IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY **No.P63 of 2015**

BETWEEN:

W.A. GLENDINNING & ASSOCIATES PTY LTD ACN 008 762 721
Plaintiff

AND

THE STATE OF WESTERN AUSTRALIA
Defendant

ANNOTATED WRITTEN SUBMISSIONS OF THE DEFENDANT

PART I: SUITABILITY FOR PUBLICATION

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

PART II: ISSUES

2. Is the *Bell Act* in its entirety, or are parts of it, inconsistent with the scheme of s.215 of the *Income Tax Assessment Act 1936* (Cth)[1] or s.260-45 in Schedule 1 to the *Taxation Administration Act 1953* (Cth) in that the *Bell Act* alters, impairs or detracts from such scheme? If so, can provisions of the *Bell Act* be read down?

3. Are provisions of the *Bell Act* directly inconsistent with s.215(3)(b) of the *ITAA 1936*, or do they otherwise alter, impair or detract from s.215(3)(b)? If so, can provisions of the *Bell Act* be read down?

[1] Former s.215 of the *ITAA 1936* has been replaced by s.260-45 in Pt.4-15, Sch.1 to the *Taxation Administration Act 1953* (Cth). Part 4-15 was inserted into the *TAA 1953* by item 1, Sch.2 of the *A New Tax System (Tax Administration) Act 1999* (Cth) with effect from 22 December 1999. Former s.215 of the *ITAA 1936* continues to apply to the liquidator of a company that was being wound up if it applied to the liquidator "just before" its repeal in 2006: see item 12, Pt.3, Sch.6 to the *Tax Laws Amendment (Repeal of Inoperative Provisions) Act 2006* (Cth). As noted by Wigney J in *Bell Group Limited (in liq) v Deputy Commissioner of Taxation* [2015] FCA 1056 at [24], s.215 of the *ITAA 1936* and s.260-45 of the *TAA 1953* operate in relevantly the same way. The Plaintiff accepts that former s.215 continues to apply in respect of all of the WA Bell Companies except for Albany Broadcasters Ltd, in respect of which s.260-45 applies; and that nothing turns on this distinction — WAG's Submissions at [66], [68].

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4. Is the *Bell Act* in its entirety, or are parts of it, inconsistent with the scheme of s.254 of the *ITAA 1936* in that the *Bell Act* alters, impairs or detracts from such scheme? If so, can provisions of the *Bell Act* be read down?

5. Are provisions of the *Bell Act* directly inconsistent with ss.254(1)(d) and 254(1)(e) of the *ITAA 1936*, or do they otherwise alter, impair or detract from them? If so, can provisions of the *Bell Act* be read down?

6. Are provisions of the *Bell Act* directly inconsistent with ss.177, 208 and 209 of the *ITAA 1936*, or do they otherwise alter, impair or detract from them? If so, can provisions of the *Bell Act* be read down?

7. To the extent that s.51 of *Bell Act* invokes s.5F of the *Corporations Act 2001* (Cth), does this operate to avoid any inconsistency that would otherwise arise between the *Bell Act* and the *Corporations Act 2001*?

8. To the extent that s.52 of *Bell Act* invokes s.5G of the *Corporations Act 2001*, do any or all of ss.5G(4), 5G(8) or 5G(11) operate to avoid any inconsistency that would otherwise arise between the *Bell Act* and the *Corporations Act 2001*?

9. Are ss.22, 25(5), 26, 27, 29 and 73 of the *Bell Act* inconsistent with s.39(2) of the *Judiciary Act 1903* (Cth)?

10. Are provisions of the *Bell Act* incompatible with requirements of Chapter III of the Commonwealth *Constitution* and thereby invalid?

11. Does WAG have standing, and is there a justiciable controversy, to bring a challenge in respect of the alleged inconsistencies between the *Bell Act* and the Commonwealth taxation legislation?

PART III: SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

12. WAG has given notice in compliance with s.78B of the *Judiciary Act 1903* (Cth).

PART IV: MATERIAL FACTS

13. These are agreed as set out in the Special Case Book.

PART V: RELEVANT CONSTITUTIONAL PROVISIONS AND LEGISLATION

14. These are collected in a Court Book that will be filed.

PART VI: SUBMISSIONS

15. WAG adopts the submissions of parties in related matters. These submissions respond only to matters specifically put by WAG. There are many matters addressed in the WAG pleadings that are not addressed in its submission. Such matters will be responded to briefly. The WAG contentions, in pleadings, submissions and by adoption of submissions of others, are as follows.

16. *First*, that the *Bell Act* in its entirety is, or parts of its are, inconsistent with the scheme of s.215 of the *Income Tax Assessment Act 1936* (Cth) or s.260-45 in Schedule 1 to the *Taxation Administration Act 1953* (Cth) in that the *Bell Act* alters, impairs or detracts from such scheme and so is invalid by reason of s.109 of the *Constitution*[2].

17. *Second*, that provisions of the *Bell Act* are directly inconsistent with s.215(3)(b) of the *ITAA 1936*[3], or otherwise alter, impair or detract from s.215(3)(b)[4].

18. *Third*, that the *Bell Act* in its entirety is, or parts of it are, inconsistent with the scheme of s.254 of the *ITAA 1936* (Cth)[5] in that the *Bell Act* alters, impairs or detracts from such scheme[6].

19. *Fourth*, provisions of the *Bell Act* are directly inconsistent with ss.254(1)(d) and 254(1)(e) of the *ITAA 1936*[7], or otherwise alter, impair or detract from them[8].

20. *Fifth*, provisions of the *Bell Act* are directly inconsistent with ss.177, 208 and 209 of the *ITAA 1936*, or otherwise alter, impair or detract from them[9].

21. *Seventh*, s.51 of *Bell Act* invokes s.5F of the *Corporations Act 2001*, but such invocation does not operate to avoid any inconsistency that would otherwise arise between the *Bell Act* and the *Corporations Act 2001*[10].

22. *Eighth*, s.52 of *Bell Act* invokes s.5G of the *Corporations Act 2001*, but none of ss.5G(4), 5G(8) or 5G(11) operate to avoid any inconsistency that would otherwise arise between the *Bell Act* and the *Corporations Act 2001*[11].

23. *Ninth*, further to the issues concerning s. 5G(8) of the *Corporations Act*, that numerous provisions of the *Bell Act* that are not displaced by s.5G(8) are directly inconsistent with, or otherwise alter, impair or detract from provisions of the *Corporations Act* not and are thereby invalid[12].

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[2] WAG's Amended Statement of Claim ('ASOC') at [56.1], [57]–[58] (SCB at 30–31, 35–36); Amended Special Case at question 3(i)(a)(1) (SCB at 137–138).
[3] WAG's Submissions at [66]–[68], [69].
[4] WAG's ASOC at [56.1.1] (SCB at 30–31); Amended Special Case at question 3(i)(a)(1) (SCB at 137–138).
[5] As to post-liquidation tax liabilities, WAG accept that s.254 of the *ITAA 1936* is and has always been the relevant source of a liquidator's obligations — WAG's Submissions at [67].
[6] WAG's ASOC at [56.1.1] (SCB at 30–31); Amended Special Case at question 3(i)(a)(1) (SCB at 137–138).
[7] WAG's Submissions at [67]–[69].
[8] This contention is only put in WAG's ASOC at [56.1.2]–[56.2] (SCB at 30–32).
[9] This contention is only put in WAG's ASOC at [56.3]–[56.4] (SCB at 32-35); Amended Special Case at question 3(i)(a)(1) (SCB at 137–138).
[10] WAG's ASOC at [74]–[78] (SCB at 45–46); Amended Special Case at question 3(i)(a)(2) (SCB at 137–138).
[11] WAG's ASOC at [79]–[88] (SCB at 46–47); Amended Special Case at question 3(i)(a)(2) (SCB at 137–138).
[12] WAG's ASOC at [81] (SCB at 46); Amended Special Case at question 3(i)(a)(2) (SCB at 137–138).

24. *Tenth*, that ss.22, 25(5), 26, 27, 29 and 73 of the *Bell Act* are inconsistent with s.39(2) of the *Judiciary Act* in various ways[13].

25. *Eleventh,* that various provisions of the *Bell Act* are incompatible with requirements of Chapter III of the *Constitution* in various ways and are thereby invalid[14].

STANDING AND THE JUSTICIABLE CONTROVERSY

26. The State denies that WAG has standing in respect of the alleged invalidity of Parts 3 and 4 of the *Bell Act* on the grounds of the alleged inconsistency with the Commonwealth taxation regime[15].

27. A person that seeks a declaration that a law is invalid must have sufficient interest in having his or her legal position clarified[16] or show that he or she is a person who now or in the immediate future probably will be affected, whether in his or her person or his or her property, by the impugned law[17]. A sense of grievance with a law, however strong, is not sufficient to give standing[18].

28. WAG has no interest in whether or not Mr Woodings, as liquidator of WA Bell Companies (where BGNV and WAG are not WA Bell Companies), should set aside amounts under former s.215 and s.254(1)(d) of the *ITAA 1936* and whether or not he will be held personally liable if he fails to do so. Similarly, it has no interest in whether the Commonwealth's rights as creditor of certain WA Bell Companies and its use of conclusive evidence provisions are affected. They are not likely to gain any advantage by the outcomes of those arguments in the sense described by Gibbs J in *Australian Conservation Foundation*[19]. In respect of such taxation arguments, WAG is not seeking clarification as to their rights, but the rights of unrelated parties; Mr Woodings and the Commonwealth. They therefore lack standing on those issues.

29. The State does not concede that if others have standing to agitate issues concerning rights of the Commissioner, that the Commissioner then has standing to intervene. The foreshadowed submissions of the Commissioner do not add to those of the plaintiff, such that the Commissioner's involvement is unlikely to add to the submissions to be presented to the Court[20].

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[13] WAG's ASOC at [59]–[68] (SCB at 36–38); Amended Special Case at question 3(i)(a)(3) (SCB at 137–138).
[14] WAG's ASOC at [59]–[71] (SCB at 36–38); Amended Special Case at question 3(i)(b) (SCB at 137–138).
[15] State's Amended Defence in P63 of 2015 at [56] (SCB at 84).
[16] *Kuczborski v Queensland* [2014] HCA 46; (2014) 254 CLR 51 at 106 [175] (Crennan, Kiefel, Gageler and Keane JJ).
[17] *Kuczborski v Queensland* [2014] HCA 46; (2014) 254 CLR 51 at 87 [99] (Hayne J).
[18] *Australian Conservation Foundation v Commonwealth* [1980] HCA 53; (1980) 146 CLR 493 at 530 (Gibbs J).
[19] *Australian Conservation Foundation v Commonwealth* [1980] HCA 53; (1980) 146 CLR 493 at 530.
[20] *Roadshow Films Pty Ltd v iiNet Ltd (No 1)* [2011] HCA 54; (2011) 248 CLR 37 at 39 [3] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

30. The State accepts that the Maranoa plaintiffs in P4 of 2016 have standing to contend that the *Bell Act* undermines Mr Woodings' obligation to retain money to meet the taxation liabilities of the relevant company under s.254(1)(d) of the *ITAA 1936*[21]. Consistent with *Williams v Commonwealth*[22], because of this, the Court does not need to determine whether WAG has standing in respect of s.254(1)(d) issues. Similarly, if and to the extent that this Court concludes that a Maranoa plaintiff or the Commissioner of Taxation has standing to raise any grounds in which standing is in dispute, then the Court does not need to determine whether in respect of that same issue WAG has standing.

31. There is a question as to whether there is a justiciable controversy for this Court to determine in respect of former s.215 of the *ITAA 1936* or s.260-45 of Schedule 1 to the *TAA 1953*[23] in circumstances where it is not alleged by Mr Woodings that he has at any material time received a notification in accordance with former s.215 or s.260-45 of Schedule 1 to the *TAA 1953*[24]. The State denies that any such notice has issued and therefore any liabilities arising under former s.215 and s.260-45 are merely hypothetical questions.

32. Proofs of debt do not constitute notice under s.215 of the *ITAA 1936*. The Commissioner's proposed submissions, and those of WAG, do not take a position on whether such notice has been issued. There is dicta to the effect that lodging a proof of debt may be sufficient notice under s.215 and its equivalents[25], but contrary dicta also[26]. The approach of the Commissioner appears to be that lodging a proof of debt is distinct from the s.215 notice[27]. If the creditor intends for a proof of debt to have a purpose collateral to its main function, that should be made plain on the face of the proof of debt.

33. Given the legislative purpose of s.215, the notice should at least put the liquidator properly on notice of the tax liability and inform the liquidator of the courses open to him or her[28]. Lodgement of a proof of debt does not do this.

34. In any event, whether or not a proof of debt constitutes notice for s.215 may not need to be determined here because the original proofs of debt were issued prior to Mr Woodings becoming the liquidator of those companies[29], and the replacement proofs of debt issued after Mr Woodings became the liquidator

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[21] See the State's Amended Defence at [56.1.1] (SCB at 99).
[22] *Williams v Commonwealth* [2012] HCA 23; (2012) 248 CLR 156 at 181 [9] (French CJ), 223 [112] (Gummow and Bell JJ), 240 [168] (Hayne J), 341 [475] (Crennan J), 361 [557] (Kiefel J).
[23] Question 2 in the Amended Special Case (SCB at 137).
[24] State's Amended Defence at [56.2.2] (SCB at 100).
[25] *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd* [1940] HCA 13; (1940) 63 CLR 278 at 311 (Dixon J) ('*Farley*'); *Pace v Antlers Pty Ltd (in liq)* [1998] FCA 2; (1998) 80 FCR 485 at 504 (Lindgren J).
[26] *Commonwealth v Duncan* [1981] VR 879 at 885 (Lush J).
[27] See in *Re Autolook Pty Ltd* (1983) 14 ATR 658 at 659 where the proof of debt appeared to be separate to the s.215 notice; *Bettina House of Fashion Pty Ltd v Federal Commissioner of Taxation* (1989) 20 ATR 495 at 497–498 in which the s.215 notice was separate from the assessment notice.
[28] See, by analogy, *Deputy Commissioner of Taxation v Woodhams* [2000] HCA 10; (2000) 199 CLR 370 at 384 [33]–[38] (Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ) which dealt with the liability under s.222AOC of the *ITAA 1936* of a director to pay the Commissioner of Taxation the unpaid amount of the company's unpaid liability.
[29] See Amended Special Case at [71B] (SCB at 127–128).

were all under the cover of a letter stating that "this advice should ***not*** be taken as notification pursuant to section 215(2) of the" *ITAA 1936*[30].

35. Because no notice was given to Mr Woodings enlivening the obligation to set aside money, he had no such obligation and any liability under s.215(3)(b)–(c) is hypothetical. There is no justiciable controversy because no immediate question of right, interest or liability arises. While this Court has accepted a party has standing if he or she will "in the immediate future probably" be affected by the impugned law[31], there is nothing to suggest imminence here.

INCONSISTENCY OF THE *BELL ACT* WITH SECTIONS 215 AND 254 OF THE *ITAA 1936*

36. WAG deals with these issues substantively in three paragraphs of its submissions[32].

37. Neither s.215 nor s.254 of the *ITAA 1936* creates a right in the Commonwealth to receive any sum. Neither provision assures that the Commonwealth will receive anything in a winding up.

38. Section 215 of the *ITAA 1936*[33] applies in respect of pre-liquidation liabilities and requires the following. *First*, that a liquidator give notice to the Commissioner within fourteen days of his appointment (s.215(1)(a)). In this matter this occurred[34]. There is nothing in the *Bell Act* that is inconsistent with this.

39. *Second*, the Commissioner is then required to notify the liquidator of the amount sufficient to provide for tax (s.215(2)). In this matter it appears that the Commissioner did not, in fact, do this[35]. Even so, had this occurred, there is no inconsistency between any provision of the *Bell Act* and this provision. By force of s.22(1) of the *Bell Act* on the transfer day all property vested in or held on behalf of a WA Bell Company, including all property held by a liquidator of a WA Bell Company, vested in the Authority. By s.33(8)(d) of the *Bell Act* the liquidator of all WA Bell Companies is to give a report, if requested, as to the liabilities of WA Bell Companies. Any such report will inevitably include details of the liability for any tax payable by any WA Bell Company the subject of a notification under s.215(2) of the *ITAA 1936*. By s.25(1) and (3) of the *Bell Act* the Commissioner can seek to prove the liability for any tax payable by any WA Bell Company the subject of a notification under s.215(2) of the *ITAA 1936*. Section 34 of the *Bell Act* facilitates the Commissioner advising of the liability for any tax payable by any WA Bell Company the subject of a

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[30] See Amended Special Case at [71F] (SCB at 130) and which refers to Amended Special Case in P4 of 2016 at Annexure 3 (SCB at 237–298).
[31] *Kuczborski v Queensland* [2014] HCA 46; (2014) 254 CLR 51 at 87 [99] (Hayne J).
[32] WAG's Submissions at [68]-[70].
[33] In the terms it provided immediately prior to its repeal on 14 September 2006 (by item 161, Sch.1 to *the Tax Laws Amendment (Repeal of Inoperative Provisions) Act 2006* (Cth)), which, as explained above, continue to apply to Mr Woodings as liquidator of each of the WA Bell Companies, save for Albany Broadcasters.
[34] See Amended Special Case at [71C] (SCB at 128).
[35] See Amended Special Case at [71G.2] (SCB at 130).

notification under s.215(2) of the *ITAA 1936*. So, the holder of the funds that are available for distribution to the creditors of the WA Bell Companies will necessarily have notice, prior to distribution, of the amount which the Commissioner claims for the pre-liquidation tax liabilities of the WA Bell Companies.

40. *Third*, the liquidator of a WA Bell Company is not to part with assets of a WA Bell Company without the leave of the Commissioner until he is notified of the amount sufficient to provide for tax (s.215(3)(a)) and is to "set aside" an amount provided for in s.215(3)(b) of the *ITAA 1936*; in essence a sum reflecting the proportion which the amount notified under s.215(2) bears (excluding the notified amount) to the aggregate of other (unsecured) debts. There is no inconsistency between any provision of the *Bell Act* and this provision, and nothing in the *Bell Act* undermines its operation. This is because the Authority has the assets and property transferred to it pursuant to s.22 of the *Bell Act*. So long as the Authority has the same assets available for distribution to creditors of WA Bell Companies, pursuant to the *Bell Act*, as did the liquidator, then the Commissioner, by reason of ss.215(3)(a) and (b) of the *ITAA 1936*, is in precisely the same position in respect of the *Bell Act* as it would be under the legislation that would otherwise (that is, but for the *Bell Act*) be applicable. To the extent that the Commissioner has notified the liquidator of the amount sufficient to provide for tax in terms of s.215(2) of the *ITAA 1936*, and assuming that all the proofs of debt submitted, including those submitted prior to Mr Woodings becoming the liquidator, constitute notice for s.215(2), this amount is approximately $167,706,491[36]. The sum held by the Authority immediately following the transfer day is in excess of $1.7 billion[37]. So any set aside amount is actually held by the Authority, in the same way that it was putatively held (or but for the *Bell Act* would putatively have been held) by a liquidator.

41. There is little authority on what is meant or comprehended by the notion of "setting aside". Plainly it does not mean quarantining or placing in a separate account or holding in a separate place. Such a meaning would defy logic and be meaningless in current times. Setting aside can only mean maintaining or having available. So, because the *Bell Act* Authority has the same assets available for distribution as did the liquidator, then the Commissioner is in precisely the same position in relation to the assets. Any inconsistency is not real[38].

42. *Fourth*, the liquidator of a WA Bell Company is, by reason of ss.215(3)(c) and (4) of the *ITAA 1936*, liable to the Commissioner to pay the set aside amount. As will be seen, this liability is, in fact, not real. This is because the liquidator does not have a personal liability under ss.215(3)(c) or (4) so long as a process

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[36] See Amended Special Case at [21] (SCB at 92–93).

[37] The bank accounts holding the trust property immediately before the transfer day held $1,038,359,017.21 and the bank accounts holding the uncontested amount immediately before the transfer day held $689,300,429.72 — see Amended Special Case at [40] (SCB at 102).

[38] In the sense that there is "no real conflict between the State law and the Commonwealth law" — *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* [2011] HCA 33; (2011) 244 CLR 508 at 529 [60] (French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ).

exists by which distributions to the Commissioner, in respect of liability for tax to which s.215(2) of the *ITAA 1936* relates, can be made. This process is effected by the *Bell Act*. If it is contended that ss.215(3)(c) and (4) of the *ITAA 1936* are aspects of a scheme to "ensure" that the set aside amount is available to distribute to the Commissioner, and provisions of the *Bell Act* alter, impair or detract from this, such a contention should be rejected, for the following reasons. *First*, as will be explained, nothing in s.215 of the *ITAA 1936* "ensures" that the set aside amount is distributed to the Commissioner. *Second*, the statutory purpose of s.215(3)(c) has been fulfilled if the liquidator in fact sets aside the amount. The incentive to do so that is provided by s.215(3)(c) has been effected. *Third*, any such inconsistency is not real. Here there is no reason to think that, if the liquidator had been notified by the Commissioner in terms of s.215(2), that he did not set aside the relevant amount, in the manner explained above. This set aside sum is now held by the *Bell Act* Authority. The total sum held by the Authority is greater than any notional set aside amount. This total sum is available to the Authority to distribute according to law. Again, any theoretical inconsistency is not real.

43. Section 254 of the *ITAA 1936* operates in respect of post-liquidation income and requires the following.

44. *First*, that the liquidator is authorised and required to retain a sum sufficient to pay tax which is or will become due on such income (s.254(1)(d)), and is personally liable for the tax payable to the extent of any amount retained, or that should have been retained. In respect of the retention obligation, it is the same as the setting aside and not parting with obligations of s.215(3)(a) and (b) of the *ITAA 1936*. For the same reasons as stated above, in respect of these provisions, there is no inconsistency between any provision of the *Bell Act* and s.254(1)(d). The Authority has the assets and property transferred to it pursuant to s.22 of the *Bell Act*. They are the same assets available for distribution to the creditors of the WA Bell Companies, pursuant to the *Bell Act*, as would have been available to a liquidator for distribution. As such, the Commissioner is in precisely the same position in respect of the *Bell Act* as it would have been but for the *Bell Act*. To the extent that the liquidator, prior to the transfer day, retained an amount sufficient to provide for tax in terms of s.254 of the *ITAA 1936*, this amount is $298,190,348.70[39]. The sum held by the Authority immediately following the transfer day is $1.7 billion[40]. So, an amount at least equivalent to the retained amount is held by the Authority and available for distribution according to law.

45. *Second*, the liquidator of a WA Bell Company is, by reason of s.254(1)(e), liable to the Commissioner to pay the retained amount, or an amount that should have been retained. Like the equivalent obligation under ss.215(3)(c) and (4) of the *ITAA 1936*, this liability is illusory, because, for so long as a process exists by which distributions to the Commissioner, in respect of liability for tax to which

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[39] See Amended Special Case in P63 of 2015 at [73A] (SCB at 131).

[40] The bank accounts holding the trust property immediately before the transfer day held $1,038,359,017.21 and the bank accounts holding the uncontested amount immediately before the transfer day held $689,300,429.72 — see Amended Special Case at [40] (SCB at 102).

s.254 of the *ITAA 1936* relates, can be made, there is no liability; and the *Bell Act* effects such a process. As with ss.215(3)(c) and (4) of the *ITAA 1936*, to the extent that it is contended that s.254(1)(e) is part of a scheme to "ensure" that the retained amount is available to distribute to the Commissioner, and provisions of the *Bell Act* are contended to alter, impair or detract from this[41], the same responses apply. As with s.215, s.254 does not "ensure" that the retained amount will be paid to the Commissioner. Indeed the purpose of s.254 is not to ensure this. As with the set aside amount for the purpose of s.215 (if it has been invoked) the s.254 retained amount is now held by the *Bell Act* Authority. The total sum held by the Authority is greater than any notional retained amount. This total sum is available to the Authority to distribute according to law.

46. The *Bell Act* provides for the setting aside and retention, prior to final distribution, of any amount found to be payable to the Commissioner.

47. The manner in which this provision operated with the various corporate insolvency provisions of certain State Acts prior to the (relatively) uniform States' *Companies Act 1961* will be seen in the consideration below of *Farley*[42], *Uther*[43] and *Cigamatic*[44]. Before doing so, it is instructive to illustrate the operation of s.215 of the *ITAA 1936*, having regard to the winding up provisions of the *Companies Act 1961*.

***Farley*[45] and *Uther*[46]**

48. *Farley* and *Uther* are authority for the following propositions. *First*, a provision of Commonwealth law that requires that a liquidator "set aside" a sum notified by the Commissioner; and provides that a liquidator who "fails to provide for payment of the tax as required ... shall be personally liable for" it — is not inconsistent with a provision of State law that does not give a priority in a winding up to the payment of this sum. *Second*, that the described setting aside and personal liability provisions of Commonwealth law are not inconsistent with State laws that provide that the sum to be received by the Commonwealth in a winding up is less than the sum to be set aside. *Third*, that nothing in such setting aside and personal liability obligations in Commonwealth law is inconsistent with a State law that provides that the Commonwealth receive nothing or no more than any other creditor. *Fourth*, that the provisions of Commonwealth law imposing personal liability on a liquidator for various sums are not inconsistent with State laws that provide that the sum to be received by the Commonwealth is less than the sum to be set aside and so less than the sum for which the liquidator is personally liable.

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[41] WAG do not make this contention expressly except to the extent it adopts BGNV's Submissions (see at BGNV's Submissions at [51]–[54]).
[42] [1940] HCA 13; (1940) 63 CLR 278.
[43] *Richard Foreman & Sons Pty Ltd, Re; Uther v Commissioner of Taxation (Cth)* [1947] HCA 45; (1947) 74 CLR 508 ('*Uther*').
[44] *Commonwealth v Cigamatic Pty Ltd (in liq)* [1962] HCA 40; (1962) 108 CLR 372 ('*Cigamatic*').
[45] [1940] HCA 13; (1940) 63 CLR 278.
[46] *Uther* [1947] HCA 45; (1947) 74 CLR 508.

49. These propositions are referable to this matter. Unless departed from or overruled, *Farley* and *Uther* compel the conclusion that the *Bell Act* is not inconsistent with s.215 of the *ITAA 1936*, even if it is engaged. As with the State legislation considered in *Farley*, that the *Bell Act* creates a mechanism for distribution of the assets of (what were) insolvent companies, of which the Commonwealth was a creditor, is not inconsistent with the setting aside provisions of s.215 of the *ITAA 1936*, nor the imposition (by s.215) of personal liability on a former liquidator for any set aside amount. The entitlement of the Commissioner to receive funds *qua* creditor is distinct from the obligation of a liquidator to set aside amounts required by Commonwealth law and from the personal liability of the liquidator for the payment of such amounts.

50. If s.215 has been engaged in this matter, so long as the Administrator under the *Bell Act* holds any sum notified prior to final distribution under the *Bell Act*, any requirement of s.215 has been met.

Cigamatic[47]

51. *Cigamatic* dealt principally with the legislative power of a State to affect the Commonwealth prerogative of priority in insolvency and reversed *Farley* and *Uther* on this issue. *Cigamatic* also considered the 'other issue' as to the effect of s.32 of the *Sales Tax Assessment Act (No 1) 1930–1953* (Cth). In respect of this, Dixon CJ[48], Kitto J[49] and Owen J[50] agreed with Menzies J[51] that:

> The basis of the decision [in *Farley*] was that the sections in question did not deal with priorities .... In [*Uther*] - the majority of the Court (Latham CJ, Rich, Starke and Williams JJ) held that neither s.32 of the *Sales Tax Assessment Act* nor a similar provision in the *Pay-roll Tax Assessment Act* conferred any statutory right to prior payment of taxes due. I do not think that this Court should now depart from what has twice been expressly decided upon a question which is no more than one of the construction of Commonwealth legislation.

52. It follows that *Cigamatic*, with *Farley* and *Uther*, is authority for the propositions stated above as arising from *Farley*.

53. None of these propositions have been doubted since. For WAG to succeed in its contention that the *Bell Act* is inconsistent with s.215 of the *ITAA 1936*, the Court must (at least) depart from the essential reasoning of *Farley*, *Uther* and *Cigamatic*.

54. Following *Cigamatic*, s.215 of the *ITAA 1936* did not give rise to any priority of the Commonwealth in a winding up, but a law such as s.292 of the *Companies Act 1961* did not apply to the Commonwealth. This was because of the broader principle as to State legislative power found in *Cigamatic* (and in relation to certain tax debts, because of s.221 of the *ITAA 1936*).

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[47] [1962] HCA 40; (1962) 108 CLR 372.
[48] *Cigamatic* [1962] HCA 40; (1962) 108 CLR 372 at 379.
[49] *Cigamatic* [1962] HCA 40; (1962) 108 CLR 372 at 381.
[50] *Cigamatic* [1962] HCA 40; (1962) 108 CLR 372 at 390.
[51] *Cigamatic* [1962] HCA 40; (1962) 108 CLR 372 at 388–389.

55. The more recent operation of s.215 arises out of the abolition of the priority of Commonwealth Crown debts, and changes made to priorities in winding up — see the *Taxation Debts (Abolition of Crown Priority) Act 1980* (Cth) and *Crown Debts (Priority) Act 1981* (Cth). Section 3 of the latter Act provided that: the Commonwealth was subject to any provision of a law of a State or Territory "(a) relating to the order in which debts or liabilities of company were to be paid or discharged".

56. When considering the purpose and effect of s.215 of the *ITAA 1936*, to determine whether the *Bell Act* undermines it, s.215 is not concerned with receipt, let alone does it confer on the Commonwealth a right to receive anything. As found in *Farley*, *Uther* and *Cigamatic*, s.215 is consistent with State laws that provide nothing to the Commonwealth, and State laws that provide a payment to the Commonwealth of less than an amount set aside by a liquidator.

57. That the *Bell Act* creates a mechanism for distribution of assets of (formerly) insolvent companies, of which the Commonwealth was a creditor, that may result in the Commissioner receiving less than any set aside amount for the payment of which a liquidator is personally liable does not give rise to any inconsistency with s.215 of the *ITAA 1936*.

58. So long as a State law provides a means by which any notified amount is available to be distributed in the final distribution of a winding up, it is not inconsistent with s.215 of the *ITAA 1936*.

59. This is the effect of ss.16(3) and 17 of the *Bell Act*. The funds previously held by the liquidator are vested in the Authority by force of s.22 of the *Bell Act*. This includes any amount that was (if it was) "set aside" by reason of s.215 of the *ITAA 1936*. This amount is now held by the Administrator. The Administrator holds it until amounts are paid under s.44 of the *Bell Act*, which is the final distribution provision.

Section 254 of the *ITAA 1936*

60. Section 254 applies to several discrete classes of persons; a liquidator is one of several defined "trustees". In certain respects, the obligations of liquidators are different to those of trustees 'proper' and all others captured by the definition of "trustee", and by the notion of "agent".

61. In *Australian Building Systems* Keane J observed, in considering the purpose of s.254, that[52]:

> Section 254 is addressed to a risk to the revenue posed by a class of persons identified by two essential characteristics: first, they are persons actively involved in deriving income, profits or gains on behalf of a principal or beneficiary; and second, they are persons whose relationship with the principal or beneficiary is such that they may be obliged to pay away to it the income, profits or gains derived on its behalf.

[52] *Federal Commissioner of Taxation v Australian Building Systems* [2015] HCA 48; (2015) 326 ALR 590 at 619 [130] ('*Australian Building Systems*').

62. Neither of these two essential characteristics of "trustees" for the purpose of s.254 applies to liquidators. This inapplicability of certain of Keane J's reasoning to liquidators applies equally to reasoning of Gordon J[53]. Again, this notion of interruption is inapposite to a liquidator, even though it applies to a trustee facing the demand of a beneficiary, or an agent *qua* principal.

63. The reasoning of Keane J[54] and Gordon J[55] in *Australian Building Systems* that the retention obligation ensures that there is sufficient money in the hands of the agent or trustee to pay his or her liability too is inapposite to liquidators. Unsecured creditors are different, in this respect, to the beneficiaries of a trustee or the principal of an agent.

64. Central to an understanding of the purpose of the provision, in respect of liquidators, is that it does not ensure that the Commissioner will receive the amount that is lawfully payable in tax, or the sum actually retained or that should have been retained. This can be illustrated. Assume that the amount properly to be retained was $500 on total income, profit or gain of $1,200. The sole assets available for distribution in the winding is that sum up of $1,200. The liquidator's expenses (excluding deferred expenses) of the winding up, other than tax, are $1,000. Assume that the $1,200 is to be distributed pursuant to (say) the current s.556(1) of the *Corporations Act 2001*. Sections 556(1)(a) and 559 require that the tax liability of $500 and expenses of $1,000 rank *pari passu*. So, the Commissioner would receive 1/3(500/1500) of $1,200; that is, less than the retained amount.

65. This scenario illustrates that the position of liquidators under s.254 of the *ITAA 1936* is different to that of others who fall within the definition of trustee. This is so because s.254, like s.215 of the *ITAA 1936*, "do[es] not give a right to the Commonwealth to receive the sum which is set aside"[56] or retained, actually or putatively. This is because the entitlement of the Commissioner to receive from the liquidator is not determined by s.254, and never has been.

66. That the *Bell Act* creates a mechanism for distribution of the assets of an insolvent company, of which the Commonwealth is a creditor, that is less than any retained amount (for the payment of which a liquidator is personally liable) does not undermine s.254 of the *ITAA 1936* in the same way that it does not undermine s.215.

67. The example above also illustrates the operation of the personal liability provision of s.254. In the example, even if the liquidator initially retained $500 in respect of the tax liability, the Commissioner would receive only $400. The liquidator is not personally liable for the $100 difference.

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[53] *Australian Building Systems* [2015] HCA 48; (2015) 326 ALR 590 at 631 [192].
[54] *Australian Building Systems* [2015] HCA 48; (2015) 326 ALR 590 at 619–620 [130]–[132].
[55] *Australian Building Systems* [2015] HCA 48; (2015) 326 ALR 590 at 631 [193]. Both her Honour and Keane J considered that s.254(1)(a) imposes an ancillary liability for tax on an agent or trustee for the purpose of ensuring the payment of the tax — see [2015] HCA 48; (2015) 326 ALR 590 at 614 [104] (Keane J), 627 [171], 628 [176] (Gordon J).
[56] *Farley* [1940] HCA 13; (1940) 63 CLR 278 at 289 (Latham CJ).

68. Section 254(1)(e) does not impose a liability to pay the retained amount (of $500) or the difference between the retained amount and any sum actually received by the Commissioner. The provision simply caps the maximum liability of the liquidator to this amount if, as with s.215, the liquidator does not finally distribute assets according to law.

Conclusion on ss.215 and 254 of the *ITAA 1936*

69. Decisions of this Court establish that provisions of Commonwealth law that require that a liquidator set aside or retain sums out of the assets of the company sufficient to provide for tax liabilities are not inconsistent with State legislative regimes that may involve the Commonwealth receiving nothing in a final distribution. Such decisions also establish that provisions of Commonwealth law that impose liability on a liquidator who "fails to provide for payment of the tax as required" are not inconsistent with such State laws.

70. In this matter, the personal liability of the liquidator imposed by ss.215 and 254 of the *ITAA 1936* was, prior to the *Bell Act*, illusory while the liquidator held funds sufficient to discharge the taxation liabilities, which he did. To the extent that any such personal liability provided an incentive to the liquidator to perform his duties according to law, this incentive to collect and distribute assets according to law is not undermined by the *Bell Act*. Like duties are imposed on the Administrator. The Administrator has received all property that the liquidator had. The only real difference between the two schemes is that the Commonwealth may not receive as much in a final distribution as it may have if a final distribution were made by a liquidator.

71. So long as the Authority has the same assets available for distribution to creditors of WA Bell Companies, pursuant to the *Bell Act*, as did the liquidator, then the Commissioner is in precisely the same position in respect of the *Bell Act* as it would be under the legislation that would otherwise (that is, but for the *Bell Act*) be applicable. Because the amounts notified by the Commissioner to the liquidator sufficient to provide for tax in terms of s.215 ($167,706,491) and s.254 ($298,190,348.70) is less than the sum held by the Authority (being in excess of $1.7 billion) the Commissioner is in precisely the same position under the *Bell Act* as it would be otherwise. Any sums that were to be putatively set aside or retained by the liquidator are actually held by the Authority.

INCONSISTENCY OF THE *BELL ACT* WITH SECTIONS 177, 208 AND 209 OF THE *ITAA*

72. WAG addresses no submissions to this issue, though it is pleaded.

73. In response, the State says that ss.208 and 209 are not inconsistent with s.25(5) of the *Bell Act*. The Commissioner's rights to pursue recovery proceedings under ss.208 and 209 of the *ITAA 1936* against Mr Woodings in respect of his personal liability, for instance under s.254(1)(e) of the *ITAA 1936*, have not been rendered nugatory by s.45 of the *Bell Act*. Section 25(5) of the *Bell Act* does not prevent the Commonwealth from lodging any proof of debt in the winding up of a WA Bell Company. The *Bell Act* (in particular ss.22 and 29) is not

inconsistent with ss.208 and 209 because they render inutile any pursuit of tax related liabilities.

74. If WAG puts any contention in respect of s.177 of the *ITAA 1936*, the State accepts that provisions of the *Bell Act* are to be read down so as to not be inconsistent with s.177.

READING DOWN — *ITAA* INCONSISTENCY

75. Section 7 of the *Interpretation Act* 1984 (WA) is in a common form. Certain provisions of the *Bell Act* can be readily read down without affecting the Act's purpose or requiring a strained or unnatural meaning or effect. No reading down here requires that the Court "perform a feat which is in essence legislative and not judicial"[57] or seeks to depart from or undermine the legislative purpose of any provision[58].

76. If notice has been, or is, given by the Commissioner in terms of s.215(2), then in respect of s.215(3) of the *ITAA*, and having regard to ss.215(3B) and (3C) of the *ITAA*, s.16(2) of the *Bell Act* can be read down such that:

> There shall be set aside in the Fund an amount as notified by the Commissioner pursuant to s.215 of the *ITAA*, until final distribution pursuant to Part 4 Division 5 of the Act.

77. In respect of s.254(1)(d), s.16(2) of the *Bell Act* can be read down such that:

> The Authority shall retain in the Fund $298,190,348.70 or such other amount notified by the Commissioner pursuant to s.254 of the *ITAA*, until final distribution pursuant to Part 4 Division 5 of the Act.

78. As noted above, it is accepted that the *Bell Act* is to be read down in light of s.177 of the *ITAA* so that if a notice of assessment to which s.177 of the *ITAA 1936* applies had been received by a liquidator of a WA Bell Company that notice is conclusive evidence of the making of the assessment and, except in proceedings under Part IVC of the TAA on a review or appeal relating to the assessment, the amount and all particulars of the assessment are correct. Sections 25(1), 34(1), 35, 37(1), 37(3), 39(6) of the *Bell Act* can be read down to accommodate this.

THE FURTHER INCONSISTENCY CONTENTION — *BELL ACT* INCONSISTENCY WITH SECTION 1408 *CORPORATIONS ACT*

79. All plaintiffs in the related matters contend that numerous sections of the *Bell Act* are inconsistent with Parts 5.4B and 5.6 of the *Corporations Act 2001*. Those arguments are dealt with below. All plaintiffs also contend that those sections of the *Bell Act* are inconsistent with Parts 5.4 and 5.6 of the pre-23 June 1993 *Corporations Law* and that the relevant provisions of the *Bell Act* are

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[57] *Pidoto v Victoria* [1943] HCA 37; (1943) 68 CLR 87 at 109 (Latham CJ).

[58] *Victoria v Commonwealth* [1996] HCA 56; (1996) 187 CLR 416 at 502 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ). See also *Pidoto v Victoria* [1943] HCA 37; (1943) 68 CLR 87 at 108 (Latham CJ); *Re Dingjan; Ex parte Wagner* [1995] HCA 16; (1995) 183 CLR 323 at 348 (Dawson J).

inconsistent with s.1408 of the *Corporations Act 2001*[59]. This contention is only pleaded by WAG and no submissions are put. The only party that puts submissions is BGNV. Accordingly, this matter is addressed only in the State's submissions responding to BGNV.

SECTIONS 5F AND 5G OF THE *CORPORATIONS ACT 2001*

80. Section 51 of the *Bell Act* invokes s.5F of the *Corporations Act 2001* (Cth) and s.52 of the *Bell Act* invokes s.5G of the *Corporations Act 2001*. The plaintiff contends that ss.5F and 5G, as invoked, do not operate so as to 'save' the *Bell Act* or provisions of it that are inconsistent with provisions of the *Corporations Act 2001*[60].

81. The scope and operation of ss.5F and 5G are to be understood having regard to their purposes.

82. The *Corporations Act 2001* arose from the enactment by each State of a *Corporations (Commonwealth Powers) Act 2001*. Each was a request Act for the purpose of s.51(xxxvii) of the *Constitution*. In terms of s.4 of the *Corporations Act 2001*, Western Australia is a referring State. The reference is limited in time and can be terminated.

83. Plainly enough, Part 1.1A is an integral basis upon which the States referred power, empowering the Commonwealth Parliament to enact the *Corporations Act 2001*, and its operation is central to States remaining referring States.

84. It is apparent from the text and context of Part 1.1A that its underlying purposes included preserving a referring State's ability to withdraw specified matters from the operation of Commonwealth Corporations legislation, including the *Corporations Act 2001*, and to legislate in a manner which may otherwise be inconsistent with such Commonwealth Corporations legislation[61], without withdrawing completely as a referring State. This purpose was given effect in different ways.

85. *First*, s.5E(1) of the *Corporations Act* provides that the Corporations legislation is not intended to exclude or limit the concurrent operation of State and Territory laws. So the *Corporations Act* does not cover a field[62]. *Second*, s.5F facilitates a State or Territory excluding certain matters from the operation of the Commonwealth Corporations legislation (in whole or in part). No inconsistency arises because the Commonwealth legislation simply does not apply to the

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[59] See WAG's ASOC at [73] (SCB at 44–45).
[60] See WAG's Submissions at [29]–[60].
[61] The point is expressed a little differently by Barrett J in *HIH Casualty & General Insurance Ltd v Building Insurers' Guarantee Corporation* [2003] NSWSC 1083; (2003) 188 FLR 153 at 182 [72].
[62] See, eg, *Director of Public Prosecutions (Vic) v County Court (Vic)* [2010] VSC 157; (2010) 239 FLR 139 at 151–152 [50]–[51] (J Forrest J); *Bow Ye Investments Pty Ltd v Director of Public Prosecutions (Vic)* [2009] VSCA 149; (2009) 229 FLR 102 at 116 [71] (Warren CJ, Buchanan JA and Vickery AJA agreeing); *IG Index Plc v New South Wales* [2006] VSC 108; (2006) 198 FLR 132 at 142–143 [39] (Bongiorno J); *Loo v Director of Public Prosecutions (Vic)* [2005] VSCA 161; (2005) 12 VR 665 at 679 [25] (Winneke P, Charles JA agreeing); *HIH Casualty & General Insurance Ltd v Building Insurers' Guarantee Corporation* [2003] NSWSC 1083; (2003) 188 FLR 153 at 190 [78] (Barrett J).

excluded matter. *Third*, s.5G provides an alternative mechanism to s.5F which operates (relevantly here) on State "post-commencement provisions". Section 5G provides for a number of particular consequences in the interaction of these State post-commencement provisions with particular provisions of and things provided for in the Commonwealth Corporations legislation. As with s.5F, the essential means of s.5G is to state that Commonwealth legislation, that might otherwise apply to the same thing as the State post-commencement provision, does not. Section 5I is in effect a mirror of s.5F. It empowers the Commonwealth to modify by regulation the operation of the Commonwealth Corporations legislation to exclude itself from matters dealt with by specified State or Territory laws.

86. As will be noted below, Part 1.1A of the *Corporations Act 2001* is to be read with s.8 of the *Corporations (Ancillary Provisions) Act 2001* (WA). The operation of this provision requires an understanding of what came before it.

Prior to Part 1.1A of the *Corporations Act 2001*

87. The *Corporations Act 2001* was preceded by the national scheme by which the States and the Northern Territory adopted, as a law of each State and the Northern Territory, the model *Corporations Law*[63].

88. Section 5 of the *Corporations ([State or Territory]) Act 1990* of each State and Territory dealt with future amendment to the adopted *Corporations Law* by States[64]. Section 6 provided that State laws inconsistent with, but which preceded, the *Corporations Law*, continued to apply.

89. Other provisions of the *Corporations ([State or Territory]) Act 1990* dealt with different issues of State legislative power; in particular ss.7, 12, 13, 15 and 16. None seek to limit the surrogate *Corporations Law* of each State and Territory to the territory of the State or Territory.

90. Another feature of the *Corporations Law* scheme was that such laws operated to the extent of the legislative power of each State and Territory. The existence of the mechanism in s.5 for a particular State to change the *Corporations Law* of that State illustrates that conflicts could have arisen, and such real conflicts were recognised and accommodated by s.5(2) and s.6. If the New South Wales Parliament amended the *Corporations Law* (NSW) to have had an effect (say) in Western Australia, there was no limit on the power of the Western Australian Parliament to legislate to 'deal with' such NSW legislation. If this gave rise to a real conflict between the *Corporations Law* (WA) and the *Corporations Law* (NSW) then this conflict would be resolved in accordance with law[65].

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[63] Along with *Corporations Regulations*, the *ASC Law* and *ASC Regulations* — see definition of "applicable provision" in s.3 of the *Corporations (Western Australia) Act 1990* (WA).

[64] *Loo v Director of Public Prosecutions (Vic)* [2005] VSCA 161; (2005) 12 VR 665 at 669 [5] (Winneke P).

[65] As has been recognised on many occasions, such conflict resolving laws in Australia — dealing with conflicting State statutes — are protean or at least undeveloped. See, for instance, *Sweedman v Transport Accident Commission* [2006] HCA 8; (2006) 226 CLR 362 at 402 [31], 406 [48] (Gleeson CJ, Gummow,

91. A State law invoking s.5 of the *Corporations ([State or Territory]) Act 1990* was not limited by that section, or anything else, to amendment having effect only within the territory of a particular State or Territory. Nor was the maintenance of the operation of pre-existing provisions under s.6 so limited. The limitation was on legislative power not territory.

92. In this matter the plaintiff contends that the States, in referring power to enable the Commonwealth to enact the *Corporations Act 2001*, including s.5F, fundamentally altered the regime that had previously existed.

93. Section 8 of the *Corporations (Ancillary Provisions) Act 2001* (WA) was enacted to complement the *Corporations Act 2001* and is part of the overall legislative package. All referring States have similar provisions[66]. By reason of this provision and s.5F(4) of the *Corporations Act 2001*, any Western Australian laws existing at the commencement of the *Corporations Act 2001*, that were inconsistent with the new *Corporations Act 2001* (or any "Corporations legislation" in the meaning in s.5F) were valid, even if they had not complied with s.5 of the *Corporations (Western Australia) Act 1990* (WA).

Section 5F of the *Corporations Act 2001*

94. This consideration of s.8 of the *Corporations (Ancillary Provisions) Act 2001* (WA) exposes an essential aspect of the plaintiff's contention about s.5F of the *Corporations Act 2001*. Even though the States enacted s.8 of the *Corporations (Ancillary Provisions) Act 2001* (by which State laws that operated beyond the territory of the particular State that were inconsistent with the *Corporations Act 2001* and other Corporations legislation — within the meaning of that term in s.5F of the *Corporations Act 2001* — were valid), because of the words "in the State or Territory" in s.5F(4) of the *Corporations Act 2001* such laws were invalid, or invalid to the extent that they operated not "in the State or Territory".

95. The plaintiff's contentions in this matter are that, notwithstanding the extra-territorial scope of s.5 of the *Corporations ([State or Territory]) Act 1990* of each State and s.8 of the *Corporations (Ancillary Provisions) Act 2001*, each referring State requested that the Commonwealth enact legislation that fundamentally altered the nature of State laws that then existed, and precluded referring States from legislating extra-territorially.

Kirby and Hayne JJ); Stephen Gageler SC, 'Private intra-national law: Choice or conflict, common law or constitution?' (2003) 23 *Australian Bar Review* 184; Graeme Hill, 'Resolving a True Conflict between State Laws: A Minimalist Approach' (2005) 29(1) *Melbourne University Law Review* 39. These matters are discussed in Mark Leeming, *Resolving Conflicts of Laws* (Federation Press, 2011) at Chapter 6. United States literature, involving (*inter alia*) "governmental interest analysis" is considerable. Much of this was first synthesised by Professor Currie, and much of this is in the various chapters of Brainerd Currie (ed), *Selected Essays on the Conflict of Laws* (Duke University Press, 1963).

[66] *Corporations (Ancillary Provisions) Act 2001* (NSW) s.8; *Corporations (Ancillary Provisions) Act 2001* (Vic) s.8; *Corporations (Ancillary Provisions) Act 2001* (Qld) s.9; *Corporations (Ancillary Provisions) Act 2001* (SA) s.8; *Corporations (Ancillary Provisions) Act 2001* (Tas) s.8.

96. WAG relies centrally on the reasoning of Barrett J in *HIH Casualty and General Insurance Ltd v Building Insurers' Guarantee Corporation*[67].

97. Barrett J's reasoning should be rejected for the following reasons. The words "in the State or Territory" in s.5F(2) are to be understood having regard to the inevitable fact that a State will not declare a matter to be an excluded matter, and thereby 'disapply' the Commonwealth legislation, unless the State fills the gap. Invariably the State Act that declares the matter to be an excluded matter in relation to one or other of s.5F(1)(a)–(d) also positively fills the gap that this declaration leaves. This is so in respect of all of the scenarios set out in s.5F(1)(a)–(d). The *Bell Act* is an example of this. This informs the meaning of the words "in the State or Territory" in s.5F(2).

98. The words "in the State or Territory" in s.5F(2) refer to the State or Territory where the matter is or the States and Territories where the matter is. This properly emphasises the importance of the word "the" in "in the State or Territory". The singular "State or Territory" includes the plural[68].

99. The declaration of an excluded matter by "a law of a State or Territory" (call it State 1) disengages the Corporations legislation from the States and Territories to which the law of State 1, in respect of the matter, applies. Assume this. A law of Western Australia declares Corporation X, that operates in (say) Western Australia and New South Wales, an excluded matter and the same law of Western Australia then legislates in respect of Corporation X. Section 5F(2) does not confer power on the Western Australian Parliament to legislate in respect of Corporation X. It withdraws the operation of Commonwealth law. Commonwealth law is then withdrawn "in relation to the matter" in the States and Territories to which the matter relates. The Western Australian law then operates in such States and Territories. If the New South Wales Parliament then wishes to legislate in respect of this matter, the Commonwealth Corporations legislation does not apply to it in New South Wales and any conflict between any New South Wales and Western Australian law in respect of the matter would be resolved by the rules or interpretative techniques for resolving such conflicts alluded to above. The (extra-territorial) operation of the Western Australian law in respect of Corporation X in New South Wales has the effect of withdrawing or disengaging the Corporations legislation in respect of Corporation X (the "matter") in New South Wales.

100. Such an understanding is consistent with the breadth of the defined term "matter" in s.5F(6), none of the meanings of which suggest or are logically consistent with, any geographical limitation. A "thing" is not necessarily territorially limited — say, the internet. Many "matters" extend beyond the territory of a single State — say, a bank account.

101. This understanding is also enhanced by the existence of s.5F(3). This understanding also provides a certain and clear meaning to s.5G(11). This

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[67] [2003] NSWSC 1083; (2003) 188 FLR 153 ('*HIH*'). See, especially, WAG's Submissions at [44]–[45], [60].

[68] *Acts Interpretation Act 1901* (Cth) s.23.

understanding also overcomes the principal and obvious difficulty with the reasoning and conclusion of Barrett J in *HIH*. If correct, Barrett J's reasoning leaves no real scope for s.5F to operate[69].

Section 5G of the *Corporations Act 2001*

102. If s.5F(2) does not provide a complete answer to the alleged inconsistency with the Corporations legislation, s.5G does[70]. Section 5G applies to the interaction between a State or Territory provision and a Commonwealth provision provided that one of the conditions set out in the table in s.5G(3) applies[71]. It is common ground that s.5G has been invoked by the *Bell Act* by its declaration in s.52(2) that Parts 3, 4 and 5 (i.e. ss.22 to 49) and ss.55 and 56(3) of the Act are Corporations legislation displacement provisions in relation to the Corporations legislation[72]. By operation of the specific excepting provisions in ss.5G(4), (5) and (8) and the general excepting provision in s.5G(11), any remaining alleged inconsistency is, in any event, avoided.

Section 5G(11)

103. If any inconsistency between one of the above displacement provisions of the *Bell Act* is not avoided through the operation of an earlier subsection of s.5G, it, in any event, is avoided by operation of s.5G(11). By reason of s.5G(11), a provision of the Corporations legislation does not operate in a State or Territory to the extent necessary to ensure that no inconsistency arises between the provision of the Corporations legislation and an inconsistent post-commencement provision.

104. The reference in s.5G(3)(b) to a provision of "a law of the State or Territory" is a reference to a provision of the law of the State or Territory that enacted the law. The term "in a State or Territory" means any State or Territory in which the law

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[69] In respect of Barrett J's conclusion that s.5F only permits the operation of State legislation that applies territorially in the declaring State, it is instructive to have regard to actual invocations of s.5F. See, eg, *Associations Incorporation Act 1987* (WA) s.3A; *Bank of Western Australia Act 1995* (WA) ss.25, 27, 42T; *Co-operatives Act 2009* (WA) ss.9, 368; *Duties Act 2008* (WA) s.284; *Electricity Industry Act 2004* (WA) s.134; *Electricity Industry (Wholesale Electricity Market) Regulations 2004* (WA) reg.18A; *Employers' Indemnity Supplementation Fund Act 1980* (WA) s.37; *Gas Corporation (Business Disposal) Act 1999* (WA) s.12A; *Legal Profession Act 2008* (WA) s.129; *Stamp Act 1921* (WA) s.121; *Strata Titles Act 1985* (WA) s.32; *Water Services Act 2012* (WA) s.222, *Grain Marketing Act 1991* (NSW) ss.34(2), 41(1), 43, *Co-operatives Act 1997* (SA) s.40, *Central Coast Water Corporation Act 2006* (NSW) ss.11, 28, *Public Trustee Act 1978* (Qld) ss.8, 81, *State Owned Corporation Act 1989* (NSW) ss.10A, 20ZB(4).

[70] Section 52(1) of the *Bell Act* limits the effect of the invocation by that section of s.5G of the *Corporations Act 2001*, by providing that the section "has effect if, and to the extent that, an excluded Corporations legislation provision has any application, as a law of the Commonwealth, in relation to a WA Bell Company". In s.50 "excluded Corporations legislation provision" is defined to mean "any provision of the Corporations legislation that does not apply in the State, as a law of the Commonwealth, in relation to the WA Bell Companies because of section 51".

[71] Under s.5G(3) Item 3, the relevant condition, which is satisfied in this case, is that the State provision is declared by a law of the State to be a Corporations legislation displacement provision for the purposes of s.5G (either generally or specifically in relation to the Commonwealth provision).

[72] By s.50 of the *Bell Act*, in Part 6 of that Act, "Corporations legislation" is defined to mean "the Corporations legislation to which the Corporations Act Part 1.1A applies".

operates. For the reasons explained above this need not be State or Territory that enacted the law.

105. The provision is not territorially limited to that legislating State or Territory. Rather it disapplies Corporations legislation in any State or Territory (or all) to the extent necessary to ensure that no inconsistency arises between the Corporations legislation and (here) the post-commencement law of the State or Territory.

106. By reason of s.5G(11), all of the displacement provisions of the *Bell Act* operate unaffected by the Corporations legislation.

Section 5G(8)

107. Further to s.5G(11), s.5G(8) operates to exclude the operation of Chapter 5 of the *Corporations Act 2001* to the winding up or other external administration of a WA Bell Company to the extent that it is effected by the displacement provisions of the *Bell Act*.

108. WAG's essential contention concerning s.5G(8) is that it does not dis-apply Chapter 5 of the *Corporations Act 2001* because s.5G(8) only dis-applies the *Corporations Act 2001* if the State law is one that that effects a winding up or administration[73], and the *Bell Act* does neither[74]. This contention proceeds on an erroneous, and far too restricted, construction of the provision.

109. The section is alleged to work as follows. The disapplication is of all of the provisions of Chapter 5 of the *Corporations Act 2001*. The disapplication occurs in respect of, or applies to, an external administration of a company (carried out under State law), whether it be characterised as a scheme of arrangement, receivership, winding up or other form of external administration. The disapplication of Chapter 5 is to the extent that the external administration (whether a scheme of arrangement, receivership, winding up or other external administration) is being carried out in accordance with the provision of a law of the State.

110. Another way of conveying the same thing is that Chapter 5 does not apply to; a scheme of arrangement (of a company), to the extent to which it is carried out in accordance with State law; a receivership (of a company), to the extent to which it is carried out in accordance with State law; a winding up (of a company), to the extent to which it is carried out in accordance with State law; or an other external administration (of a company), to the extent to which it is carried out in accordance with State law.

111. The construction of WAG emphasises the word "the" in s.5G(8) — to contend that Chapter 5 provisions do not apply to "a" winding up only to the extent to which "the" winding up is carried out in accordance with a provision of law of a

[73] WAG's Submissions at [35], [59].
[74] WAG's Submissions at [55]–[59].

State or Territory[75]. So, a State law can only displace Chapter 5 to the extent that the State replaces the Commonwealth's regime with an identical regime.

112. Such a construction denies s.5G(8) of any sensible operation. Why would a State ever displace in such a circumstance? If all that a State could do would be to replicate Chapter 5, why would it?

113. The section operates so long as that which is provided for in State law meets the description of a scheme of arrangement, receivership, winding up or other external administration of a company.

The *Bell Act* process is a "winding up" for the purpose of s.5G(8)

114. The *Bell Act*, and more particularly its displacement provisions, provide for a winding up of the WA Bell Companies. Their administration is carried by the Administrator who collects and realises the assets. This is effected by the transfer of property — the getting in (Part 3 Division 1). There is a process for gathering information (s.33) to facilitate dealing with proofs of creditors by admitting or rejecting. There is a process for "creditors" of the companies (given an extended definition to include liabilities) to lodge proofs (s.34). There is a process of considering proofs and determining assets and liabilities (Part 4 Divisions 3 and 4); and a process for payment of expenses and distribution of net proceeds (Part 4 Division 5).

115. The nature of these activities is immediately recognisable as a "winding up".

WAG's asserted 'necessity' of distribution of the company's assets in windings up

116. This is the contention that because under most companies regimes the company being wound up is not divested of assets until final distribution, the process of the *Bell Act* is not a winding up because the assets to be distributed are vested in the Authority[76]. This is a distinction without a difference. The transfer of assets by s.22 of the *Bell Act* is simply a transfer from the companies to the Authority. The assets ultimately to be distributed are formerly the assets of the companies.

WAG's asserted 'necessity' of non-application to deregistered companies

117. It is contended that, because the *Bell Act* regime deals with deregistered companies, its processes cannot be a winding up regime[77]. What the *Bell Act* does in respect of deregistered companies is very limited. The *Bell Act* does not take any property of deregistered companies[78]. Only if a deregistered company is reinstated will the property revested in the company as a consequence of its reinstatement (and which is taken to then be received by the company) transfer

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[75] WAG's Submissions at [59].
[76] WAG's Submissions at [57].
[77] WAG's Submissions at [58].
[78] Section 22(4)(b) of the *Bell Act*.

to or vest in the Authority at the time at which it is received[79]. None of that is contrary to the notion of a winding up.

118. A winding up of Company A may impact upon Company B, which interacts with Company A in some way. This does not alter the character of the winding up of Company A. That a winding up of Company A may be impacted by deregistered company B is not unusual, and nor does it mean that what is being done *re* Company A is not a winding up.

The *Bell Act* process is an "external administration" for the purpose of s.5G(8)

119. If the *Bell Act* does not effect a winding up, it effects an "external administration", or an "other external administration". Neither phrase is defined in the *Corporations Act 2001*. The phrase "other external administration" is not used anywhere other than s.5G(8) of the *Corporations Act 2001*.

120. WAG submits that its meaning is shaped by Parts 5.1 to 5.3A[80] of the *Corporations Act 2001*[81]. This approach should be rejected. The *Corporations Act 2001* refers to "external administration" outside of the context of Parts 5.1 and 5.2 and 5.3A[82]. Indeed, Chapter 5 is headed "external administration" (and was observed in *Saraceni v Jones* to deal with different species of external administration[83]). Similarly, bodies corporate which are "externally-administered" include bodies corporate that are being administered in ways other than Parts 5.1, 5.2 and 5.3A[84].

121. The meaning of "other external administration" goes beyond the forms of external administration provided for in Chapter 5 of the *Corporations Act 2001*. *First*, in its ordinary and natural meaning, "other external administration" is not limited to the forms in Chapter 5. It relates to administration by an external agency not in accordance with the constitution of the company. In effect, it refers to administration other than by the directors. Chapter 5 is but one example of such external administration. Another example, outside of Chapter 5

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[79] Section 22(3) of the *Bell Act* read with the definition of "reinstated WA Bell Company" in s.3 of the *Bell Act*.

[80] The State assumes WAG is referring to Part 5.3A of Chapter 5, when it refers to Part 5.3 of Chapter 5. Parts 5.1 to 5.3A deal with schemes of arrangement, receivership and administration of a company's affairs with a view to executing a company arrangement. Part 5.3 which was present in the corporations legislation regime prior to 23 June 1993 dealt with "official management".

[81] WAG's Submissions at [59].

[82] For example, the definition of property in s.9 describes Part 5.8 of the Corporations Act as "offences relating to external administration". Part 5.8 deals with offences relating to all types of external administration referred to in Chapter 5. Clause 39 of Schedule 4 of the Corporations Act provides for regulations to be made applying Chapter 5 of the Act or a similar law about external administration to transferring financial institutions if, inter alia, before the transfer the institution is under "external administration (however described)".

[83] *Saraceni v Jones* [2012] WASCA 59; (2012) 42 WAR 518 at 527 [24] (Martin CJ).

[84] *Corporations Act 2001* (Cth) s.9 (definition of "externally-administered bodies corporate"). The phrase is used in a range of contexts which are not limited to Part 5.3A administration: see, for example s.1282(2)(b) which provides that ASIC must grant an applicant's application for registration as a liquidator if it is satisfied of the applicant's experience in connection with "externally-administered bodies corporate" and s.1298A which provides the power to cancel or suspend a person's registration as liquidator as liquidator, receiver or administrator of an externally administered body corporate.

of the *Corporations Act 2001*, is provided for by the *Payment Systems and Netting Act 1998* (Cth), which does not limit the meaning of external administration to the *Corporations Act 2001* definitions but includes the circumstance where "someone takes control of the person's property for the benefit of the person's creditors because the person is, or is likely to become, insolvent"[85]. That definition is the subject of a proposed amendment to also include statutory management regimes for authorised deposit-taking institutions under the *Banking Act 1959* (Cth) and judicial management regimes under various insurance Acts[86].

122. *Second*, even if "external administration" is limited to a method provided for in Chapter 5 of the *Corporations Act 2001*, for the adjective "other" to have any work to do, it likely refers to external administrations beyond Chapter 5. As mentioned, "other external administration" appears only in s.5G(8) of the *Corporations Act 2001*. It is impossible to contend that "external administration" and "other external administration", in this context, are co-extensive. If this was proposed, the word "other" would not appear.

123. *Third*, it is difficult to discern that the purpose of s.5G(8) is to limit the legislative power of the States and Territories to only establish forms of external administration provided for by the Commonwealth Parliament in Chapter 5 of the *Corporations Act 2001*. In providing for displacement of the external administration provisions of the *Corporations Act 2001*, it is impossible to conceive of why s.5G(8) would then exclude substitution of different forms of external administration. Such an interpretation prevents a State or Territory from implementing (say) a form of official management, which was provided for under Part 5.3 of the *Corporations Law*, or from enacting *sui generis* external administration schemes.

124. Such a *sui generis* regime was utilised in the *James Hardie Former Subsidiaries (Winding Up and Administration) Act 2005* (NSW). This form of external administration was expressed to differ "from a winding up or other form of external administration of a company under the *Corporations Act*"[87]. The NSW Act retained the day-to-day control of the companies in directors, but subjected them to external administration in the form of oversight and direction by the Special Purpose Fund Trustee, and in some circumstances, the Minister and the Supreme Court[88]. Although the Special Purpose Fund Trustee performed functions akin to a liquidator, others were more like a Committee of Inspection[89]. That regime was implemented relying upon, inter alia, ss.5G(8),

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[85] *Payment Systems and Netting Act 1998* (Cth) s.5.

[86] Explanatory Memorandum, *Financial System Legislation Amendment (Resilience and Collateral Protection) Bill 2016* (Cth) at [1.28]–[1.30].

[87] Explanatory Note, James Hardie Former Subsidiaries (Winding up and Administration) Bill 2005 (NSW) at 3.

[88] Explanatory Note, James Hardie Former Subsidiaries (Winding up and Administration) Bill 2005 (NSW) at 4. See Part 2 of the *James Hardie Former Subsidiaries (Winding Up and Administration) Act 2005* (NSW) which established the special purpose fund trust. See also ss.12–17 and Part 4, which set out various functions of the Minister and the SPF Trustee.

[89] Explanatory Note, James Hardie Former Subsidiaries (Winding up and Administration) Bill 2005 (NSW) at 4. See, eg, Part 4 Division 5 on the process of making and paying claims and Part 4 Division 8 on the process of completing the winding up.

(9) and (11) to displace, amongst other things, Chapter 5 of the *Corporations Act 2001*[90].

125. The *Bell Act* creates a form of "other external administration" if not a winding up.

Section 5G(4)

126. Sections 5G(4) and (5) also operate to facilitate the valid operation of a number of provisions of the *Bell Act.*

127. Dealing first with s.5G(4). It provides that a provision of the Corporations legislation does not prohibit the doing of an act, or impose a liability (whether civil or criminal) for doing an act, if a provision of a law of a State or Territory specifically authorises or requires the doing of that act.

128. The operation of this provision is explained by Barrett J in *HIH*[91]. Numerous provisions of the Corporations legislation displacement provisions of the *Bell Act* specifically authorise or require the doing of acts within the meaning of s.5G(4). A summary of the principal provisions which do so and the nature of the acts that are specifically authorised or required is set out in Attachment A scheduled to these submissions.

129. So, the *Corporations Act 2001* does not prohibit the doing of any of the specifically authorised acts or impose a liability (whether civil or criminal) for doing the act, thereby enabling the requirements of the State displacement provisions to be complied with.

Section 5G(5)

130. Section 5G(5) of the *Corporations Act 2001* operates[92] in respect of provisions of the *Bell Act* that authorise a person to give instructions to the directors or other officers of a company or body (s.5G(5)(a)); or provides that a company or body is subject to the control or direction of a person (s.5G(5)(c)). In such circumstances, the Corporations legislation does not, *inter alia*, "prevent the person from... exercising control or direction over the company or body"(s.5G(5)(d)).

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[90] See ss.19, 60 of the *James Hardie Former Subsidiaries (Winding Up and Administration) Act 2005* (NSW).

[91] [2003] NSWSC 1083; (2003) 188 FLR 153 at 195 [95]–[96]: "In such a case, a provision of the Corporations legislation (including the Corporations Act) does not prohibit the doing of the act or impose a liability (whether civil or criminal) for doing it. The specific authority or requirement of State or Territory law is thus accommodated to the extent of removal of any prohibition or liability that would otherwise apply or arise under the Corporations legislation. It is not said, in any explicit way, that the State or Territory provision may be obeyed and given effect to despite a provision of the Corporations legislation that would otherwise stand in the way. But that, it seems to me, must be the effect of s 5G(4). Section 5G(4) displaces the prohibition or liability that would arise from the Corporations Act to such an extent as to enable the authority conferred by State or Territory law to be exercised or the requirement imposed by State or Territory Law to be met. There is no geographical or territorial quality to the way in which Commonwealth law yields."

[92] In relation to the Corporations displacement provisions of the *Bell Act*.

131. There are numerous provisions of the *Bell Act* that, in effect, provide that each WA Bell Company is subject to the control and direction of a person (the Authority) and authorise the Authority to give instructions to the directors or other officers (including the liquidator[93]) of each WA Bell Company[94].

132. By reason of the operation of s.5G(5), the Authority can control and direction the WA Bell Companies notwithstanding anything contained in the Corporations legislation.

A further contention concerning s.5F of the *Corporations Act 2001* — *situs* of debts

133. Maranoa (though not WAG) contend that s.5F(2) only operates to 'disapply' provisions of the Corporations legislation in the territory of Western Australia; and that in this matter certain assets that have been transferred to and vested in the Authority pursuant to s.22 were choses in action not situate "in" Western Australia[95]. This contention of Maranoa is dealt with in that matter.

134. WAG contends that various bank accounts transferred and vested in the Authority by reason of s.22(1) of the *Bell Act* were (prior to vesting) located outside of Western Australia. This is said to be because the NAB and Westpac accounts were governed by the law of Victorian and New South Wales contracts with Mr Woodings[96]. There is a short answer to this. If s.5F of the *Corporations Act 2001* operates in the manner contended for by Barrett J, there is no sensible basis to apply the proper law of any contract to determine the *situs* or law area of debts. The *situs* of such choses in action is the place where the debt (created by the term deposit) would be paid in the ordinary course of business[97], not the proper law of any underlying contract.

OTHER CLAIMS OF *BELL ACT* INCONSISTENCY WITH THE CORPORATIONS LEGISLATION — NON-DISPLACEMENT PROVISIONS

135. This genus of argument emerges out of ss.5F and 5G of the *Corporations Act 2001*. The State contends above that s.5F operates in respect of the whole of the *Bell Act* to avoid all inconsistency between the whole of the *Bell Act* and the Corporations legislation. Then it is contended that if s.5F(2) does not provide a complete answer to the alleged inconsistency with the Corporations legislation, s.5G operates (as a result of its invocation in s.52 of the *Bell Act*), declaring Parts 3, 4 and 5 and ss.55 and 56(3) of the Act to be Corporations legislation displacement provisions in relation to the Corporations legislation.

136. So, if the invocation of s.5F fails but s.5G operates as the State contends, there remains the issue of inconsistency between provisions of the *Bell Act* that have

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[93] *Corporations Act 2001* (Cth) s. 9 (definition of "officer" of a corporation).
[94] For instance, ss.27, 28, 29, 33.
[95] Maranoa's Statement of Claim at [81], [81A] (SCB at 43–44).
[96] WAG's Submissions at [50].
[97] *AssetInsure Pty Ltd v New Cap Reinsurance Corp Ltd* [2006] HCA 13; (2006) 225 CLR 331 at 352 [58] (Kirby and Hayne JJ); *Jabbour v Custodian of Absentee's Property of Israel* [1954] 1 WLR 139 at 146.

not been declared to be Corporations legislation displacement provisions and the Corporations legislation.

137. WAG contends that s.74 of the *Bell Act* is inconsistent with s.554A of the *Corporations Act 2001* because s.554A of the *Corporations Act 2001* provides a right to appeal in respect of an adjudication of a proof of debt and s.74 denies a right to appeal[98]. (To the extent WAG adopts Maranoa's submission, then it adopts a submission which says that s.74 of the *Bell Act* is also inconsistent with s.1321 of the *Corporations Act 2001*[99].)

138. This is really a grievance concerning the regime established by the major parts of the State regime principally set up by Parts 3 to 4 of the *Bell Act* which are all displacement provisions. The answer to this is that s.5G(8) of the *Corporations Act 2001* allows the State to displace the Commonwealth regime, and implement its regime. If that has been validly done, then ss.554A and 1321 of the *Corporations Act 2001* have no remaining operation that affects, and could thereby be inconsistent with, the impugned sections of the *Bell Act*. Section 554A provides an appeal in respect of a person who is aggrieved by "the liquidator's estimate of the value of the debt or claim" and s.1321 provides an appeal for act, omission or decision of a person who is effectively, dealing with an administration, compromise, scheme, receivership or liquidation under Chapter 5. Neither section has any operation if s.5G(8) has been utilised to replace the Chapter 5 regime with the Bell Act regime.

INCONSISTENCY OF PROVISIONS OF THE *BELL ACT* WITH SECTION 39(2) OF THE *JUDICIARY ACT 1903* (CTH)

The *Bell Act* ss.25(5), 27 and 29 contention

139. Section 25(5) is not a direction to any Court as to the manner or outcome of the exercise of jurisdiction[100] or a withdrawal of jurisdiction. It is in the nature of numerous uncontroversial legislative restrictions on the bringing of claims. The most obvious analogy is the restriction on creditors bringing or maintaining an action against a company once a winding up order has been made[101].

140. This Court has never characterised winding up as an exclusive judicial function, though it has acknowledged that winding up orders have long fallen to courts[102]. Dr Cooke[103] details such matters as does Professor Lester[104]. Professor Lester notes that prior to the enactment of the *Joint Stock Companies Winding-up Act*

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[98] See WAG's ASOC at [72.3] (SCB at 39–40); WAG's Submissions at [22].
[99] See Maranoa's Submissions, Annexure A at 35.
[100] See *Chu Kheng Lim v The Minister for Immigration, Local Government and Ethnic Affairs* [1992] HCA 64; (1992) 176 CLR 1 at 37 (Brennan, Deane and Dawson JJ).
[101] See s.471B of the *Corporations Act 2001* (Cth). See also the discussion in *Re Gordon Grant and Grant Pty Ltd* [1983] 2 Qd R 314 at 316–317.
[102] *R v Davison* [1954] HCA 46; (1954) 90 CLR 353 at 368 (Dixon CJ and McTiernan J), *Gould v Brown*[1998] HCA 6; (1998) 193 CLR 346 at 404 [68].
[103] Colin Cooke, *Corporation, Trust and Company: An Essay in Legal History* (Manchester University Press, 1950).
[104] See V Markham Lester, *Victorian Insolvency: Bankruptcy, Imprisonment for Debt, and Company Winding-up in Nineteenth-Century England* (Clarendon Press, 1995) in particular at Chapter 6.

1848 (UK) thought was given to vesting the whole of the jurisdiction for the winding-up of insolvent companies in the existing bankruptcy commissioners, with neither the Bankruptcy Court nor Chancery having any role[105]. As recorded by Professor Lester, this proposal was rejected because of the possibility that matters might arise in the course of winding up that relied upon the equitable jurisdiction, which made efficient an ongoing role for Chancery[106].

141. That there is nothing inherent in the nature of a winding up that renders it exclusively judicial is exemplified by the 1870s experience with the Albert Life Assurance Company. In 1869, the Albert Life Assurance Company collapsed. In response, *The Albert Life Assurance Company Arbitration Act 1871*[107] and *The Albert Life Assurance Company Arbitration Act 1874*[108] were passed which established an administrative winding up. This circumstance evidences that winding up has never been an exclusively judicial function. The *Bell Act* employs a similar non-judicial process for the finalisation of the winding up and division of assets of companies. Another example of a legislative provision that is not a direction to a Court as to the manner or outcome of the exercise of its jurisdiction is the privative clause. Relevant also is the *BLF Case*[109]. The *BLF Case* highlights the critical operation of s.25(5). The section does not remove jurisdiction, federal or otherwise, from the Supreme Court. State laws that remove jurisdiction are invalid by reason of inconsistency with s.39(2)[110].

142. The basal proposition in all of this is as expressed by Gleeson CJ, Gaudron and Gummow JJ in *Edensor*[111]. The necessary distinction is between depriving or withdrawing or limiting the exercise jurisdiction and (say), "prohibiting persons within [a] description ... from resorting to the jurisdiction of the Court and not a section depriving the Supreme Court of jurisdiction"[112].

143. The former is not inconsistent with s.39(2) of the *Judiciary Act*. Sections 25(5), 27 and 29 of the *Bell Act* are of this genus.

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[105] V Markham Lester, *Victorian Insolvency: Bankruptcy, Imprisonment for Debt, and Company Winding-up in Nineteenth-Century England* (Clarendon Press, 1995) at 223.
[106] V Markham Lester, *Victorian Insolvency: Bankruptcy, Imprisonment for Debt, and Company Winding-up in Nineteenth-Century England* (Clarendon Press, 1995) at 223–224.
[107] 34 & 35 Vict. c.xxxi.
[108] 37 & 38 Vict. c.lviii.
[109] *Australian Building Construction Employees' & Builders Labourers' Federation v Commonwealth* [1986] HCA 47; (1986) 161 CLR 88 ('*BLF Case*'). The impugned legislation in that case is similar to Schedule 6A of *The Albert Life Assurance Company Arbitration Act 1871*, in that it also contains a recitation, by which the Parliament made certain findings. The recital is set out at 92–93 of the reported decision: "WHEREAS the Parliament considers that it is desirable, in the interest of preserving the system of conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of anyone State, to cancel the registration of The Australian Building Construction Employees' and Builders Labourers' Federation under the Conciliation and Arbitration Act 1904".
[110] *Commonwealth v Rhind* [1966] HCA 83; (1966) 119 CLR 584 at 606 (Menzies J).
[111] *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* [2001] HCA 1; (2001) 204 CLR 559 at 588 [59].
[112] *Commonwealth v Rhind* [1966] HCA 83; (1966) 119 CLR 584 at 606 (Menzies J).

The *Bell Act* s.73 contention

144. A provision of State law that limits the bringing of actions in respect of class of matters X, some of which may attract federal jurisdiction, but which recognises that the Supreme Court, in exercise of federal jurisdiction, can grant leave to bring such an action does not withdraw federal jurisdiction or deprive a State Court of it. The imposition of a leave requirement is commonplace for Courts, both in the exercise of State and federal jurisdiction[113]. The imposition of a leave requirement does not direct a Court in the exercise of its power. Section 73 of the *Bell Act* does not withdraw jurisdiction simply because the Supreme Court may decline to grant leave. This contention should be rejected.

The *Bell Act* s.22 and s.26 contentions

145. The plaintiff's arguments concerning ss.22 and 26 of the *Bell Act* are put in the context of inconsistency with s.39(2) of the *Judiciary Act*, and more broadly Chapter III of the Commonwealth *Constitution*. The response is the same. That ss.22 and 26 may have the effect or consequence that the plaintiff will receive less money than they would have liked or, but for ss.22 and 26, have obtained from actions already on foot in the Supreme Court does not destroy or render ineffective the exercise of judicial power in federal jurisdiction by the Supreme Court[114].

146. Sections 22 and 26 of the *Bell Act* alter substantive rights. By altering substantive rights, the Act is not inconsistent with a provision of Commonwealth law (s.39(2)) that confers jurisdiction on a State court to deal with the substantively different matter.

PROVISIONS OF THE *BELL ACT* INFRINGE CHAPTER III OF THE *CONSTITUTION*

147. There are four contentions put by WAG to the effect that the Bell Act infringes Chapter III of the Commonwealth *Constitution*.

The first contention — concerning ss.22 and 26 of the Bell Act

148. This is, in effect, a different way of stating the contention that ss.22 and 26 of the *Bell Act* render COR 146 of 2014 "inutile" or deny the action of its "legal basis", thereby "destroying" its character as a matter. So, in addition to these effects being inconsistent with s.39(2) of the *Judiciary Act* they are also contended to be contrary to Chapter III of the Commonwealth *Constitution*.

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[113] See, eg, s.35(2) of the *Judiciary Act 1903* (Cth); s.101(2) of the *Supreme Court Act 1970* (NSW); s.60(1)(e)–(f) of the *Supreme Court Act 1935* (WA).

[114] *R v Humby; Ex parte Rooney* [1973] HCA 63; (1973) 129 CLR 231 at 250. See also *HA Bachrach Pty Ltd v The State of Queensland* [1998] HCA 54; (1998) 195 CLR 547; *BLF Case* [1986] HCA 47; (1986) 161 CLR 88 at 96–97 (Gibbs CJ, Mason, Brennan, Deane and Dawson JJ), *Duncan v Independent Commission Against Corruption* [2015] HCA 32; (2015) 324 ALR 1 at 8 [26] (French CJ, Kiefel, Bell and Keane JJ) ('*Duncan*').

149. The same responses apply as put above. The contention fails by reason of the line of authority (now "well settled"), most recently articulated in *Duncan*[115].

The second contention — concerning s.73 of the *Bell Act*

150. This is that provisions of the *Bell Act*, including s.73 of the *Bell Act*, direct the exercise of judicial power by the Supreme Court exercising federal jurisdiction, in various and variously articulated ways. This contention should be rejected. State Parliaments routinely legislate in a manner that affects pending proceedings being considered in federal jurisdiction. *Duncan*[116] is the most recent obvious example. What Chapter III of the Commonwealth *Constitution* precludes is a State law that seeks to direct the manner in which a court, State or otherwise, deals with a substantive matter before it. Nothing in the *Bell Act* does this[117].

The third contention — concerning extinguishment of subject matter

151. This is that the *Bell Act* has extinguished the subject matter of COR 146 of 2014[118]. The *Bell Act* has not extinguished the subject matter of COR 146 or 208 of 2014. Even if the *Bell Act* has extinguished the subject matter of COR 146 or 208 of 2014, there is nothing in this that deprives an action before a Court the status of "matter". *Duncan*[119] is a complete answer to this proposition, as is the *BLF Case*[120].

The fourth contention — concerning exclusive judicial function

152. This contention is put only by WAG and construes the *Bell Act* as investing, not only judicial power, but an exclusive judicial function, in the State executive government and thereby infringes Chapter III[121].

153. The contention rests on two basal propositions; first, that the *Bell Act* invests judicial power on the Authority and the Governor and, second, that the State cannot confer judicial power other than on a Court.

154. It is trite that nothing in Western Australian constitutional instruments or the Commonwealth *Constitution* imposes or requires a separation of powers in Western Australia[122]. Subject to the principles deriving from *Kable*[123] and

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[115] [2015] HCA 32; (2015) 324 ALR 1 at 8 [26] (French CJ, Kiefel, Bell and Keane JJ).
[116] [2015] HCA 32; (2015) 324 ALR 1.
[117] See also *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* [1992] HCA 64; (1992) 176 CLR 1 at 36–37 (Brennan, Deane and Dawson JJ), cited with approval by Gummow, Hayne and Bell JJ (with whom French CJ, Crennan and Kiefel JJ agreed in this respect in *Australian Education Union v General Manager of Fair Work Australia* [2012] HCA 19; (2012) 246 CLR 117 at 141 [50] and *Duncan* [2015] HCA 32; (2015) 324 ALR 1 at 8 [24] (French CJ, Kiefel, Bell and Keane JJ).
[118] WAG's Submissions at [128]–[129].
[119] [2015] HCA 32; (2015) 324 ALR 1 at 8 [24] (French CJ, Kiefel, Bell and Keane JJ).
[120] [1986] HCA 47; (1986) 161 CLR 88 at 96–97 (Gibbs CJ, Mason, Brennan, Deane and Dawson JJ).
[121] WAG's Submissions at [76(c)], [138]–[139].
[122] See, eg, *North Australian Aboriginal Justice Agency Limited v Northern Territory of Australia* [2015] HCA 41; (2015) 326 ALR 16 at 59 [168] (Keane J); *Building Construction Employees and Builders'*

Kirk[124] State courts can exercise non-judicial powers and judicial power can be conferred on State executive bodies. Indeed, *Kirk* is premised upon State Supreme Courts exercising power over "the exercise of State executive and judicial power by persons and bodies other than the Supreme Court"[125].

155. Both of the principles deriving from *Kable*[126] and *Kirk*[127] emerge from the words of the Commonwealth *Constitution*. In respect of *Kable* it is the imperative words as to the existence of State Supreme Courts[128] found in the words of s.77(iii) and perhaps s.73(ii). The doctrinal underpinning, or basis for implication, of *Kable* derives from the express words of s.77(iii), which require that State courts be capable of being invested with federal jurisdiction or suitable repositories for it[129]. In respect of *Kirk* it is ss.73 and 71[130].

156. So WAG's proposition must be understood to be that judicial power in respect of a matter in federal jurisdiction can only be exercised by a Chapter III Court. Though not stated, it must be assumed that such a proposition derives from the words of s.71 and perhaps s.77(iii) of the Commonwealth *Constitution*. Again, though not stated, it is likely that this proposition derives from *The Wheat Case*[131].

157. The response to this is that the powers exercisable by the Authority and the Governor under the *Bell Act* are not judicial, or exclusively, judicial powers.

158. The definition of judicial power is notoriously opaque[132]. Oftentimes Kitto J's statement in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd*[133] is called in aid[134].

Labourers Federation of New South Wales v Minister for Industrial Relations (1986) 7 NSWLR 372 at 401 (Kirby P).

[123] *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24; (1996) 189 CLR 51 at 94, 98 (Toohey J), 104 (Gaudron J), 115–116 (McHugh J) ('*Kable*').

[124] *Kirk v Industrial Court of New South Wales* [2010] HCA 1; (2010) 239 CLR 531 at 581 [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) ('*Kirk*').

[125] *Kirk* [2010] HCA 1; (2010) 239 CLR 531 at 581 [98].

[126] [1996] HCA 24; (1996) 189 CLR 51 at 94, 98 (Toohey J), 104 (Gaudron J), 115–116 (McHugh J).

[127] [2010] HCA 1; (2010) 239 CLR 531 at 581 [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[128] Recognised in *Kable* [1996] HCA 24; (1996) 189 CLR 51 at 111 (McHugh J), 139 (Gummow J); *Forge v Australian Securities and Investments Commission* [2006] HCA 44; (2006) 228 CLR 45 at 76 [63] (Gummow, Hayne and Crennan JJ); and confirmed in *Kirk* [2010] HCA 1; (2010) 239 CLR 531 at 566 [55], 580 [96] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[129] See the recent application of the *Kable* principle by this Court in *Pollentine v Bleijie* [2014] HCA 30; (2014) 253 CLR 629 at 648–649 [42] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ). Gageler J in his separate judgment at 655 [68] phrased the question in similar terms; whether the impugned legislation was "incompatible with the status of the District Court as a court capable of being invested with federal jurisdiction".

[130] *Kirk* [2010] HCA 1; (2010) 239 CLR 531 at 580-581 [97]–[98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[131] *New South Wales v Commonwealth (The Wheat Case)* [1915] HCA 17; (1915) 20 CLR 54 at 62 (Griffith CJ).

[132] *Gould v Brown* [1998] HCA 6; (1998) 193 CLR 346 at 403–404 [66] (Gaudron J).

[133] [1970] HCA 8; (1970) 123 CLR 361 at 373, 374.

159. The powers exercised by the Authority and the Governor pursuant to the *Bell Act* are not judicial. The Authority does not determine existing rights under agreements (which are now terminated by force of s.26 of the *Bell Act*). It determines new *sui generis* statutory rights. Similar in effect was the matter considered in *Precision Data Holdings*[135].

160. It matters not that the creation of new rights and obligations arises over disputes over past events[136]. In exercising its power under s.39 of the *Bell Act* the Authority does not inquire into or apply "the law". If the Authority forms views about the various creditors' existing rights and liabilities, that is not an exercise of judicial power. Exercises of administrative power commonly involve determination of existing rights and duties[137], and even as to whether a crime has been committed[138]. Any opinion formed as to existing rights and liabilities is simply a step in arriving at the ultimate conclusions as to the amount to be paid, or property to be transferred or vested in each creditor under the new rights created by the *Bell Act*[139]. The decisions of the Authority and the Governor are to be made in their absolute discretion. That considerations as to policy may play a role in decisions as to amounts to be paid is an indicia contrary to its characterisation as judicial power[140].

161. This power is no different to that of the Conciliation and Arbitration Commission considered in *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia*[141], where the Commission's resolution of a dispute did not involve exercise of judicial power, but arbitral power. That was so, even though in the exercise of that arbitral power, the Commission undertook similar inquiries and determined similar questions of fact as would have been made and determined in proceedings brought for the enforcement of an award before a court. Similarly here. That

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[134] See *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* [2015] HCA 7; (2015) 317 ALR 279 at 292–294 [51]–[59] (French CJ, Hayne, Kiefel, Bell and Keane JJ); *Duncan v New South Wales* [2015] HCA 13; (2015) 318 ALR 375 at 386–389 [41]–[51] (French CJ, Hayne, Kiefel, Bell, Gageler, Keane and Nettle JJ); *Attorney-General (Cth) v Breckler* [1999] HCA 28; 197 CLR 83 at 109-111 [40]–[43] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Brandy v Human Rights and Equal Opportunity Commission* [1995] HCA 10; (1995) 183 CLR 245 at 256–258 (Mason CJ, Brennan and Toohey JJ), 267–269 (Deane, Dawson, Gaudron and McHugh JJ).

[135] *Precision Data Holdings Ltd v Wills* [1991] HCA 58; (1991) 173 CLR 167 especially at 190 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

[136] *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia* [1987] HCA 63; (1987) 163 CLR 656 at 663 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

[137] *Nicholas v The Queen* [1998] HCA 9; (1998) 193 CLR 173 at 219 [109] (McHugh J).

[138] *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* [2015] HCA 7; (2015) 317 ALR 279 at 288 [32]–[34] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

[139] It is open for an administrative body to form an opinion as to legal rights as a step to the ultimate determination of that body — *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* [2015] HCA 7; (2015) 317 ALR 279 at 293 [55] (French CJ, Hayne, Kiefel, Bell and Keane JJ). See also *Re Cram; Ex parte Newcastle Wallsend Coal Co Pty Ltd* [1987] HCA 29; (1987) 163 CLR 140 at 149 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

[140] *Precision Data Holdings Ltd v Wills* [1991] HCA 58; (1991) 173 CLR 167 at 189–191 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Attorney-General (Cth) v Alinta Ltd* [2008] HCA 2; (2008) 233 CLR 542 at 597 [168]–[169] (Crennan and Kiefel JJ).

[141] [1987] HCA 63; (1987) 163 CLR 656, see particularly at 664 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

the Authority's or the Governor's determination may relate to the same subject matter as that which might otherwise have been considered by a court does not constitute such determinations of the processes preceding them as exercises of judicial power.

PART VII: LENGTH OF ORAL ARGUMENT

162. It is estimated that the oral argument for the State of Western Australia will take one day.

Dated: 25 March 2016

10

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ATTACHMENT A

Bell Act displacement provisions that specifically authorise or require acts to be performed within scope of section 5G(4)

Bell Act	Acts specifically authorised or required
22(1), (2) and (3)	Confers on the Authority the powers of an owner over property vested in it under s.22 and thereby, in effect, specifically authorises the Authority to act in exercise of the powers ((1)-(3), (9)-(11)). Specifically authorise and require that certain actions in relation to the issue of certain certificates in respect of vested property ((12)-(15)).
23	Specifically authorises the Authority to issue notices which may require recipients to do specified things including providing access to records in relation to property to which the Act applies, account for their dealings with the property and do all things necessary to deliver to the Authority the property specified in the notice. This provision also, in effect, specifically requires that a person receiving the notice comply with it.
24	Specifically authorises and requires the Minister and the Authority to take all practicable steps for the purpose of securing the effect sought to be achieved by s.22 if a transfer and vesting of property under s.22 is not, to any extent, fully effective.
25	Specifically authorise a person to prove various liabilities under Part 4 Division 2(1) to (4). Specifically requires that no action, claim or proceeding arising out of a liability that may be proved in accordance with Part 4 Division 2 may be made or maintained against the specified persons.
26	Specifically requires that each of the specified agreements is taken and always has been taken to be void (1). Specifically authorises a person to prove a claim the person had to be repaid under an agreement voided under that section in accordance with Part 4 Division 2 (3).
27 & 28	Section 28, read with s.27, specifically authorises the Authority to control the company's property and affairs and to exercise various powers and functions.
29	In effect, specifically authorises the Authority to give written approval to a person performing or exercising a function or power as an officer of the company.
30	Specifically authorises the Governor to by proclamation dissolve a WA Bell Company and requires them to be treated as such ((1)-(2)). Specifically authorises the Authority to be substituted in place of a WA Bell Company in pending proceedings or under an agreement ((3)-(5)).
31	Specifically authorises the Authority to give a copy of a certificate issued by it under s.22(2) to a relevant official and requires the relevant official to then take certain actions.
33	Specifically requires the liquidator of a WA Bell Company to do certain acts, including to give to, or as directed by, the Authority various books of the company and the liquidator that are relevant to the affairs of the company as at immediately before the transfer day (7).
34	Specifically requires and permits the Authority to do certain things in relation to calling for proofs of liabilities.
36	Specifically requires and/or authorises the Authority to take certain steps in relation to the preparation of a draft report/s and specifically authorises a recipient of a report to make a written submission.
37	Specifically requires the Authority to determine the property and liabilities of each WA Bell

	Company and, in doing so, to have regard to certain matters and, in effect, specifically authorises the Authority to exercise an absolute discretion.
38	Specifically requires and/or authorises the Authority to report to the Minister on the property and liabilities of each WA Bell Company ((1)-(5)).
39(1), (2), (4), (5) and (6)	Specifically requires and/or authorises the Authority to make recommendations to the Minister with respect to the amount (if any) to be paid to a person, or the property (if any) to be transferred to or vested in a person (instead of or in addition to the payment of money), in respect of the aggregate of all liabilities of all WA Bell Companies to that person as a creditor; and, in effect, authorises the Authority to exercise an absolute discretion including as to whether all, some or none of the money is paid ((1), (2), (4)-(7), (9)).
40	Specifically authorises the Authority to recommend to the Minister an amount to be paid to, or property to be transferred or vested in the creditor of any kind of a WA Bell Company who had provided funding for, or an indemnity against costs or liability in relation to, the Bell litigation, and, authorises and requires certain acts to be done by the Authority in relation thereto, and, in effect, specifically authorises the Authority to exercise an absolute discretion.
41	Specifically authorises the Minister to submit to the Governor an interim report of the Authority and the Governor to determine an amount to be paid to, or property to be transferred to or vested in, a person.
42	Specifically requires the Minister to submit to the Governor the report of the Authority and the Governor to determine an amount to be paid to, or property to be transferred to or vested in, a person.
43	Specifically requires the Minister to give a determination of the Governor to the Authority. Specifically authorises and requires that every liability of a WA Bell Company to a person not receiving a distribution is discharged and extinguished (8).
44	specifically requires the Authority to notify specified persons of the Governor's determination, pay out of the Fund the amounts specified and transfer or vest property; in effect specifically authorises and requires the Authority not to take such an action unless the person first gives the Authority an executed deed in an approved form and that provides for a release or discharge of any person from any liability the Minister considers appropriate. Specifically authorises and requires that every liability of a WA Bell Company to a specified person is discharged and extinguished ((4)-(5), (6)-(7)).
45	Specifically authorises and requires the discharge of the liquidator of WA Bell Companies on their dissolution.
46	Specifically authorises and requires the closure of the Fund and that any money standing to the credit of the Fund when it is closed has to be credited to the Consolidated Account.
48	Specifically authorises and requires the vesting of certain property in the State absolutely and free from encumbrance after closure of the fund.
55	In effect, specifically requires certain persons not take any step for achieving the reinstatement of the registration of a deregistered company listed in Schedule 1 without the written approval of the Authority; and specifically authorises the imposition of a penalty if such a person takes such a step.
56(3)	In effect, specifically requires that a person must take any steps that are within the person's power to take and that are necessary to ensure that the transfer to, and vesting in, the Authority by s.22 of property located outside the State is made effective; and specifically authorises the imposition of a penalty if the person refuses or fails to take any such steps.