GREENWAY CHAMBERS

The Shape of Things to Come: The Changing Class Actions Landscape and the New Privacy Tort

Wednesday 4 March | 5:30 pm

SESSION SPEAKERS

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Topics of discussion

Topic 1 – Overview of class actions

Topic 2 – Some features of the class actions framework

Topic 3 – Concepts relating to class closure

Topic 4 – *Lendlease Corporation Ltd v Pallas*

Topic 5 – The new privacy tort

Topic 6 – Elements of claim and other relevant provisions

Topic 7 – Class actions for data breach: misuse, recklessness and damages

Overview of class actions

1. Class actions landscape has changed very substantially in recent years.
2. There were 79 class action filings in 2024-2025, up from 46 in 2023-24, including:
    - 28 consumer class actions
    - 25 employment class actions
    - 13 government liability class actions.
3. Yet only 8 class actions in relation to securities and 1 for financial products.
4. Diversity of consumer class actions: aged care; motor vehicle performance; cold and flu medication; breast implants; and supermarket pricing.
5. Thirty class action settlements approved, totalling more than $1.9 billion (including seven over $100 million each).

Source: Mallesons, *The Review: Class Actions in Australia 2024/2025*.

Features of class actions framework

Features of Part 10 of *Civil Procedure Act 2005* (NSW) (**CPA**): context for High Court decision in *Lendlease Corporation Ltd v Pallas*.

1. Pleading must identify at least one common issue of law or fact common to all group members (s 161(1)(c)).
2. Group members need only be described but do not need to be named (ss 161(1)(a), 161(2)).
3. Court must fix a date before which a group member may opt out (s 162(1)).
4. Group members are bound by Court's determination of common issue/s, unless they have opted out (s 179).
5. Ordinarily, hearing must not commence before date for opting out (s 162(4)).
6. Legislation provides for notices to group members (s 175), including compulsory notices (s 175(1)) in relation to:
    - commencement of proceedings
    - right to opt out by a specified date.

Concepts of class closure

Some matters of terminology:

1. **Open class:** persons are captured within class definition class who did not know about proceeding or consent to becoming a group member when it was commenced: *Clurname Pty Ltd v Commonwealth Bank of Australia (No 1)* [2015] FCA 153, [4] (Foster J).
2. **Closed class:** class membership defined so as to identify all class members: eg all persons meeting a pleaded description and whose names are listed: see eg *Farey v National Australia Bank Ltd* [2014] FCA 1242, [6] (Jacobson J).
3. **'Soft' closure:** Court makes time-limited orders providing that only group members who register before a certain date are entitled to benefit from settlement. If no settlement, group members continue to have right to share in potential judgment.
4. **'Hard' closure:** Court orders that group members are not entitled to share in benefits of settlement unless they register with plaintiff's solicitors.
5. Discussion of soft vs hard closure in *Gill v Ethicon SÀRL (No 2)* (2019) 134 ACSR 649: Lee J cast doubt on appropriateness of hard closure orders in most cases.

Concepts of class closure 2

Gill v Ethicon SÀRL (No 2) (2019) 134 ACSR 649.

1. Lee J observed at [6]:

> "… it is very difficult to see how it is appropriate for a court, exercising a protective and supervisory role in respect of group members, to take the step of extinguishing the property rights of persons on a final basis, unless it is in the context of approving a settlement prior to an initial trial. When this is appreciated, and it is understood that "soft" closure orders can be adapted to serve the admittedly desirable end of facilitating such a settlement, it is not evident to me why a "hard" closure order would ever be appropriate (at least in an open class proceeding or a closed class proceeding with a large number of group members)."

2. Should not be assumed that soft closure orders will be appropriate and made as matter of course (at [9]).

Lendlease Corporation Ltd v Pallas

Lendlease Corporation Ltd v Pallas [2025] HCA 19; (2025) 99 ALJR 834 (**Lendlease**)

1. Securities case: representative plaintiffs alleged misleading or deceptive conduct, breach of continuous disclosure requirements.
2. Issue: whether Court has power under CPA section 175(5) to order that notice be given to group members of defendant's intention, if proceeding is settled, to seek an order that a group member who has neither opted out nor registered not be permitted to benefit from any settlement prior to final judgment, without leave of the Court.
3. Arose from a separate question formulated by Ball J.
4. Answered in negative by NSW Court of Appeal in *David William Pallas & Julie Ann Pallas as trustees for the Pallas Family Superannuation Fund v Lendlease Corporation Ltd* [2024] NSWCA 83.

Lendlease Corporation Ltd v Pallas (slide 2)

Section 175 of CPA relevantly provides:

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

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

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

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

…

(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.

Lendlease Corporation Ltd v Pallas (slide 3)

Section 179 of CPA :

A judgment given in representative proceedings

(a) must describe or otherwise identify the group members who will be affected by it, and

(b) binds all such persons other than any person who has opted out of the proceedings under section 162.

NSW provisions substantially identical to provisions in Part IVA of *Federal Court of Australia Act 1976* (Cth).

Lendlease Corporation Ltd v Pallas (slide 4)

David William Pallas & Julie Ann Pallas as trustees for the Pallas Family Superannuation Fund v Lendlease Corporation Ltd [2024] NSWCA 83.

1. NSW Court of Appeal held Court did not have power to order notice sought by Lendlease.
2. Main features of reasoning:
    - Proposed order contrary to fundamental precept of Pt 10 that a group member need not do anything in order to obtain benefit of any settlement or favourable judgment.
    - Providing proposed notification would promote conflict of interest between registered group members and unregistered group members.
    - Section 175(5) is constrained by section 175(6): must relate to an event which has happened. Proposed notification did not to relate to an event but rather only to a present intention on part of Lendlease (and possibly plaintiffs).
    - *Wigmans v AMP Ltd* (2020) 102 NSWLR 199 was not plainly wrong, contrary to Full Court of Federal Court in *Parkin v Boral Ltd* (2022) 291 FCR 116.

Lendlease Corporation Ltd v Pallas (slide 5)

Gageler CJ, Gleeson and Jagot JJ

1. Potential for inconsistencies of interest is inherent in statutory scheme and is to be managed by Court ([22]).
2. Purpose of s 175(5) is to ensure group members are kept informed of "any matter" relevant to them in the representative proceeding; power should be construed as liberally as language permits, with only control being relevance ([41]).
3. Ordering giving of proposed notice does not impermissibly usurp any part of Supreme Court's function under CPA s 173 . It does not prevent Court from discharging that function as required ([43]).
4. "Encouraging group members to register their participation in a representative proceeding for the purpose of facilitating effective settlement negotiations does not transform an opt out scheme into an opt in scheme. The proceeding may or may not settle. The Court is not bound to make the foreshadowed order. The representative plaintiffs and Lendlease also know that the Court is not bound to make the foreshadowed order" ([47]).

Lendlease Corporation Ltd v Pallas (slide 6)

Gordon and Steward JJ (Edelman J agreeing)

1. Language of provision is wide enough to extend to any type of information relevant to group members. Word "matter" is wide enough to cover information which Lendlease wished to send. To extent that "event" in s 175(6) qualifies this power, it is easily satisfied ([87]).

2. Power in s 175(5) will be exercised as part of Court's supervisory role when it is necessary to inform group members about key matters. "**It would be contrary to this purpose if the Court had power to approve a settlement that excluded unregistered group members, but did not have power to inform group members of the intention to seek settlement on this basis**" ([91]).

3. "The power to order the proposed notification is not denied because of the suggested "fundamental precept" of Pt 10 that a group member need not do anything in order to obtain the benefit of any settlement or favourable judgment. … **That observation describes an ordinary and expected incident of the opt out model for representative proceedings. But it was not intended to establish a categorical principle of legislative presupposition that group members are always entitled to do nothing** before benefitting from a settlement or favourable judgment, or limit the Court's powers to give notice of any matter which may be relevant to group members in the proceeding. **There is no such "fundamental precept"**"" ([95]).

Lendlease Corporation Ltd v Pallas (slide 7)

Gordon and Steward JJ (continued)

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

Lendlease Corporation Ltd v Pallas (slide 8)

Beech-Jones J

> "Part 10 of the CPA expressly or implicitly contemplates the existence of such potential conflicts and expressly or implicitly contemplates that they will be managed and addressed. … One means of addressing such a potential conflict … would be the appointment of separate legal representatives to represent the interests of different sets of group members to address whether such an order should be made, whether the settlement should be approved and such other questions in relation thereto that might be formulated under s 168 of the CPA" ([147]).

Why this case matters

1. Narrow question of statutory construction but touches upon an important aspect of class actions practice.
2. In an open class, at some point members must register to share benefits of settlement or judgment (see Gordon and Steward JJ, [72])
3. Encouraging group members to register makes it easier to value quantum of claims, which can benefit both defendants and plaintiffs.
4. As Gordon and Steward JJ explained at [93]:

> "Any defendant to a class action seeks finality in litigation, and such an objective is entirely reasonable. Although the interests of the defendant and representative plaintiff do not necessarily or always align, registration may also benefit the representative plaintiff. For example, registration helps the representative plaintiff to understand the size and identity of the class in order to negotiate an appropriate settlement and facilitate Court approval of that settlement."

5. Most class actions are resolved by settlement. *Lendlease* recognises and supports this.
6. Part 10 of CPA is procedural, not substantive. Accordingly, "[a] construction of [Part 10's] provisions that facilitates the conduct and resolution of a class action, whether by way of settlement or final judgment, is to be preferred" (Gordon and Steward JJ, [90]).

New Privacy Tort, Key Elements, Class Actions, and Cybersecurity

1. Background.
2. How we got a privacy tort: an early case and the law reform process.
3. The new tort: elements of claim and other relevant provisions.
4. Class actions for a data breach: misuse, recklessness and damages.

A mix of claims: class actions for data breaches

- Data breaches are of great interest to plaintiff class action law firms and funders: large class and members easy to identify.

Past process:

- ***Federal Court***: class action claims are problematic because of claim mix. Not about privacy interest.
- ***Information Commissioner***: **representative complaint** mechanism (ss 36, 38) direct to the Office of the Australian Information Commissioner (**OAIC**) for APP breaches. Only non-binding determinations which require *de novo* hearing in Federal Court to enforce.
- Firms have pursued the class action and OAIC channel for the same class and data breach i.e. Medibank and Optus.

Reforms:

- Statutory tort: direct cause of action for breach of privacy.
- Individuals can claim compensation from Court where the Information Commissioner seeks a civil penalty for breach of the APPs: **new s 80UA**.

***ABC v Lenah Game Meats* (2001):**

- No trespass, confidence, defamation. Company had no human privacy interest.
- Court reluctant; preferred incremental approach (as later adopted in UK). The privacy interest seen as nebulous as with no Bill of Rights to rely upon.

US and UK influence:

- Samuel Warren & Louis Brandeis (1890): *The Right to Privacy:* "right to be let alone".
- US categorisation of four privacy torts: William Prosser 1960 (we keep first two).
- UK: common law tort of misuse of private information and "reasonable expectation of privacy": *Campbell v MGN Ltd* after *HR Act* (1998) and ECHR Art 8.

Relevance today

- Privacy tort now supports claims for emotional distress, based on dignity and autonomy.
- Australian Courts will be likely asked to consider extrinsic materials: Australian Law Reform Commission Reports 108 (2008) and 123 (2014).
- Courts expected to develop through cases and draw on key concepts from other torts and international precedents: EM [358]. US, UK, Canada, NZ.

The new tort: two types of privacy invasion

- Schedule 2 to *Privacy Act* (effective 10 June 2025).
- Two types of invasion:
  - **intrusion upon seclusion**; and
  - **misuse of personal information.**
- Standalone provisions operate independently from the *Privacy Act*: (cl 6 interpretation) EM [346].
- Reforms about, among other things, "personal data … [which is] subject to misuse or mishandling, including through data breaches, **fraud** and **identity theft**, unauthorised surveillance and other **significant online harms**": EM [2].

Elements of the tort

Clause 7(1) sets out the elements of cause of action:

1. Defendant **invaded** plaintiff's **privacy**
2. A person in plaintiff's position would have a **reasonable expectation of privacy**
3. **Fault -** intentional or reckless
4. The invasion was **serious**
5. **Public interest balancing**

Actionable without proof of damage: clause 7(2).

1. Invasion of privacy

Plaintiff has a cause of action in tort if the defendant <u>invades</u> their privacy by:

- **intruding upon seclusion** (cl 7(1)(a)(i)); or
- **misusing information** that relates to the plaintiff (cl 7(1)(a)(ii)).

"Misuse of information" includes *collecting*, *using*, or *disclosing information* about the individual.

Applied in context of a data breach: a Plaintiff invades a person's privacy by misusing information that relates to the person including by collecting, using, or disclosing information about the person.

2. Reasonable Expectation of Privacy

A person in the position of the plaintiff would have a reasonable expectation of privacy in all the circumstances.

Essentially objective test - "is this private?": ALRC 123 (2014) - *Campbell v MGN Ltd* (UK).

Court considerations include:

- means and purpose of invasion (including technology)
- plaintiff's attributes (age, cultural background)
- plaintiff's conduct (e.g., seeking publicity)
- *nature of information* - ***intimate, health-related, financial.*** This is important in the context of a data breach.

3. Fault – invasion was Intentional or Reckless

"Reckless" definition per s 5.4 ***Criminal Code Act 1995*** (Cth):

> *"A person is reckless with respect to a circumstance [or result] if:*
>
> *(a) he or she is aware of a **substantial risk** that the circumstance [or result] exists or will exist; and*
>
> *(b) having regard to the **circumstances known** to him or her, it is **unjustifiable** to take the risk."*

1. **Awareness of substantial risk.**
2. **Risk is (a) unjustifiable in (b) circumstances known.**
3. **Determination is factual.**

4. Invasion of privacy was Serious

Objective test to **prevent trivial claims**: EM [406].

Factors for assessing seriousness (cl 7(6)):

- degree of offence, distress, harm to dignity (person ordinary sensibilities in plaintiff's position); and
- defendant's knowledge or reasonable awareness of potential harm.

– "The inclusion of likely harm to dignity as a consideration in this subclause recognises that an invasion of privacy may be serious even if it does not cause material harm or offence." EM [409].

– "Other matters may also be relevant, for example… the **number of individuals affected**." EM [410].

5. Public Interest Balancing Test

The public interest in person's privacy outweighs any countervailing public interest (cl 7(1)(e)).

Countervailing public interest factors include (cl 7(3)):

- freedom of expression (including political communication)
- media freedom
- open justice
- national security
- public health and safety

"Balancing exercise similar to *Campbell v Mirror Group Newspapers* [2002] EWHC 499 (QB)": EM [415].

Damages

Actionable without proof of damage (cl 7(2)).

Damages for (cl 11):

- **emotional distress**
- **exemplary or punitive damages** to deter future conduct (exceptional cases)
- **damage caps**: non-economic + punitive damages capped at $478,550 or defamation limits
- no aggravated damages to avoid duplication of compensation.

Court may consider apologies, corrections, prior compensation, settlement attempts, defendant conduct post-breach (cl 11(6)).

Other Relevant Provisions

Defences – cl 8

- For court/tribunal, consent, threats to life, defamation defences.

Exemptions – Part 3

- Journalists, agencies & State and Territory authorities, law enforcement, intelligence, under 18.

- Interim injunctions (cl 9).

- Apology not admission (cl 13).

Limitation period (cl 14): must commence within **one year** from awareness, or three years from invasion.

A database hack – *misuse* and *recklessness*

Misuse: in a database breach, does the company invade client privacy by "misusing information" that relates to the client by collecting, using, or disclosing information about the client? Is it the company or the hacker misusing by using or disclosing?

Recklessness: was the invasion (i.e. disclosure of information/data breach) reckless because:

- the company was **aware of a substantial risk of that result** (meaning a substantial risk of a data breach); and
- **taking the risk of the result** (risk of a data breach), having regard to what it knows (i.e. inadequate policies and protections, past breaches etc.), **was it unjustifiable** (meaning "not able to be shown to be right or reasonable"), as a question of fact?

Evidence of recklessness

Risk assessments, audits, and reports on known security issues:

- documentary evidence showing **known security risks were left unaddressed;**
- Board papers and management communications showing **awareness of risks;**
- **regulatory correspondence** and findings from privacy authorities; and
- **repeated data breaches** from similar causes.

Expert opinion on the **foreseeability and preventability** of the breach.

Expert reports on **industry standards** and breach **cause.**

Emotional Distress Evidence

Representative plaintiff evidence:

- psychological or psychiatric expert assessments documenting emotional harm, distress, anxiety, or loss of sleep; and
- medical or counselling records supporting claims of emotional injury.

Class-wide evidence:

- expert psychological evidence explaining typical emotional impacts from breaches;
- statistical survey evidence or questionnaires measuring anxiety, stress, and other psychological impacts among class members.

Example of evidence in personal harm torts.

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Questions?

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