Before the High Court

Intermediate Appellate Courts and the Doctrine of Precedent: *Lendlease Corporation Ltd v Pallas*

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Abstract

The High Court of Australia appeal in *Lendlease Corporation Ltd v Pallas* raises a novel question of precedent: what approach should an intermediate appellate court ('IAC') take when faced with competing IAC authorities? The cases reveal that different approaches have been adopted: deferring to the home jurisdiction, favouring the most recent decision, and approaching the issue afresh. The principled answer to this question must be informed by the modern concept of a single Australian common law and the corollary rule that an IAC should not depart from a decision of another IAC on an issue of national operation unless convinced that the earlier decision is 'plainly wrong'. It is argued that if Court B has found a decision of Court A to be plainly wrong, should the issue come before Court A again for determination, it is not open for Court A to defer to its previous decision or consider the matter afresh. In an integrated judicial system of equals working together to achieve a common goal, consistency demands that Court A give heightened deference to the decision of Court B.

I Introduction

In *Lendlease Corporation Ltd v Pallas*,[1] the High Court will consider conflicting interpretations of a statutory provision reached by two intermediate appellate courts ('IACs'). Our focus is not on the construction of that provision, but rather a novel question of precedent that arises on the pending appeal. It is now orthodox that an IAC 'should [not] depart from a decision of another intermediate appellate court'

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1 *Lendlease Corporation Ltd v Pallas*, High Court of Australia, Case No S108/2024.

when interpreting uniform national legislation, Commonwealth legislation, or the common law of Australia, unless 'convinced that the interpretation is plainly wrong'.[2] But beneath this rule lies a host of narrower, unanswered questions, including that raised by the appeal: what approach should an IAC take when faced with competing IAC authorities?

Notwithstanding this is a question of general importance to the role of IACs in a single federal polity, it is 'not an issue on which the parties or contradictor [are] joined' and the parties '[do] not have any particular interest' in the answer.[3] It has therefore been the subject of minimal attention in the written submissions filed by the parties.[4] The purpose of this column is to fill that lacuna. As a necessary first step, Part II traces the emergence of the two competing lines of authority. Part III articulates the rationale for the 'plainly wrong' rule as tempering the interests of consistency and correctness. Part IV then interrogates the approach taken by the New South Wales Court of Appeal, arguing that the principled approach would have been to give heightened deference to the decision of the Full Federal Court of Australia. Part V concludes.

II Diverging Interpretations

The constructional question before the High Court concerns s 175(5) of the *Civil Procedure Act 2005* (NSW) and s 33X(5) of the *Federal Court of Australia Act 1976* (Cth), both of which state that a 'Court may, at any stage, order that notice of any matter be given to a group member or group members'. The issue on appeal is whether these provisions authorise the issuance of a notice foreshadowing that upon settlement, group members who neither registered nor opted out by a specified date will not be able to share in the settlement, but will nevertheless be bound by it.

The New South Wales Court of Appeal answered this question in the negative in *Wigmans v AMP*,[5] influenced by the High Court's reasoning in *BMW v Brewster*.[6] Two years later, in *Parkin v Boral*, the Full Federal Court reached the opposite conclusion.[7] In doing so, Murphy and Lee JJ noted as 'trite, but necessary, to stress' that the Court should not depart from *Wigmans* unless it considered it to be plainly

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2 *Hill v Zuda Pty Ltd* (2022) 275 CLR 24, 34–5 [25] (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ) ('*Hill*'), citing *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151–2 [135] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ) ('*Farah*'); *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390, 411–12 [49]–[50] (Gummow, Heydon and Crennan JJ, Hayne J agreeing) ('*CAL No 14*'); *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, 492 (Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ).

3 Lendlease Corporation Ltd, 'Application for Special Leave to Appeal', Special Leave Application in *Lendlease Corporation Ltd v Pallas*, Case No S59/2024, 13 May 2024, [18].

4 Lendlease Corporation Ltd, 'Appellants' Submissions', Submission in *Lendlease Corporation Ltd v Pallas*, Case No S108/2024, 12 September 2024, [32]–[35], [67]–[69]; Contradictor, 'Contradictor's Submissions', Submission in *Lendlease Corporation Ltd v Pallas*, Case No S108/2024, 10 October 2024, [74]–[81]; Lendlease Corporation Ltd, 'Appellants' Reply', Submission in *Lendlease Corporation Ltd v Pallas*, Case No S108/2024, 24 October 2024, [17]. The respondents' submissions do not address this issue.

5 *Wigmans v AMP Ltd* (2020) 102 NSWLR 199.

6 *BMW Australia Ltd v Brewster* (2019) 269 CLR 574 ('*Brewster*').

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

wrong.[8] Their Honours stated: 'As another intermediate appellate court within an integrated national legal system, we should be slow to conclude that a considered judgment of another intermediate court is "plainly wrong" …'.[9] Following an analysis of the relevant statutory provisions and the reasoning of the New South Wales Court of Appeal in *Wigmans*, their Honours were ultimately 'compelled' to the conclusion that *Wigmans* was plainly wrong and should not be followed.[10]

In *Pallas v Lendlease Corporation Ltd*,[11] the New South Wales Court of Appeal sat an enlarged Bench to revisit the correctness of the decision in *Wigmans*. Bell CJ (with whom Gleeson, Leeming and Stern JJA agreed) stated:

> The starting point of the analysis is not whether s 175(5) of the [*Civil Procedure Act 2005*] 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.[12]

Ultimately, the Chief Justice accepted that, while opinions could differ on the question, *Wigmans* was not plainly wrong, the reasoning in *Parkin* did not sufficiently justify the conclusion that *Wigmans* was plainly wrong, and *Wigmans* was correct.[13]

Notably, and without providing any authority or justification, Bell CJ also observed:

> 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.[14]

Writing separately, Ward P was not convinced that either *Wigmans* or *Parkin* was plainly wrong. Had the President been persuaded *Wigmans* was plainly wrong, her Honour 'would have concluded that there was compelling reason (namely, for uniformity in this area) to depart from [*Wigmans*], having regard to the different conclusion reached [in *Parkin*]'.[15] Her Honour agreed with Bell CJ that when faced with this 'dilemma', the Court ought to defer to its own previous decision.[16] Accordingly, the New South Wales Court of Appeal followed *Wigmans*.

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8 Ibid 143 [97] (Murphy and Lee JJ, Beach J agreeing).

9 Ibid 145 [109] (Murphy and Lee JJ, Beach J agreeing) (citations omitted). Although not uniform legislation, it was said that the provisions 'are in all but identical terms', citing *Brewster* (n 6) 589 [5] (Kiefel CJ, Bell and Keane JJ). On the application of the 'plainly wrong' rule to non-uniform statutes, see n 65 below.

10 *Parkin* (n 7) 145 [109]–[110] (Murphy and Lee JJ, Beach J agreeing).

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

12 Ibid 107 [93].

13 Ibid 107 [94], 112 [119] (Bell CJ, Gleeson, Leeming and Stern JJA agreeing).

14 Ibid 90 [23] (Bell CJ, Gleeson, Leeming and Stern JJA agreeing).

15 Ibid 113 [127] (Ward P).

16 Ibid.

The question to which the pending appeal gives rise is whether this mode of reasoning was correct.

III A Single Common Law and the 'Plainly Wrong' Rule

Fundamental to this issue is the concept of a single common law of Australia. This concept, in its current form, is relatively recent.[17] It was preceded by a more expansive pursuit: pan-Commonwealth uniformity.[18] While in theory pan-Commonwealth uniformity encompassed intra-Australian uniformity, the reality was more nuanced.[19] English–Australian deference was not reciprocal and Australian courts were often forced to choose between 'imperial deference or intra-Australian camaraderie'.[20] Hence, while some proposed a precedential obligation between coordinate Australian courts stretching beyond mere 'comity'[21] in the first half of the 20th century, no duty in this regard was recognised.[22] As Chief Justice Barwick observed extra-judicially in 1970, notwithstanding 'some degree of comity' that existed between the courts of the colonies and then the states, 'the decisions of the courts of one colony or State did not and do not bind the courts of another'.[23] It was only when ties with the motherland started to loosen that greater bonds between IACs began to be forged.[24]

Several decades on, it is now accepted that there is one common law of Australia. A 'consequence'[25] or 'corollary'[26] thereof is that, as stated above, an IAC should not depart from a decision of another IAC on the interpretation of uniform legislation, Commonwealth legislation, or the common law, unless convinced that interpretation is plainly wrong. This is for two interlocking reasons. The *first* is that the High Court does not need to pronounce on an issue before it can be said that the common law of Australia exists.[27] Rather, there is always a uniform rule throughout the country although, like Schrödinger's cat, its true form might not finally be revealed until the High Court opines.[28] The principled development of the common

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17 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 563–4 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); *Lipohar v The Queen* (1999) 200 CLR 485, 505–6 [44]–[45], 507 [50] (Gaudron, Gummow and Hayne JJ) ('*Lipohar*').

18 Antonia Glover, 'What's Plainly Wrong in Australian Law? An Empirical Analysis of the Rule in *Farah*' (2020) 43(3) *UNSW Law Journal* 850, 860.

19 Ibid.

20 Ibid 861.

21 'Comity' is used in this sense to refer to the practice of respect, courtesy and civility: see *R v XY* (2013) 84 NSWLR 363, 373 [34] (Basten JA) ('*XY*').

22 Glover (n 18) 862.

23 Sir Garfield Barwick, 'Precedent in the Southern Hemisphere' (1970) 5(1) *Israel Law Review* 1, 18. See also AR Blackshield, 'Precedent in South Australia: The Hierarchic and the Heuristic' (1981) 7(1) *Adelaide Law Review* 79, 90–1.

24 The reasons for the shift were gradual and have been canvassed elsewhere: see, eg, Glover (n 18) 857–64.

25 Mark Leeming, *Common Law, Equity and Statute: A Complex Entangled System* (Federation Press, 2023) ch 10.

26 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631, 667–8 [125] (Lee J, Allsop CJ and Jagot J agreeing) ('*Personnel Contracting*').

27 *Lipohar* (n 17) 506 [46] (Gaudron, Gummow and Hayne JJ). Cf Robert Stevens, 'Review Essay: Sorting Sources' (2023) 45(4) *Sydney Law Review* 539, 547.

28 Leeming (n 25) 232.

law is thus a collective duty of all courts of Australia.[29] The *second* reason is the importance of consistency in the development and application of the law. The interests of stability, respect, certainty, and public confidence in the integrated judicial system require that courts of a certain level apply laws in a uniform manner.[30]

In a single federation where there are ten IACs and many potential voices, the plainly wrong rule exists as a principle of restraint which promotes consistency and coherence in Australia's single common law.[31] This interest in consistency is more onerous than comity.[32] As Black CJ stated in *S v Boulton*, 'comity', suggesting as it does a basis in goodwill and courtesy, does not 'reflect sufficiently the approach that should be taken when a point of common law comes to be considered by one of Australia's [IACs]'.[33] The obligation is a heightened one of 'duty' to avoid 'an undesirable disconformity' between the views of two different courts on a common issue.[34] As Chief Justice Gageler has written, extra-judicially:

> Comity conveys a mutuality of respect among equals. What comity does not quite convey is the critical contemporary notion of equals within the one system of law working together in a co-ordinated fashion to achieve a common goal.[35]

The duty imposed upon IACs is not, however, unfettered. Flexibility is provided to depart from a decision where it meets the threshold of being 'plainly wrong or, to use a different expression, [where there is] a compelling reason to do so'.[36] What is meant by the term 'plainly wrong' has been the subject of 'rich and nuanced analysis'.[37] As Bell CJ noted in *Pallas*, while the disjunctive is important, these are really 'two sides' of the same coin: a compelling reason to depart from an earlier decision is that the judgment is clearly demonstrated to be erroneous; equally, a strong conviction that the earlier judgement is erroneous will often provide a compelling reason to depart from it.[38] It would be overly simplistic to impose a checklist criterion to the level of persuasion required.[39] At bottom, the essential

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29 *Miller v Miller* (2011) 242 CLR 446, 486 [120] (Heydon J).

30 *Gett v Tabet* (2009) 109 NSWLR 1, 13 [286] (Allsop P, Beazley and Basten JJA) ('*Gett*').

31 *Hill* (n 2) 35 [26] (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ).

32 *Hasler v Singtel Optus Pty Ltd* (2014) 87 NSWLR 609, 631 [101] (Leeming JA, Gleeson and Barrett JJA agreeing).

33 *S v Boulton* (2006) 151 FCR 364, 370 [26] (Black CJ).

34 *CAL No 14* (n 2) 412–13 [51] (Gummow, Heydon and Crennan JJ, Hayne J agreeing).

35 Justice Stephen Gageler, 'Integrating the Australian Judicial System' (2023) 15(1) *The Judicial Review* 21, 32.

36 *Hill* (n 2) 34–5 [25] (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ), citing *Farah* (n 2) 151–2 [135] (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ) and *RJE v Department of Justice* (2008) 21 VR 526, 554 [104] (Nettle JA).

37 Gageler (n 35) 32.

38 *Pallas* (n 11) 90 [23] (Bell CJ, Gleeson, Leeming and Stern JJA agreeing).

39 One example of a factor from the relevant cases is the existence of an immediately apparent error that was not merely a difference in choice of approach: *Gett* (n 30) 15 [294] (Allsop P, Beazley and Basten JJA). Another is whether the principle is longstanding and has been 'worked through in a series of cases': *Totaan v The Queen* (2022) 108 NSWLR 17, 35 [76] (Bell CJ, Gleeson JA, Harrison, Adamson and Dhanji JJ agreeing) ('*Totaan*'); *Personnel Contracting* (n 26) 644 [38] (Allsop CJ, Jagot J agreeing).

question is whether, in all the circumstances, the pursuit of *correctness* sufficiently outweighs the pursuit of *consistency* and its associated values.[40]

IV Two Propositions

The New South Wales Court of Appeal's reasoning in *Pallas* seeks to strike a different balance. It can be encapsulated by two sequential propositions:

- *Proposition 1*: If Court B finds a decision of Court A to be plainly wrong, should the issue come before Court A again for determination the 'starting point' is for Court A to ask whether its original decision is plainly wrong.[41]
- *Proposition 2*: If Court A is not convinced its earlier decision is plainly wrong, or that the decision of Court B is plainly wrong, it is appropriate for Court A to 'adhere to its previously expressed view'.[42]

Proposition 1 is unsupported at a level of principle and authority. The better view is that when Court B has declared the decision of Court A to be plainly wrong, Court A must apply the same plainly wrong threshold to Court B's decision if it is to depart from it. On this reasoning, Proposition 2 falls away. To make good this argument, it is convenient to trace the authorities dealing with conflicting decisions generally, before turning to examine the principled approach.

A *Approaches Taken to Conflicting IAC Authorities*

No doubt a product of their historical context, earlier decisions exhibit deference to the home IAC in circumstances of conflict. For example, in the 1967 decision of *R v White*,[43] a South Australian appellate court was confronted with apparently conflicting decisions of the English Court of Criminal Appeal and one of its previous decisions on the issue of whether multiple convictions in one day constituted separate 'occasions'. Hogarth J was ultimately not satisfied that the decisions were conflicting but noted that, if they were, the relevant authorities should be considered and, if doubt remained, 'the Court should adhere to its previous decision', rationalising that a dissatisfied party could appeal.[44]

The more recent decisions can be split into two categories.

The first category of case exhibits a preference for the most recent authority, particularly where an earlier authority has been found to be plainly wrong. In *Re J & E Holdings*,[45] the New South Wales Court of Appeal considered conflicting decisions of the Queensland and Victorian appellate courts on an issue concerning

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40 As has been said, the rule reflects a 'compromise between the desirability of achieving uniformity and the undesirability of repeating gross error': *Totaan* (n 39) 35 [75] (Bell CJ, Gleeson JA, Harrison, Adamson and Dhanji JJ agreeing), quoting Justice JD Heydon, 'How Far Can Trial Courts and Intermediate Appellate Courts Develop the Law?' (2009) 9(1) *Oxford University Commonwealth Law Journal* 1, 27.

41 See above n 12 and accompanying text.

42 See above n 14 and accompanying text.

43 *R v White* [1967] SASR 184.

44 Ibid 202 (Hogarth J, Mitchell J agreeing).

45 *Re J & E Holdings Pty Ltd* (1995) 36 NSWLR 541.

the *Corporations Law*. The Victorian appellate court had declared the Queensland decision to be plainly wrong. In resolving this conflict, the New South Wales Court of Appeal followed the Victorian decision as the most recent IAC decision on point.[46] Sheller JA stated that '[c]ertainty in the law' requires

> that only in an extreme case would an intermediate appellate court or a judge of first instance not follow the latest decision by an intermediate appellate court if, in that latest decision, the arguments have been fully reviewed and a conclusion reached that an earlier decision of another intermediate appellate court was plainly wrong.[47]

In *Patrick Stevedores*, the Victorian Court of Appeal faced conflicting decisions of the Full Court of the Supreme Court of Victoria and the Full Federal Court on an issue concerning the principles of procedural fairness.[48] The Full Federal Court had departed from the earlier Victorian decision, stating that it no longer reflected a correct statement of law. The Full Federal Court decision had been followed, in preference to the Victorian decision, in other states such as South Australia. The Court determined that the circumstances before it were ultimately distinguishable from that raised in the conflicting case law.[49] However, had the cases been directly on point, the Court found that it was 'not bound to follow any one of those decisions'.[50] This position was contrasted to a circumstance where, post *Farah Constructions v Say-Dee*, a later IAC decision finds an earlier IAC decision to be plainly wrong. In that situation, the Court concluded that it 'might be bound to follow the later decision unless [it] took the view that the later decision was "plainly wrong"'.[51]

The second category of case includes those that consider the relevant issue afresh. In *Joyce v Grimshaw*, the Full Federal Court was confronted with conflicting decisions of its own Court and a Queensland appellate court on the interpretation of a provision of the *Crimes Act 1914* (Cth).[52] The Court stated:

> There is obviously a degree of tension, and potential conflict, between the need for there to be comity between decisions of the Full Court of this Court and other intermediate State appellate courts, and the need for there to be comity as between differently constituted Full Courts of this Court.[53]

In reconciling this conflict, the Full Court interpreted the provision in the context of its history and background, and then assessed the weight of authorities.[54] The Court ultimately favoured the interpretation previously reached by a differently constituted Full Court.

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46 Ibid 551 (Sheller JA, Priestley and Powell JJA agreeing).

47 Ibid. This was quoted with apparent approval in *David Grant & Co Pty Ltd v Westpac Banking Corporation* (1995) 184 CLR 265, 272 (Gummow J, Brennan CJ, Dawson, Gaudron and McHugh JJ agreeing). See also *Spicer Thoroughbreds Pty Ltd v Stewart* [2023] NSWCA 82, [56] (Leeming JA, Mitchelmore JA and Griffiths AJA agreeing); *Trans Pacific Investment Corporation Pty Ltd v Rusty Rees Pty Ltd* (1995) 57 FCR 210, 214 (Black CJ, Davies and Beaumont JJ).

48 *DPP (Vic) v Patrick Stevedores Holdings Pty Ltd* (2012) 41 VR 81.

49 Ibid 107 [118] (Maxwell P, Weinberg JA and Ferguson AJA).

50 Ibid 109 [128] (Maxwell P, Weinberg JA and Ferguson AJA).

51 Ibid.

52 *Joyce v Grimshaw* (2001) 105 FCR 232.

53 Ibid 241 [47] (Miles, Mathews and Weinberg JJ).

54 Ibid 241 [48] (Miles, Mathews and Weinberg JJ).

In *R v XY*,[55] the New South Wales Court of Criminal Appeal faced a situation like that hypothesised in *Patrick Stevedores*, with a later Victorian decision finding an earlier New South Wales decision to be plainly wrong (in this case, on the approach to prejudicial evidence). However, Basten JA considered that the approach put forward in *Patrick Stevedores* should not be followed because (1) it implies that *Farah* is the final statement of the High Court on the doctrine of precedent; and (2) it is not conducive to the orderly administration of justice for IACs to routinely characterise other IAC judgments as plainly wrong.[56] His Honour concluded:

> Uncertain though the state of current authority is, the course this court should take in all the circumstances is to determine for itself the correct approach to the statutory provision, giving proper consideration to the reasoning and conclusions of earlier authorities, both in this court and in the Victorian Court of Appeal.[57]

In *R v Kinghorn*, the New South Wales Court of Criminal Appeal was presented with conflicting approaches to an issue under taxation legislation of its Queensland counterpart on the one hand, and an earlier decision of its own Court (allied with its Western Australia counterpart) on the other. Notably, no reference had been made in the Queensland decision to the earlier New South Wales and Western Australian decisions. The Court found that it was 'not constrained by the principles laid down in *Farah*' and proceeded to resolve the issue by construing the legislation itself with the benefit of the other decisions.[58]

With these foundations laid, it is convenient to examine the principled approach to the question raised on this High Court appeal.

B *The Principled Approach*

An IAC should depart from its own previous decision 'cautiously and only when compelled to the conclusion that the earlier decision is wrong'.[59] Much like the plainly wrong rule governing inter-hierarchical relations, this reflects the need for 'restraint in departing from previous decisions in order to foster stability and

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55 *XY* (n 21).

56 Ibid 374 [38] (Basten JA, Hoeben CJ at CL agreeing).

57 Ibid 375 [40] (Hoeben CJ at CL and Simpson J agreeing). Further examples of courts considering a matter afresh where an earlier IAC decision has been deemed plainly wrong by a later IAC decision include *Xiao v The Queen* (2018) 96 NSWLR 1, 51 [278] (Bathurst CJ, Beazley P, Hoeben CJ at CL, McCallum and Bellew JJ) ('*Xiao*'); *R v Dyson* (1997) 68 SASR 156, 161–4 (Doyle CJ), 164 (Bollen J), 165 (Perry J), 165–6 (Duggan J), 166–8 (Debelle J) ('*Dyson*'). See also *Construction, Forestry, Mining and Energy Union v Australian Building and Construction Commissioner* (2018) 259 FCR 20, 41 [62]–[65] (Bromwich J, Kenny and Tracey JJ agreeing); *Rail Services Australia v Dimovski* (2004) 1 DDCR 648, 665 [84] (Young CJ in Eq, Hodgson JA agreeing).

58 *R v Kinghorn* (2021) 106 NSWLR 322, 351–4 [113]–[132] (Bathurst CJ and Payne JA, Bell P, Ward CJ in Eq and Bellew J agreeing) ('*Kinghorn*'). Further examples of courts considering a matter afresh where a later IAC decision did not find the earlier IAC decision to be plainly wrong include: *HBSY Pty Ltd v Lewis* (2023) 298 FCR 303, 317 [52]–[54] (Markovic, Downes and Kennett JJ) ('*HBSY*'); *Obeid v Lockley* (2018) 98 NSWLR 258, 297 [170] (Bathurst CJ, Beazley P and Leeming JA agreeing) ('*Obeid*').

59 *Nguyen v Nguyen* (1990) 169 CLR 245, 269 (Dawson, Toohey and McHugh JJ, Brennan and Deane JJ agreeing).

predictability in the law'.[60] It follows that absent a decision of Court B, Proposition 1 reflects the correct starting point for Court A.

But how does this principle of *intra*-hierarchical deference interact with that of *inter*-hierarchical deference outlined above? The former cannot be viewed in isolation from the latter. As the New South Wales Court of Appeal stated in *Gett v Tabet*, in discussing the prevailing view that whether an IAC should depart from one of its previous decisions is a matter of practice for each IAC to determine itself:

> The constitutional importance of the doctrine of precedent cannot be entirely at large within a national integrated legal system to the extent that each intermediate appellate court is entitled to determine for itself its own practice with respect to following earlier decisions. That is particularly so … where … intermediate appellate courts are required to take into account, and in some circumstances follow, decisions of courts of coordinate jurisdiction.[61]

These constraints on the principles of intra-hierarchical deference are important. As established in Part III above, each IAC operates as part of a unified judicial hierarchy with the High Court at its apex. In modern times, and particularly in respect of issues of national operation, that is a system in which IACs exist as *equals* working together to achieve a *common goal*: the articulation of Australia's single common law. Taken to its logical end point, this means that institutional distinctiveness at the IAC level must be symbolic only. Beyond historical custom, an IAC has no principled reason to treat an *intra*-hierarchical IAC decision any differently to an *extra*-hierarchical IAC decision. Of course, institutional distinctiveness remains relevant to other parts of the precedential equation: for example, in accordance with ordinary rules of precedent in a hierarchical system, trial judges remain bound to follow their home IAC in the event of conflicting IAC decisions.[62] However, at the IAC level, a single common law dictates that the pursuit of *intra*-hierarchical consistency is but one component of, and must necessarily yield to, the pursuit of *inter*-hierarchical consistency.

Once the above is appreciated, Proposition 1 cannot stand.

Where one IAC has declared the decision of another IAC to be plainly wrong, as the Court in *Parkin* did the decision in *Wigmans*, there is no inconsistency in the law. After full consideration of the legal issue and Court A's earlier decision on that legal issue, Court B has, in accordance with the plainly wrong threshold, decided to depart from it. The palimpsest of the single common law has altered. The Court in *Pallas* therefore erred in asking itself whether *Wigmans* was plainly wrong. It would also have erred if it purported to consider the matter afresh without giving heightened

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60 *Gett* (n 30) 12 [286] (Allsop P, Beazley JA, Basten JA).

61 Ibid 10 [278] (Allsop P, Beazley and Basten JJA). See also Gageler (n 35) 33.

62 See, eg, *Lo Pilato v Kamy Saeedi Lawyers Pty Ltd* (2017) 249 FCR 69, 114 [234] (Katzmann J); *Chel v Fairfax Media Publications Pty Ltd [No 6]* [2017] NSWSC 230, [37] (Beech-Jones J). Only in one case did a trial Judge conclude that he was bound to follow the 'common law of Australia' over a binding decision of the home Court of Appeal: *Re Amerind Pty Ltd (in liq)* (2017) 320 FLR 118, 182–9 [334]–[372] (Robson J). This approach was rejected on appeal: *Commonwealth v Byrnes* (2018) 54 VR 230, 291 [286] (Ferguson CJ, Whelan, Kyrou, McLeish, Dodds-Streeton JJA).

deference to the decision in *Parkin*.[63] In a national judicial system of equals working together in a coordinated fashion to achieve a common goal, the New South Wales Court of Appeal owed a duty to follow *Parkin* unless it was itself convinced that the Full Court in *Parkin* was plainly wrong.[64] This is consistent with the reasoning in *Re J & E Holdings* and *Patrick Stevedores*. Basten JA's criticisms of this approach in *XY* are uncompelling. To the extent it could be said that at the time of that decision the precedential rules between IACs were still in a state of flux, the position is now relatively settled.[65] And while it may be undesirable for courts to declare others plainly wrong, this is a necessary consequence of a unified system in which the interests of consistency and correctness are to be balanced. As is explained below, this latter issue can at least in part be alleviated by a shift in the nomenclature used.

To state the position another way: the correct starting point is for Court A to recognise that the decision of Court B reflects the common law of Australia. True it is that Court A may, as in *Pallas*, disagree with whether the threshold has been met to justify the conclusion reached by Court B to depart from the original decision of Court A. But if Court B has fully considered the decision of Court A and applied the correct standard of departure (as the Full Court did in *Parkin*), Court A can only interrogate the reasoning of Court B to assess whether Court B's decision is plainly wrong, *not* to assess whether Court B's treatment of Court A's previous decision was persuasive enough to justify departure. To accept the alternative would undermine the premise of a requirement of heightened deference; it would mean that an IAC could always second-guess another IAC's 'plainly wrong' finding, generating a similar potential for inconsistency as would pertain if the plainly wrong rule did not exist. Of course, if Court B overlooked a critical issue (which may, but need not, have featured in Court A's original decision), this may provide a 'compelling reason' for Court A to depart from Court B's decision, but one would think that when an issue is being considered for a third time, even greater restraint is to be exercised.[66] The distinction we have drawn here is subtle but important. Proper framing of the

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63 Cf *XY* (n 21); *Xiao* (n 57); *Dyson* (n 57). The position might be different if the second decision had not considered the first decision or had applied the incorrect threshold to justify departure from that decision: see *Kinghorn* (n 58); *HBSY* (n 58); *Obeid* (n 58).

64 It might be said that Bell CJ's conclusion in *Pallas* (n 11) at 112 [119] that 'far from being "plainly wrong", *Wigmans* is correct' represents an implicit finding on the part of the New South Wales Court of Appeal that *Parkin* was plainly wrong. This is to be doubted: a finding that *X* is 'correct' does not necessarily equate to finding that *Y* is 'plainly wrong'. Nor should the latter finding too readily be implied, given that it alters the landscape of Australia's single common law and creates a new point of departure for all IACs across the country.

65 In *XY* (n 21) 375 [39] Basten JA was referring to the statement of McHugh J in *Marshall v Director-General, Department of Transport* (2001) 205 CLR 603, 632–3 [62] that a court in one jurisdiction should not 'slavishly follow' the decisions of others 'in respect of similar or even identical legislation' as '[t]he duty of courts, when construing legislation, is to give effect to the purpose of the legislation'. Once the rationale for the plainly wrong rule is appreciated, the reasoning in *Marshall* is sound. In respect of non-uniform statutes, the existence of a single common law does not demand a consistent outcome. Of course, it is logical and desirable that similar and identical statutes are to be interpreted consistently, but at a level of principle, this is not a 'corollary' of the single Australian common law.

66 See *Minister of Pensions v Higham* [1948] 2 KB 153, 155 (Denning J); *Colchester Estates (Cardiff) v Carlton Industries plc* [1986] Ch 80, 85 (Nourse J); *Willers v Joyce [No 2]* [2018] AC 843, 852 [9] (Lord Neuberger for the Court). Any contention that this affords an 'advantage' to the second court confronted with the relevant issue should be rejected. IACs are not competitive entities but equals in the pursuit of a common enterprise.

inquiry promotes convergence to a single answer, rather than divergence to potentially conflicting answers.

Ultimately, Proposition 1 insists upon an anachronism of a colonial epoch where IACs viewed comity as their only connecting force. That approach does not find favour in the modern authorities or at a level of principle. If Proposition 1 is incorrect, Proposition 2 falls away. There is no need to reconcile two *not* plainly wrong decisions. That logic would lead to an equally erroneous end point: Court A is left promoting *in*consistency by searching for *in*correctness.

In reaching this conclusion, one cannot be critical of the approach taken by the New South Wales Court of Appeal. There is an innate perplexity in reconciling the concept of a single common law with the existence of distinct judicial hierarchies and the historical context in which those hierarchies have evolved from independent colonies to a Commonwealth of common enterprise. There is also an inherent 'awkwardness' in the practice of an IAC declaring the decisions of another IAC to be plainly wrong, which is often 'likely to appear as a gratuitous insult when applied to another court'.[67] This appeal gives the High Court the opportunity to address both issues. As to the former, it is a matter of clarifying that IACs exist as equals within one system of law working together in a coordinated fashion to achieve a common goal. As to the latter, it is making clear that 'pejorative'[68] phrases such as 'plainly wrong' are not productive of that common goal and should be avoided; the focus instead should be directed to the 'quality and cogency of the case made out for departure from [an] earlier decision'.[69]

V Conclusion

The interaction between IACs in Australia's integrated judicial hierarchy has changed significantly since Federation. We have argued that the modern concept of a single common law of Australia and the corollary rules of heightened deference that govern IAC relations mean that where an IAC is considering an issue of national operation, institutional distinctiveness is symbolic only. It follows that the New South Wales Court of Appeal in *Pallas* erred in considering for itself whether it should depart from its earlier decision in *Wigmans*. It ought to have given heightened deference to the more recent decision of the Full Federal Court in *Parkin*, unless it was convinced that it should depart from that decision.

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67 *XY* (n 21) 373 [34] (Basten JA).

68 *Secretary, Department of Justice and Regulation (Vic) v Fletcher* [2017] VSCA 44, [45] (Maxwell P, Redlich and Beach JJA).

69 *Pallas* (n 11) 116 [140] (Leeming JA).