregistered class members is made. That is because there may be a variety of different interests of group members to be taken into account in a mediation and it cannot be beyond the ability of experienced lawyers to contemplate a range of potential settlement options in the course of mediation (taking into account the competing interests of registered and unregistered class members just as they might need to take into account the competing interests of class members with different strengths of claims or the like).
7. In *Haselhurst v Toyota Motor Corporation Australia Ltd (t/as Toyota Australia)* (2020) 101 NSWLR 890; [2020] NSWCA 66 (*Haselhurst*) at [120] Payne JA, with whom Bell P, as the Chief Justice then was, Macfarlan and Leeming JJA, and Emmett AJA agreed, considered that a bifurcation in the interests of class members in reaching a settlement at mediation gave rise to an insoluble conflict of interest. True it is, that if an order excluding unregistered class members from participation in a settlement were to be inevitable then registered class members would likely have an interest in minimising the class (to maximise their returns) and unregistered class members would likely have a competing interest in no settlement being reached so as to maintain a potential to share in a judgment for damages. But no such order could be said to be inevitable – the question ultimately being as to the fairness and reasonableness of the result; and even then that involves an assumption as to how any proposed settlement might be structured. For example, for all we know, the defendant might only be prepared to settle on the basis of an amount per member (irrespective of the size of the class) such that the registered class members would have no real interest in whether or not unregistered class members should be excluded from participation in the settlement.
8. It has been recognised that a settlement of representative proceedings may reflect conflicts of interests within the class group (see *Kelly v Willmott Forests Ltd (in liq) (No 4)* [2016] FCA 323; (2016) 335 ALR 439 (*Kelly v Willmott (No 4)*) at [126] per Murphy J). Indeed, in *Parkin* it was considered that the risk of a potential or actual conflict of interests is inevitable when looking at the very nature of representative proceedings (see *Parkin* at [126] per Murphy and Lee JJ, with whom Beach J agreed).
9. Thus, while, as between group members, the proposed notification may give rise to differences in the interests in the class group in reaching a settlement (i.e., the unregistered group members may be opposed to any settlement should they not be able to benefit therefrom, whereas the registered group members may be in favour of any favourable settlement), I do not accept that the existence of a *possibility* for a conflict of interest will necessarily result in the existence of an insoluble conflict of interest in *reality*.
10. Although the representative plaintiff has a fiduciary obligation to ensure that all the unheard class members’ interests are represented during the proceedings (see, for example, *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507; [2015] HCA 28 at [40] per French CJ, Bell, Gageler (as the Chief Justice then was) and Keane JJ; *Wigmans v AMP Ltd* (2021) 270 CLR 623; [2021] HCA 7 at [117] per Gageler, Gordon and Edelman JJ; see also, Legg M, “Entrepreneurs and Figureheads – Addressing Multiple Class Actions and Conflicts of Interest” (2009) 32 *University of New South Wales Law Journal* 909 at 919, as to the fiduciary duties imposed on the representative party), it has also been recognised that agreement as to a proposed settlement necessarily results in their interests merging (see *Kelly v Willmott (No 4)* at [126] per Murphy J), sometimes in lieu of satisfying the entire group’s interests. The Court’s role in safeguarding the group members’ interests illustrates the imperfect position that the representative may occupy in such proceedings (see, for example, *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd (No 4)* [2010] FCA 1029 (*P Dawson (No 4)*) at [4] per Finkelstein J).
11. When considering whether a settlement should be approved, focus is on whether the proposed settlement is “fair and reasonable having regard to the interests of the class members who will be bound by it, including as between class members” (see *Endeavour River Pty Ltd v MG Responsible Entity Ltd* [2019] FCA 1719 at [9] per Murphy J).
12. The Federal Court’s rejection of a settlement proposal in *Kelly v Willmott (No 4)* and its subsequent approval of the settlement in *Kelly v Willmott Forests Ltd (in liq) (No 5)* [2017] FCA 689 illustrates how settlements which *do* reflect conflicts of interest between the representatives and class members can be addressed. Relevantly, one of the amendments that Murphy J considered as integral to assuage the concerns of potential conflict with the settlement was the inclusion of provision for unregistered class members to seek leave of the Court to opt out of the proceedings (“[t]he fact that unregistered class members could seek leave to opt out also mitigates [the] impact [of the fact that unregistered class members are bound in the settlement but are shut out from its benefits]”) (at [47]). The notification in the present case allows for the possibility of unregistered group members obtaining the benefit of the settlement with the leave of the Court, thereby contemplating that they may not be shut out from the settlement benefits. The stated intention is not an extinguishment of the unregistered class members rights at the making of the notification; thus, I do not accept that there is an *insoluble* conflict at that stage.
13. That said, it is clear that reasonable minds differ on this issue as to whether and when an insoluble conflict arises. Hence, my conclusion that *Wigmans* cannot be said to be plainly wrong.
14. Finally, as to Bell CJ’s conclusion that *Wigmans* was incorrect (at [100]) in referring to the power to issue notices under s 175(5) being unqualified, focussing on the import of the requirement in s 175(6) that notice under the section be given as soon as practicable after the happening of the event to which it relates, I have some concern that this is introducing a somewhat technical distinction between the happening of an event and the formation of an intention. I see no reason why the latter could not itself be an “event”; and I remain concerned that there is a risk that unregistered group members may have a legitimate grievance if not forewarned in advance of the possibility that an application might later be made to exclude them from participation in a settlement reached at a mediation before they had elected to opt in or out of the group. In that regard, I see force in the view expressed by Murphy and Lee JJ in *Parkin* at [134] that it may be preferable for such notification to be made to the group members, so they are given notice of any intention of their representatives’ interests which may be adversely affect their interests (as observed by Murphy and Lee JJ in *Parkin* at [134]). Hence, I prefer to rest my concurrence in the orders proposed by the Chief Justice on my conclusion that *Wigmans* is not plainly wrong.
15. **GLEESON JA**: I agree with the Chief Justice.
16. **LEEMING JA**: I agree with the orders proposed by Bell CJ, and with his reasons. I write separately because I participated in the earlier decision of this Court in *Wigmans v AMP Ltd* (2020) 102 NSWLR 199; [2020] NSWCA 104 which a Full Court of the Federal Court considered to be “plainly wrong” in *Parkin v Boral Ltd* (2022) 291 FCR 116; [2022] FCAFC 47, and I wish to make three additional points. Most of the reasoning in both judgments is contained in the Chief Justice’s judgment, and I shall not reproduce it needlessly.
17. First, I reiterate what was said by Nettle JA in *RJE v Secretary to the Department of Justice* (2008) 21 VR 526; [2008] VSCA 265 at [104], by this Court in *R v XY* (2013) 84 NSWLR 363; [2013] NSWCCA 121 at [30] and *Hasler v Singtel Optus Pty Ltd* (2014) 87 NSWLR 609; [2014] NSWCA 266 at [102], by a Full Court of the Federal Court in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631; [2020] FCAFC 122 at [126], and by many other courts, namely, that it is preferable to express the test applicable when one intermediate appellate court departs from a decision of another intermediate appellate court on federal or uniform legislation or common law which is materially unaffected by statute by asking whether there is a “compelling reason” to do so. I respectfully agree with Lee J’s statement in the last mentioned case that this is a “more constructive articulation of the principle enunciated by the High Court”. As Bell CJ notes, the equivalence of the formulations was endorsed by the High Court in *Hill v Zuda Pty Ltd* (2022) 275 CLR 24; [2022] HCA 21 at [25]. In many or most such cases, it will be better to speak to the quality and cogency of the case made out for departure from the earlier decision, rather than the egregiousness of the court’s error. One reason for that is that the court’s reasons will typically be a response to the parties’ submissions, and it is not unknown for the point which is now sought to be departed from not even to have been contested before the earlier court. I shall return to this.
18. Secondly, a deal of the reasoning in *Parkin* is directed to the passage in *Wigmans* at [77]-[79]:

The opt-out nature of the regime has long been recognised to be an important aspect of the legislative regime. In *Mobil Oil Australia Pty Ltd v State of Victoria* (2002) 211 CLR 1; [2002] HCA 27 at [39]-[40], Gaudron, Gummow and Hayne JJ said of the materially equivalent federal regime:

“[39] … There is, therefore, a real possibility that some group members would remain ‘perfectly ignorant of the proceedings, and of what is really going on’. That is, some of those who would benefit from success in the proceeding (but thereby lose the opportunity to pursue their individual claim in some way, or to some effect, different from the group proceeding) may have their rights affected without their knowing or consenting to that being done.

[40] So much follows from the fact that Pt 4A provides for what is sometimes called an ‘opt out’, rather than an ‘opt in’, procedure. That is, persons who are group members may opt out of the proceeding and, if they do, they are taken never to have been a group member (unless the Court otherwise orders) ... . *Group members, however, need take no positive step in the prosecution of the proceeding to judgment to gain whatever benefit its prosecution may bring*.” (Emphasis added; footnote omitted.)

In *Brewster* at [73], Kiefel CJ, Bell and Keane JJ noted that passage with approval, and applied it to the similarly worded Pt 10 of the Act.

What is proposed by Komlotex and AMP is prima facie contrary to a fundamental precept of Pt 10, as confirmed by the joint judgments in *Mobil Oil* and *Brewster*, and inherent in the legislative choice of an opt out regime. If what is contemplated by Komlotex and AMP comes to pass, group members who take no positive step will gain no benefit from any settlement and will have their rights extinguished. Indeed, it is reasonable to expect that the extinction of passive or unregistered group members’ rights would be one of the drivers of any settlement between registered group members and AMP. This prima facie gives rise to a conflict between group members who are registered and those who are not.

1. The expression “fundamental precept” in that passage was echoed in the conclusion at [102]:

Ms Wigmans recognised that s 183 was not relied on to sustain the orders the subject of the appeal. She nonetheless submitted that the power to issue notices must nonetheless conform with the basic precepts of the scheme established by Pt 10. That submission is sound. Sections 175 and 176 do not sustain orders which are contrary to basic precepts of Pt 10. Nor do the case management powers in Pt 6 (ss 56-61) extend to the making of orders in representative proceedings under Pt 10 that are inconsistent with those precepts.

1. The term “fundamental precept” was deprecated in *Wetdal Pty Ltd v Estia Health Ltd* [2021] FCA 475 in an obiter passage at [89]-[90] which stated that aspects of *Wigmans* were problematic. The point sought to be made was that there are occasions when group members could, at an early stage in proceedings, be compelled to take a positive step, such as to respond to a subpoena or an order for particulars. Hence it was said to follow that “it is not a fundamental precept of representative proceedings that group members can never be required to take any positive step at an early stage in the proceeding”.
2. In *Parkin*, the joint judgment said at [115]-[116]:

Secondly, the premise of the judgment in *Wigmans* is that the proposed order was inconsistent with a “fundamental precept” of the class action regime, being that “group members may do nothing prior to a settlement and still reap its benefits”: at [131]. That was said to be a precept “confirmed by the joint judgments in *Mobil Oil* and *Brewster*, and inherent in the legislative choice of an opt-out regime”: at [79].

We respectfully disagree. In its generality this observation is neither helpful nor wholly accurate. Moreover, *Mobil Oil* and *Brewster* were not about mining the detail of such an extra-textual generalisation. In our view, while group members are generally permitted by Pt IVA to adopt a passive role prior to settlement or judgment, it is distracting to speak in terms of a “fundamental precept” or absolute rule (if that is what is meant by that expression). We agree with Beach J’s remarks in *Wetdal* (at [89]-[90]).

1. At [125] the joint judgment reiterated:

The Contradictor did not contend that these judgments of single judges and intermediate courts of appeal going back over 20 years were wrongly decided. Rather, he argued that they should be seen as exceptions to the “fundamental precept” identified in *Wigmans*, as the steps ordered to be taken by group members were not directed to their “fundamental substantive rights”. We see little substance in the asserted “fundamental precept” when in numerous contested applications courts have (correctly) decided that Pt IVA and cognate State legislation provides power to compel group members to take a positive step prior to settlement or judgment.

1. I do not think that the reasoning in *Parkin* reproduced above concerning what was said in *Wigmans* about a “fundamental precept” accurately reflects what was said in *Wigmans*. That may be because submissions were made in the Federal Court to the effect that *Wigmans* had held that it was an “absolute rule” that group members could be passive until settlement and enjoy its fruits. A common enough rhetorical technique is to characterise the rule or principle for which a decision stands in a particular way, falsify that characterisation, and then contend that the decision should not be followed. The passages in *Parkin* also hold that that the reference to a “fundamental precept” was “distracting”, and perhaps also that if a “fundamental precept” was something which fell short of an absolute rule, it was not clear what it was. In the circumstances, it seems desirable to be a little more elaborate, even at the price of lengthening this Court’s reasons.
2. The passages in *Wigmans* reflected submissions made to this Court. Orally, Gleeson SC said (transcript, 25 May 2020, p 9):

GLEESON: … I want to show you shortly under the statute that that’s exactly the way the statute contemplates judgments should work, and it does so because of a principle of equality and rateability between the class. But *the basic idea of the statute*is up until settlement or judgment the only thing you have to do as a group member is opt in or opt out.

WHITE JA: Sorry, the only thing you have to do is opt in or opt out?

GLEESON: Sorry, [to] opt out or not opt out. (Emphasis added.)

1. And later (transcript, 25 May 2020, p 16):

It would come down to whether that use of registration to facilitate a possible s 163 application, did it infringe *the basic principle* that group members can remain passive. (Emphasis added.)

1. In reply, counsel said (transcript, 25 May 2020, p 62):

The first notice, as your Honour raised in argument for consideration, by saying you have three options, the first option which is you have to register to participate, *contradicts the scheme which is that you are a member upon the choice of the representative to constitute the action, and you will remain as such unless you opt out*. So that misrepresents that aspect of the scheme. The second option which is opt out, that is the option which is recognised in the scheme, and the third option to do nothing, that is the one that has had attached to it the threat of the consequences.

In the second notice, as your Honour raises, it appears to say that as a summary of the class action deadline orders, if you wish to register, you must either retain Maurice Blackburn, or fill the form, and if you wish to have no part of the case, you must opt out. And what that doesn’t tell you clearly, or at all, is that the statute constitutes you as a member by reason of this action being commenced on your behalf, and it is a perfectly available option, as per the High Court in Brewster, to simply remain passive and in due course receive a notice if a settlement is to be reached which affects your interests. *So for those reasons, we would submit these notices are not merely infelicitous in their language, they have contradicted the premises of the scheme*. (Emphasis added.)

1. Counsel’s references in oral submissions to the “the basic idea of the statute”, the “basic principle”, “contradicts the scheme” and “the premises of the scheme” were all to the same end, and were reflected in the references in the reasons of this Court to a “fundamental precept” or the “basic precepts” of the scheme.
2. It is not difficult to enumerate principles which may be described as “fundamental precepts” in many areas of the legal system. In *Russo v Aiello* (2003) 215 CLR 643; [2003] HCA 53 at [11], Gleeson CJ said, for the purpose of addressing submissions challenging the conclusion that the plaintiff had not given a full and satisfactory explanation for his late claim under the *Motor Accidents Act 1988* (NSW), that:

Lord Mansfield said that “all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted”. This is a fundamental precept of the adversarial system of justice, and is treated as axiomatic in the day to day operations of courts. (Footnote omitted.)

1. A unanimous High Court said that “[a] fundamental precept of the criminal law is that a sentence should not be increased beyond that which is proportionate to the crime in order to extend the period of protection of the community”: *Muldrock v The Queen* (2011) 244 CLR 120; [2011] HCA 39 at [60]. That precept was invoked in order to review an increased non-parole period imposed by a court of criminal appeal following a Crown appeal.
2. Fundamental precepts also play a role in statutory construction. (One may refer to fundamental “principles” if one prefers, noting that in *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140; [2009] HCA 51 at [141],Hayne, Kiefel and Bell JJ explicitly used the terms “precept” and “principle” synonymously, speaking of the longstanding reticence to decide constitutional questions unnecessarily.) That was why Deane J commenced his dissenting reasons in *Kleinwort Benson Australia Ltd v Crowl* (1988) 165 CLR 71 at 81; [1988] HCA 34 with the sentence:

It has long been a fundamental precept of the law of bankruptcy that “a bankruptcy notice, which is the foundation of a bankruptcy, attended as a bankruptcy is with penal consequences, is a matter in which great strictness is required”.

1. That was a case where the High Court divided on the scope of the provisions in the *Bankruptcy Act 1966* (Cth) (ss 41(5), 41(6) and 306(1)) which validated bankruptcy notices containing defects. The legal meaning of the statutory text was informed by that precept.
2. In *Wilde v The Queen* (1988) 164 CLR 365; [1988] HCA 6, the High Court divided over the application of the common form proviso in criminal appeals. Gaudron J, one of the dissentients, concluded that the proviso was unavailable, and said at 383-384:

The passages above cited recognize that it is fundamental to the integrity of the administration of criminal justice that no person should be convicted of a criminal offence on which he is indicted save by the verdict of a jury following a trial in which the relevant principles of law are correctly applied. That precept, in my view, remains unaffected by the proviso. It is not negated in express words. There is no basis for such implication. Recognition of this precept renders the proviso neither nugatory or otiose. Indeed, as Fullagar J observed in *Mraz*, regard must be had to this precept in the process of construction of the proviso. His Honour stated:

“It [the proviso to s 6(1)] ought to be read, and it has in fact always been read, in the light of the long tradition of the English criminal law that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed.”

Recourse to this fundamental precept in interpreting the proviso places limitations on what a court of criminal appeal is entitled to do in exercising its discretion to utilize the proviso. (Footnote omitted.)

1. Examples could readily be multiplied. The expression “fundamental precept” in *Wigmans* was used in the same way. It was not deployed to connote an “absolute rule”. It was deployed to address a basic principle underlying the regime established by the statute. The point of doing so was to support a process of statutory construction to the effect that a construction that undercut such a basic principle was not lightly to be preferred.
2. *Parkin* criticised this Court’s observation in *Wigmans* that “group members may do nothing prior to a settlement and still reap its benefits” as “neither helpful nor wholly accurate”. Insofar as it was said not to be “helpful”, I do not agree. It is not disputed that an aspect of the scheme is that group members need as a general principle do nothing and nonetheless reap the benefit of a settlement. Whether or not a posited construction aligns with or contradicts such a principle is an orthodox aspect of statutory construction. Insofar as it was said to be not wholly “accurate”, that indicates that the expression was treated as connoting an absolute rule. It may be that that reflected a submission which had been made to the court, and perhaps even one which was not fully refuted. It may be accepted for present purposes that there is no absolute rule that a group member may do nothing prior to a settlement and still reap its benefits. But that was not what was said in *Wigmans*.
3. The gravamen of this aspect of the reasoning in *Wigmans* did not deal with relatively minor qualifications upon the general approach reflected in Pt 10 of the *Civil Procedure Act 2005* (NSW)that group members need do nothing and gain the benefit of a settlement. What was involved was not some minor intrusion upon the general entitlement of group members to do nothing at early stages in the litigation, such as the provision of particulars or documents. What was involved was the sacrifice of the entirety of unregistered group members’ claims, as a foreseeable and foreseen aspect of a proposed settlement by which registered group members and their lawyers and funders would benefit from the price paid by a respondent for eliminating “tail risk”. This departure from a basic aspect of the Part bears upon the question of statutory construction.
4. Thirdly, I agree with what the Chief Justice has said at [118]-[119] concerning what was said of the differences between s 175(5) and s 183 of the *Civil Procedure Act* in *Wigmans* at [100], although I also think it is tolerably plain from reading the passage in context that the only point being made was a textual one about those two provisions, rather than a statement that the power was unqualified by any other consideration extraneous to the provision.
5. **STERN JA**: I agree with the Chief Justice.

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[Appendix A (269920, pdf)](http://www.caselaw.nsw.gov.au/asset/18ee97cd1459169accad0041.pdf)

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