

BETWEEN:

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

AND

THE STATE OF WESTERN AUSTRALIA  
Defendant



**PLAINTIFF'S WRITTEN SUBMISSIONS<sup>1</sup> - ANNOTATED**

**Part I: Suitability for Publication**

1. The Plaintiff certifies that these submissions are in a form suitable for publication on the internet.

20 **Part II: Concise Statement of the Issues**

2. The issues which arise in this matter are identified at paragraph 85A of the Amended Special Case (ASC).<sup>2</sup>

**Part III: s 78B Notices**

3. Notices pursuant to s.78B of the *Judiciary Act 1903* (Cth) (**Judiciary Act**) have been given. The Attorneys-General for Tasmania, South Australia and Victoria

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<sup>1</sup> These submissions are prepared on the basis that this matter is being heard along with the separate but related proceedings commenced by Maranoa Transport and Mr Antony Woodings (**Woodings**) (P4 of 2016) and BGNV (S248 of 2015). It has been agreed between the Plaintiff, Woodings and BGNV that, save for any issues which the Plaintiff relies upon which it does not consider to have been covered or sufficiently covered by them, the Plaintiff will otherwise adopt the written and oral submissions of Woodings and BGNV.

<sup>2</sup> This document relies upon definitions used in the Special Case Book at page 140.

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have given notice to intervene. The Attorneys-General for the Commonwealth and New South Wales have indicated a possible intention to intervene.

**Part IV: Judgments Below**

4. This proceeding is brought in the Court's original jurisdiction pursuant to s.30(a) of the Judiciary Act.

**Part V: Facts**

5. The relevant facts are contained within the ASC. Key facts include the following:

- 10 (a) the Bell litigation comprised of various legal proceedings commenced in the Supreme Court of Western Australia by, amongst others, the liquidators of TBGL and BGF against various Australian and overseas banks;<sup>3</sup>
- (b) as a result of those proceedings, a subsequent appeal and cross-appeal to the Court of Appeal of Western Australia and an appeal and cross-appeal to this Court (which appeal and cross-appeal was subsequently discontinued by consent),<sup>4</sup> approximately \$1.7 billion was paid by the banks, approximately \$718 million of which was paid to certain of the WA Bell Companies (including TBGL and BGF)<sup>5</sup> and approximately \$1 billion of which was paid to Woodings on trust in accordance with the terms of the Settlement Trust;<sup>6</sup>
- 20 (c) immediately before the transfer day, these monies were held in certain interest bearing term deposit accounts held with National Australia Bank (NAB) and Westpac;<sup>7</sup>
- (d) the Bell litigation had been funded by ICWA, the Commonwealth and BGNV (for different amounts and in respect of different periods);<sup>8</sup>
- (e) the Plaintiff is an ordinary, unsecured creditor of BGF with an amended proof of debt in the winding up of that company in the amount of \$183,297,347.04;<sup>9</sup>
- 30 (f) in August 2014, and as part of the winding-up of the WA Bell Companies, in accordance with the *Corporations Act 2001* (Cth) (**Corporations Act**), Woodings, in his capacity as liquidator of TBGL and BGF, commenced action COR 146 of 2014 in the Supreme Court of

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<sup>3</sup> ASC [28] (SCB 96).

<sup>4</sup> ASC [28] (SCB 96).

<sup>5</sup> ASC [31A] (SCB 97).

<sup>6</sup> ASC [36A] (SCB 100). [37.1] (SCB 100). [38] (SCB 101).

<sup>7</sup> ASC [32] (SCB 97); ASC Attachment F (SCB 161).

<sup>8</sup> ASC [24] (SCB 93).

<sup>9</sup> ASC [19] (SCB 92).

Western Australia seeking orders pursuant to s.564 of the Corporations Law for the benefit of ICWA, the Commonwealth and BGNV<sup>10</sup> (each of which was joined as a Defendant to the proceedings);<sup>11</sup>

- (g) the Plaintiff was also joined as a defendant to the proceedings<sup>12</sup> and is the only creditor of a WA Bell Company which did not fund the Bell litigation that is actively involved in the proceedings;<sup>13</sup>
- (h) in October 2014, ICWA commenced action COR 202 of 2014 and COR 208 of 2014 in the Supreme Court of Western Australia, which actions have been consolidated as COR 208 of 2014.<sup>14</sup> The defendants to those proceedings include the parties to COR 146 of 2014;<sup>15</sup>
- 10 (i) the relief sought in the proceedings include that set out at paragraphs 52A to 52E of the ASC;<sup>16</sup>
- (j) a controversy has arisen between the Plaintiff, BGNV, ICWA and the Commonwealth<sup>17</sup> regarding the orders sought in the proceedings, including the issues identified at paragraphs 45 and 46 of the ASC;<sup>18</sup>
- (k) as at the date of the Bell Act, COR 146 of 2014 and COR 208 of 2014 were being case managed simultaneously with the intention that they be heard and determined together;<sup>19</sup>
- (l) also as at the date of the Bell Act:
- 20 i) various income tax assessments or amended income tax assessments for various of the WA Bell Companies issued by the Commissioner were unpaid;<sup>20</sup> and
- ii) Woodings had given notification of his appointment as the liquidator of various of the WA Bell Companies in accordance with former s.215(1)(a) of the ITAA 1936, but had not received a notification from the Commissioner satisfying the requirements of former s.215(2) of the ITAA

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<sup>10</sup> ASC [42] (SCB 104).

<sup>11</sup> ASC [43] (SCB 104).

<sup>12</sup> ASC [43] (SCB 104).

<sup>13</sup> ASC [43A] (SCB 104).

<sup>14</sup> ASC [51] (SCB 106).

<sup>15</sup> ASC [53] (SCB 107).

<sup>16</sup> ASC [52A]-[52E] (SCB 106-107).

<sup>17</sup> ASC 44 (SCB 104).

<sup>18</sup> ASC [45]-[46] (SCB 104-105).

<sup>19</sup> ASC [54] (SCB 108).

<sup>20</sup> ASC [79] (SCB 132).

1936 (unless any of the proofs of debt lodged by the Commissioner were themselves sufficient to amount to such notification).<sup>21</sup>

**Part VI: Argument**

6. The Plaintiff's argument is set out in the following sections:
- (a) Section One: Operation of the Bell Act;
  - (b) Section Two: Plaintiff's standing and existence of justiciable controversy;
  - (c) Section Three: Test for inconsistency under s.109 of the Constitution;
  - 10 (d) Section Four: the Bell Act is inconsistent with provisions of the Corporations legislation applicable to Woodings, the Plaintiff and other Bell group companies;
  - (e) Section Five: the Bell Act is inconsistent with provisions of the *Taxation Administration Act 1953* (Cth) (TAA), *Income Tax Assessment Act 1936* (Cth) (ITAA 1936), *Income Tax Assessment Act 1997* (Cth) (ITAA 1997) applicable to Woodings, the Plaintiff and other Bell group companies;
  - (f) Section Six: the Bell Act infringes Ch III of the Constitution and is inconsistent with the Judiciary Act; and
  - 20 (g) Section Seven: Severance.

**Section One: Operation of the Bell Act**

7. A summary of the operation of the Bell Act (as agreed between the Plaintiff and the Defendant when agreeing the Special Case) is contained in Annexure A.

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<sup>21</sup> ASC [71C] (SCB 128).

**Section Two: Plaintiff's standing and existence of justiciable controversy<sup>22</sup>**

8. This matter is commenced in federal jurisdiction.<sup>23</sup> The question of standing is therefore better expressed as whether there is a “matter” between the Plaintiff and the Defendant concerning s.109 of the Constitution and the application of the ITAA 1997, ITAA 1936 and TAA.<sup>24</sup>
9. For a matter to exist there must be a justiciable controversy between the parties which requires there to be a final and binding adjudication between the parties.<sup>25</sup> Standing or the existence of a matter is directly related to the relief claimed.<sup>26</sup> There is no requirement for a reciprocity of right and liability or right and duty between a plaintiff and defendant.<sup>27</sup> Rather, the Court needs to assess the subject matter itself as set out by the terms of Ch III of the Constitution and whether there is a justiciable controversy identifiable independently of the proceedings which are brought for its determination.<sup>28</sup>
10. It is self-evident that the Plaintiff's rights, as a creditor of BGF, are seriously prejudiced by the Bell Act. If the Defendant contends that the Plaintiff nevertheless has no standing to litigate the question of the Bell Act's validity, the Plaintiff will address that contention in reply.
11. The Defendant has advised that to the extent that the question of standing is decided in favour of Woodings, in P4 of 2016, the Defendant would not challenge the standing of the Plaintiff in this action (consistently with the approach taken in *Williams v the Commonwealth of Australia* (2012) 248 CLR 156).

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<sup>22</sup> It is noted that the Defendant's solicitors wrote to the Plaintiff's solicitors on 2 March 2016 and advised that:

*"(a) if and to the extent that the Full Court were to conclude, contrary to the State's contentions in P4 of 2016, that a Woodings Plaintiff has standing to raise any of the above grounds in respect of which standing is in dispute, then consistently with the approach taken in Williams v The Commonwealth of Australia (2012) 248 CLR 156, the State's position is that the Court does not need to determine whether in respect of that same issue BGNV and WAG have standing; and*

*(b) further, to the extent that BGNV or WAG also seek to rely on s.254(1)(d) of the ITAA 1936 in the same way in which it is relied on in paragraph 56.1 of the Woodings' statement of claim, the State also considers that the Court does not need to determine whether in respect of that issue BGNV and WAG have standing."*

<sup>23</sup> Section 76(i) of the Constitution; s.30(a) of the Judiciary Act.

<sup>24</sup> *Truth About Motorways Pty Limited v Macquarie Infrastructure Investment Management Limited* (2000) 200 CLR 591 at 610-613 [42]-[50], 629-633 [101]-[109], 659-660 [177]-[179]; *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 68-69 [150]-[158]. See also *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 262 per Gaudron, Gummow and Kirby JJ; *Croome v Tasmania* (1997) 191 CLR 119 at 132-133.

<sup>25</sup> *CGU Limited v Blakeley* [2016] HCA 2 at [24]-[30] per French CJ, Kiefel, Bell and Keane JJ; *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 68-69 [150]-[158].

<sup>26</sup> *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 68-69 [150]-[158].

<sup>27</sup> *Truth about Motorways* (2000) 200 CLR 591 at 631 [105]-[106] (referring to *R v Davison* (1954) 90 CLR 353 at 368) and 660-661 [183]-[184] per Hayne J.

<sup>28</sup> *CGU Limited v Blakeley* [2016] HCA 2 at [27]-[30] per French CJ, Kiefel, Bell and Keane JJ; *Fencott v Muller* (1983) 152 CLR 570 at 603 per Mason, Murphy, Brennan and Deane JJ.

12. The Defendant raises a separate issue concerning whether there is a justiciable controversy arising from the assertion that Woodings has not received a notification in accordance with former s.215 of the ITAA 1936.<sup>29</sup> Whether or not Woodings has received a notification is not to the point: the point being that Woodings was at the time of the Bell Act and remains susceptible to the receipt of such notification. In this regard the Plaintiff notes that for a justiciable controversy to be established it is not a requirement that there exist any immediate right, duty or liability between opposing parties.<sup>30</sup>

### Section Three: Test for inconsistency under s.109 of the Constitution

- 10 13. The resolution of this matter does not require detailed reference to the principles relating to the application of s.109 of the Constitution.

14. In *Victoria v The Commonwealth* (1937) 58 CLR 618 at 630, Dixon J stated:<sup>31</sup>

*"When a State law, if valid, would alter, impair or detract from the operation of a law of the Commonwealth Parliament, then to that extent it is invalid. Moreover, if it appears from the terms, the nature or the subject matter of a Federal enactment that it was intended as a complete statement of the law governing a particular matter or set of rights and duties, then for a State law to regulate or apply to the same matter or relation is regarded as a detraction from the full operation of the Commonwealth law and so as inconsistent."*

- 20 15. Later cases have attributed the first proposition as being an example of direct inconsistency and the second proposition as indirect inconsistency.<sup>32</sup> This categorisation is not without controversy but does not require resolution in this matter. What is necessary to note is the paramountcy of the Parliament of the Commonwealth under the Constitution.<sup>33</sup>

16. In *Jemena Asset Management*,<sup>34</sup> French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ held that the notions of 'altering', 'impairing' or 'detracting' all involved the common idea that the State law undermined the federal law. Their Honours then went on to say:

30 *"All tests of inconsistency which have been applied by this Court for the purpose of s 109 are tests for discerning whether a 'real conflict' exists between a Commonwealth law and a State law."*

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<sup>29</sup> Amended Defence, [56.1A].

<sup>30</sup> *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 407 [67] per Gummow and Gaudron JJ quoting *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265.

<sup>31</sup> See further *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 at 78.

<sup>32</sup> *The Queen v Dickson* (2010) 241 CLR 491 at 504 [22].

<sup>33</sup> *Jemena Asset Management (3) Pty Ltd v Coinvest Limited* (2011) 244 CLR 508 at 523 [36]-[37].

<sup>34</sup> *Jemena Asset Management (3) Pty Ltd v Coinvest Limited* (2011) 244 CLR 508 at 525 [40].

17. A conflict must not be trivial and is determined by undertaking a process of statutory construction of the federal and State law,<sup>35</sup> with a proper understanding of the policy and purpose of the State law necessary to construe the State law and assess its operation.<sup>36</sup>
18. In terms of any process of statutory construction, it is noted that the Court should not “strain to give a meaning to statutes which is artificial or departs markedly from their ordinary meaning simply in order to preserve their constitutional validity”.<sup>37</sup>

**Section Four: The Bell Act is inconsistent with provisions of the Corporations Legislation applicable to Woodings, the Plaintiff and other Bell group companies**<sup>38</sup>

10 Relevant provisions of the Corporations Legislation

19. The winding up of each WA Bell Company was governed by Commonwealth laws whose applicability was dependent on when the winding up was ordered.<sup>39</sup> The WA Bell Companies wound up before 23 June 1993 apply the Corporations Law as was in existence at that time.<sup>40</sup> For the windings up after 23 June 1993 the relevant provisions are those in the present Corporations Act.<sup>41</sup> It is submitted there is little difference between the winding up provisions in the old and new Corporations legislation.

Inconsistency between the Corporations Act and the Bell Act

20. In terms of the rights, duties and liabilities imposed on Woodings under the Corporations Act, ss.468, 474, 478 of Corporations Act provide that, in respect of a company in liquidation, the liquidator is to have possession, custody and power of disposal of that which is or which appears to be the property of the company and that the property of the company shall not be transferred or otherwise disposed of other than by or under the authority of the liquidator and then only for the purposes of the proper conduct of the company’s liquidation in accordance with the relevant provisions of the Corporations Act. Section 22 of the Bell Act is inconsistent with those sections of the Corporations Act as it provides that, on the transfer day, all property vested in or held on behalf of or on trust for a WA Bell Company is transferred to and vests in the Authority.

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<sup>35</sup> *Went v Attorney-General (Vic)* (1948) 77 CLR 84 at 120-122 per Dixon J.

<sup>36</sup> *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 465 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

<sup>37</sup> *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 349 [42] per French CJ. Cited with approval by Gagelet J in *North Australian Aboriginal Agency Limited v Northern Territory* [2015] HCA 41 at [77].

<sup>38</sup> In this section and those which follow, the word “inconsistent” is used with the intention of it incorporating the concepts referred to in Section Three above.

<sup>39</sup> *Re Bell Group Ltd (in liq); Ex parte Woodings* [2015] WASC 88 at [13]-[19] per Pritchard J.

<sup>40</sup> Applying s.1383(1) of the Corporations Law (as in force at the time) and s.1408(1) of the Corporations Act.

<sup>41</sup> The provisions contained at Part 5.6 of Div.8 of the Corporations Act relating to pooling do not apply.

21. Sections 553, 553D, 554, 554A and 554E of the Corporations Act provide that a creditor may lodge a proof of debt with a company's liquidator and that the liquidator shall adjudicate upon any proof of debt so lodged. Sections 25, 34 and 37 of the Bell Act are inconsistent with those sections of the Corporations Act as they provide that any creditor of a WA Bell Company may lodge a proof of debt with the Authority and that the Authority shall adjudicate upon any proof of debt so lodged.
- 10 22. Section 554A of the Corporations Act provides a right of appeal to a court from an adjudication with respect to a proof of debt, which appeal operates as an appeal *de novo*. Section 74 of the Bell Act is inconsistent with s.554A of the Corporations Act as it provides that there is no appeal open to a creditor of a WA Bell Company from an adjudication with respect to a proof of debt, save and except for jurisdictional error.
23. Sections 555, 556, 559 and 564 of the Corporations Act prescribe and prioritise the payments to be made to, inter alia, creditors of a company in liquidation, subject only to any order made by a court pursuant to s.564. Sections 38, 39, 40, 41, 42, 43 and 44 of the Bell Act are inconsistent with those sections of the Corporations Act as they provide that any payments made to the creditors of the WA Bell Companies shall be:
  - 20 (a) determined by the Governor;
  - (b) in respect of the aggregate of all liabilities of all WA Bell Companies to that person as a creditor;
  - (c) where the Governor is not required to determine that any amount is to be paid to, or any properties to be transferred to or vested in, any person, on any account whatsoever;
  - (d) where the aggregate value of all money determined by the Governor to be paid, and all property determined by the Governor to be transferred or vested, is not required to be equal to the value of the money or property held by the Authority or the total liabilities of all WA Bell Companies;
  - 30 (e) where the Authority must report to the Minister, who in turn must submit the report to the Governor, which report must include the Authority's recommendation as 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 in that person as a creditor; and
  - 40 (f) where, in making a recommendation, the Authority must have regard to the matters referred to in s.39(2)(a), (b) and (c) of the Act and may have regard to the matters referred to in s.39(2)(d) and (e), but otherwise has an absolute discretion as to the quantification of any liability, the amount recommended to be paid to a person or the property

recommended to be transferred to, or vested in, a person, as well as the priority to give to that payment, transfer or vesting.

24. Sections 477 and 478 of the Corporations Act require that the liquidator of a company in liquidation shall perform and exercise the liquidator's functions and powers provided therein. Section 29 of the Bell Act is inconsistent with those sections of the Corporations Act as it provides that the liquidator of each WA Bell Company shall not perform or exercise and must not purport to perform or exercise a function or power as liquidator unless the performance or exercises are within the Authority's written approval or is in the exercise of a power or duty under the Act.
- 10 25. Sections 530B, 531 and 542 of the Corporations Act provide that the books and records of a company in liquidation are to be provided to and retained by the liquidator during the course of the company's liquidation. Section 33(7) of the Bell Act is inconsistent with those sections of the Corporations Act as it provides that the books and records of each WA Bell Company are to be delivered by the liquidator to the Authority.
26. Sections 579A to 579L of the Corporations Act permit the pooling of payments in certain circumstances and subject to any orders made by a court. Section 42(3) of the Bell Act is inconsistent with those sections of the Corporations Act as it provides for the pooling of payments to be made to a person in respect of the aggregate of all liabilities of all WA Bell Companies to that person as a creditor and without being subject to any order of a court.
- 20 27. Sections 480 and 481 of the Corporations Act provide for the discharge of a liquidator from liability only by an order of a court. Section 45 of the Bell Act is inconsistent with those sections of the Corporations Act as it provides that, upon dissolution of a WA Bell Company, a liquidator of the company is discharged from all liability arising out of or relating to anything done, or purportedly done, by them in the performance of their duties.
28. Sections 601AD, 601 and 601AA of the Corporations Act provide that a company ceases to exist upon deregistration. Section 30 of the Bell Act is inconsistent with those sections of the Corporations Act as it provides that a WA Bell Company ceases to exist upon the Governor dissolving the company by proclamation.
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Section 5F of the Corporations Act

29. The combined effect of ss.5F(1)(d) and 5F(2)(d) of the Corporations Act is that if a provision of a law of a State declares a "matter" to be an "excluded matter" for the purposes of s.5F in relation to the "Corporations legislation",<sup>42</sup> the provisions of the Corporations legislation (other than s.5F and otherwise than to any extent specified in the State law) do not apply in the State in relation to the "matter".
30. By s.51(1) of the Bell Act, each WA Bell Company is declared to be an "excluded matter" for the purposes of s.5F of the Corporations Act in relation to the whole of

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<sup>42</sup> "Corporations legislation" includes the Corporations Act: section 9.

the Corporations legislation (other than to the extent specified in sub-sections (2) and (3)).

31. The Plaintiff's case is that:

(a) s.5F(2) of the Corporations Act only operates to dis-apply the provisions of the Corporations legislation from operating "in a State" where the "matter" is one which has a sufficient territorial attribute or can be applied in a territorially defined or ascertainable way; and

10 (b) the provisions of the Corporations Act with which the Bell Act is inconsistent do not have a, alternatively do not have a sufficient, territorial attribute and cannot be applied in a territorially defined or ascertainable way.

Section 5G of the Corporations Act

32. Section 5G(1) of the Corporations Act provides that s.5G "has effect despite anything else in the Corporations legislation". In respect of "a post commencement provision",<sup>43</sup> s.5G applies to the interaction between a provision of the law of a State and a provision of the Corporations legislation if the State provision is declared by the law of the State to be a "Corporations legislation displacement provision" for the purposes of s.5G.

20 33. By s.52(2) of the Bell Act, Parts 3, 4 and 5 and ss.55 and 56(3) of the Act are declared to be "Corporations legislation displacement provisions" for the purposes of s.5G of the Corporations Act. Accordingly, Parts 3, 4 and 5 and ss.55 and 56(3) of the Bell Act are each "a post-commencement provision" within the meaning of s.5G(3).

34. Section 5G(8) of the Corporations Act provides that the provisions of Chapter 5 of the Corporations Act do not apply to a scheme of arrangement, receivership, winding-up or other external administration of a company to the extent to which the scheme, receivership, winding-up or administration is carried out in accordance with the provision of a law of a State.

35. The Plaintiff's case is that:

30 (a) s.5G(8) of the Corporations Act only operates to dis-apply the provisions of Chapter 5 of the Corporations Act in respect of, relevantly, a winding-up of a company to the extent to which the winding-up (as opposed to, for example, its administration) is carried out in accordance with the provision of a law of a State; and

(b) the Bell Act does not provide for or involve the carrying out of a "winding-up ... of a company" within the meaning of s.5G(8) of the Corporations Act.

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<sup>43</sup> See Item 3 of the table set out in Corporations Act, s.5G(3).

36. Section 5G(11) of the Corporations Act provides that Corporations legislation does not operate in a State to the extent necessary to ensure that no inconsistency arises between the provision of the Corporations legislation and the provision of a law of a State that would otherwise be inconsistent with a provision of the Corporations legislation.
37. The Plaintiff's case is that:
- 10 (a) s.5G(11) of the Corporations Act only operates to dis-apply provisions of the Corporations Act from operating "in" a State which has a sufficient territorial attribute or can be applied in a territorially defined or ascertainable way; and
- (b) the provisions of the Corporations Act with which the Bell Act is inconsistent do not have a, alternatively do not have a sufficient, territorial attribute and cannot be applied in a territorially defined or ascertainable way.

*HIH Casualty and General Insurance Pty Ltd (in Liq) v Builders Insurers' Guarantee Corporation*

- 20 38. The operation of ss.51' and 5G of the Corporations Act was considered in *HIH Casualty and General Insurance Ltd (in liq) v. Building Insurers' Guarantee Corporation*.<sup>44</sup> The analysis of Barrett J has been subsequently referred to with apparent approval by appellate courts.<sup>45</sup>
39. The Plaintiff respectfully submits that the analysis of Barrett J is correct and should be adopted by this Court.
40. *HIH* concerned the liquidation of HIH and State statutory authorities seeking to rely upon contracts of reinsurance held by HIH. Barrett J labelled the State and Territory legislation as "cut-through provisions", which were designed to "obtain the benefit of reinsurance held by [the insurer] in respect of the relevant claims".<sup>46</sup>
- 30 41. Directions were sought by the liquidators of HIH pursuant to s.479(3) of the Corporations Act in relation to the treatment of proceeds of the reinsurance contracts and the effect on the "cut-through provisions" on s.116(3) of the *Insurance Act 1973* (Cth) (as then enacted), s.116(3) of the *General Insurance Reform Act 2001* (Cth) and ss.555 (Debts and claims proved to rank equally except as otherwise provided), 556 (Priority payments) and 562A (Application of proceeds of contracts of reinsurance) of the Corporations Act.
42. The statutes containing the "cut-through provisions" dealt (in various ways) with the circumstance where an insurer by which the forms of compulsory insurance are

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<sup>44</sup> (2003) 202 ALR 610; [2003] NSWSC 1083.

<sup>45</sup> *Pioneer Park Pty Ltd (in liq) v Australian and New Zealand Banking Group Limited* [2007] NSWCA 344 at [18]-[19] per Basten J; *Loo v DPP (Vic)* [2005] VSCA 161 at [26] per Winneke J.

<sup>46</sup> (2003) 202 ALR 610 at 618 [17].

written will become insolvent or otherwise fail to honour their engagements.<sup>47</sup> Barrett J noted: *“the general aim of the state and territory provisions is to cause the authority holding or administering a statutory fund from which is met a claim that would in the normal course have been met by the insurer in respect of the claim”*.<sup>48</sup>

43. The *Insurance Act* and *General Insurance Reform Act* were able to act in harmony with the cut-through provisions. This was not the case with ss.555, 556 and 562A of the *Corporations Act* and it was noted that if any of the cut-through provisions contained in the State legislation were inconsistent with the *Corporations Act* they would be invalid to the extent of any inconsistency.<sup>49</sup>

10 44. Barrett J noted that, under s.5F of the *Corporations Act*, a provision of State or Territory law may declare a matter to be an excluded matter for the purposes of s.5F in relation to the whole or some specified portion of the *Corporations Act*. Section 5F was classified as a *“defining and moulding provision”*, which defines and moulds its own operation to prevent any s.109 inconsistency. His Honour stated<sup>50</sup>:

20 *“The concept is thus a dual concept of restriction of territorial application and restriction of application to subject matter. The effect of both s 5F(2) and s 5F(4) is to single out a particular “matter”, being the “matter” identified by the state or territory enactment, and to cause the territorial operation of the Corporations Act to be modified and restricted so that such application as it would otherwise have had “in” the relevant state or territory “to” (or “in relation to”) the particular “matter” is negated. As a corollary, such application as the Corporations Act has to or in relation to the particular matter that cannot be classified as application “in” the state or territory is not negated.”*

45. Barrett J held that the provisions in question were not capable of having a territorial quality linked to a state or territory. In this regard, Barrett J stated as follows:

30 *“[89] Such a concept is no doubt meaningful in relation to Corporations Act provisions dealing with matters having clear territorial attributes. Section 911A, for example, says that a person who carries on a financial services business “in this jurisdiction” must hold a licence ...*

*[91] The directions in ss555, 556 and 562A of the Corporations Act as to the application of assets and payment of claims in the winding up of a company that that Act itself causes to be incorporated “in this jurisdiction” and therefore to be a body corporate cannot be regarded as applying “in” any particular state or territory “to” (or “in relation to”) the “matter” of such application and payment. The directions apply “in” the whole of the area to which the Commonwealth Act’s territorial operation extends. And*

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<sup>47</sup> (2003) 202 ALR 610 at 618 [15].

<sup>48</sup> (2003) 202 ALR 610 at 618 [17].

<sup>49</sup> (2003) 202 ALR 610 at 641-642 [77].

<sup>50</sup> (2003) 202 ALR 610 at 645 [88].

they do so in a way that is geographically indiscriminate, so that, unless there is some clear provision to the contrary, a particular thing that must be done in obedience to them cannot be regarded as something to be done "in" one particular state or territory rather than any other and an act of statutory compliance or implementation does not in any sense belong to one state or territory rather than any other. The fact that a particular liquidator has his office in Sydney or Hobart, or that the bulk of the work in relation to a particular winding up is done in Adelaide or Perth does not mean that compliance with and implementation of ss555, 556 and 562A take on some character identifiable with the particular state... "

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46. As for s.5G(8), Barrett J described its operation in the following terms:<sup>51</sup>

"Section 5G(8) operates in a conceptually similar way. As relevant to a situation of the kind under discussion, that section says that the provisions of Ch 5 of the Corporations Act (in which ss555, 556 and 562A appear) "do not apply to a ... winding up ... of a company to the extent to which the ... winding up ... is carried out in accordance with a provision of a law of a State or Territory". The object upon which this part of s5G(8) fixes is the winding up of a company. It recognises that a state or territory provision made applicable by s 5G may affect the carrying out of such a winding up. Where such a state or territory provision has such an effect, Ch 5 of the Corporations Act has, in relation to the winding up, a modified operation. Its application to the winding up is denied or withdrawn so far as is necessary to allow the winding up to be carried out in accordance with the state or territory provision. Use of the words "carried out" in relation to "winding up" recognise that winding up governed by the parts of Ch 5 relevant to winding up is a process."

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47. Barrett J also stated:

"The collection of activities thus generally described constitutes the "winding up" with which s 5G(8) is concerned. As in the case of s 5G(4), the effect of s 5G(8) is to cause the Corporations Act provisions as to the carrying out of the winding up process to yield in a comprehensive way that has no territorial quality distinct from the overall reach of that Act."<sup>52</sup>

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Section 5F of the Corporations Act does not operate to save the inconsistencies between the Bell Act and the Corporations Act

48. The observations of Barrett J in *IIIH* are equally applicable to the sections of the Corporations Act with which the Bell Act is inconsistent as none of them are by their nature operative in a territorially defined or ascertained way or possessing a (let alone sufficient) territorial attribute.

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49. Put another way, the application of s.5F cannot avoid the identified inconsistency between the provisions of the Bell Act and the provisions of the Corporations Act other than in Western Australia. As the subject matter of the dis-application of the

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<sup>51</sup> (2003) 202 ALR 610 at 647-648 [97].

<sup>52</sup> (2003) 202 ALR 610 at 640 [97].

Corporations Act is such that it is not limited to Western Australia, s.5F is incapable of operating so as to dis-apply the relevant provisions of the Corporations Act outside of the State. This is particularly so given that the Bell Act itself provides<sup>53</sup> that “*it is the intention of the parliament that this act should, so far as possible, operate to the full extent of the extraterritorial legislative power of the State*”.

50. Accordingly, it would be open to Woodings to challenge the transfer of property affected by s.22 of the Bell Act by reference to s.468 of the Corporations Act in a State other than Western Australia. Moreover, immediately before the transfer day, the property of the WA Bell Companies was held in the form of term deposit accounts with NAB and Westpac which were governed by the laws of Victoria and New South Wales respectively and located outside of Western Australia.<sup>54</sup>

Section 5G(8) of the Corporations Act does not operate to save the inconsistencies between the Bell Act and the Corporations Act

51. There are no general principles of company law applicable to a winding up in Australia.<sup>55</sup>
52. As to the “*process*” of winding up, in *HHH Barrett J* referred, with apparent approval, to the description by McPherson SPJ in *Crust’n’Crumbs Bakers (Wholesale) Pty Ltd*.<sup>56</sup>
- 20 “*Winding up is a process that consists of collecting the assets, realising and reducing them to money, dealing with proofs of creditors by admitting or rejecting them, and distributing the net proceeds, after providing for costs and expenses, to the persons entitled. It is a process, comparable to an administration in equity, that begins or “starts” with and order of the court. However it is not the court order itself that “winds up” the company: the order does no more than direct that the company be wound up, which is then carried into effect by an officer of the court, the liquidator, who does the things that I have identified in order to liquidate the company’s assets and wind up its affairs. In referring to “winding up” or to the company being “wound up”, and to the manner and the incidents of doing so, s 601 therefore speaks not of proceedings aimed at obtaining an order of court to wind up the company but of the process that ensues from and follows such*
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<sup>53</sup> Bell Act, s.6.

<sup>54</sup> ASC at [33]-[35], [39]-[41], and see also *Haque v Haque* [1964-1965] 114 CLR 98 at 107 (Barwick CJ) and 136-137 (Windeyer J); *Foley v Hill* [1848] 1 H.L.C. 28. For the avoidance of doubt, the Plaintiff does not seek to maintain its claims concerning the situs of relevant debts at [40] in the Reply.

<sup>55</sup> *Sons of Gwalia Ltd v Margaratic* [2007] HCA 1 at [36] per Gummow J.

<sup>56</sup> [1992] 2 Qd R 76 at 78. The observations of MacPherson SPJ in *Crust’n’Crumbs* have been referred to and applied, including in *Joye v Beach Petroleum NL and Cortaus Limited (in Liq)* [1996] FCA 1552 at [49] (Beaumont and Lehane JJ) and [3] (Spender J); *Commonwealth of Australia v Emanuel Projects Pty Ltd* [1996] FCA 1633 at [14]-[15] (Branson J); *Scobie and Scobie Ex Parte: Deputy Commissioner of Taxation* [1995] FCA 1456 at [25] (Cooper J); *Australian Securities and Investments Commission v Primalife Corporation Limited* [2006] FCA 1072 at [28] (Goldberg J); *Mier & Jonsson v FN Management* [2005] QCA 408 at [15]-[17] (Keane JA, with whom McMurdo P and Douglas J agreed).

*an order. Leaving aside the case of a successful appeal, winding up thus "starts" when, and not before, an order to wind up is made appointing a liquidator."*

53. As for the Companies legislation, the Corporations Act provides the following with respect to the carrying out of a winding up, namely for winding up in insolvency,<sup>57</sup> winding up by the Court on other grounds,<sup>58</sup> the powers and duties of court appointed liquidators and general powers of the courts,<sup>59</sup> voluntary winding up,<sup>60</sup> the position of contributories,<sup>61</sup> the powers and duties of liquidators generally,<sup>62</sup> investment of surplus funds and unclaimed money to be paid to the Australian Securities and Investment Commission (ASIC),<sup>63</sup> committees of inspection,<sup>64</sup> proof and ranking of claims,<sup>65</sup> matters such as undue preferences,<sup>66</sup> disclaimer of onerous property,<sup>67</sup> pooling of funds,<sup>68</sup> recovering property or compensation,<sup>69</sup> offences,<sup>70</sup> employee entitlements,<sup>71</sup> miscellaneous matters such as examining a person about a corporation.<sup>72</sup>
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54. In *Mier & Jonsson v FN Management*,<sup>73</sup> Keane JA (as his Honour then was) (with whom McMurdo P and Douglas J agreed) held that where a statute makes reference, without more, to the "winding up" of an entity "*it is referring to the application of a procedure containing these essential characteristics*".<sup>74</sup> This must be so where the reference to "winding up" is in fact contained in the self-same statute that otherwise provides for the process and procedure of "winding up".
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55. Viewed in this way, when one has regard to the provisions of the Act, on no basis can it fairly be said that the "*winding up (of each WA Bell Company) is carried out in accordance with the provision(s) of (the Act)*" within the meaning of s.5G(8).

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<sup>57</sup> Corporations Act, Part 5.4.

<sup>58</sup> Corporations Act, Part 5.4A.

<sup>59</sup> Corporations Act, Part 5.4B.

<sup>60</sup> Corporations Act, Part 5.5.

<sup>61</sup> Corporations Act, Part 5.6, Division 2.

<sup>62</sup> Corporations Act, Part 5.6, Division 3.

<sup>63</sup> Corporations Act, Part 5.6, Division 4.

<sup>64</sup> Corporations Act, Part 5.6, Division 5.

<sup>65</sup> Corporations Act, Part 5.6, Division 6.

<sup>66</sup> Corporations Act, Part 5.6, Division 7.

<sup>67</sup> Corporations Act, Part 5.6, Division 7A.

<sup>68</sup> Corporations Act, Part 5.6, Division 8.

<sup>69</sup> Corporations Act, Part 5.7B.

<sup>70</sup> Corporations Act, Part 5.8.

<sup>71</sup> Corporations Act, Part 5.8A.

<sup>72</sup> Corporations Act, Part 5.9.

<sup>73</sup> [2005] QCA 408.

<sup>74</sup> [2005] QCA 408, [16].

56. Whilst Part 4 of the Bell Act is headed "*Completion of winding up of WA Bell companies*", what it actually provides for is the effective termination (or, at a minimum, suspension) of the "*winding up of WA Bell companies*" by divesting each WA Bell Company of its assets, preventing the liquidator of each WA Bell Company from doing anything (other than providing information to the Authority and any auditor appointed by the Authority pursuant to s.33) and then creating a process, operating completely externally from any WA Bell Company, by which the former assets of each WA Bell Company may ultimately be transferred to a former creditor of a WA Bell Company, not in accordance with any concept of winding up, but by reference to the *sui generis* criteria (both as to process and substantive rights) laid out in ss.34 to 49 of the Bell Act.
57. At its most basic, a provision which divests a company in liquidation of its assets is not a provision which can fairly be described as dealing with the "winding up" of the company. Indeed, the fact that the company is in liquidation is incidental to that provision's purpose and effect, namely to denude that corporation of its assets.
58. Moreover, the Bell Act applies to companies which have been de-registered. On no basis could it be said in respect of such companies that it provides for their "winding up".
59. The Plaintiff acknowledges that, in addition to "winding up", s.5G(8) also speaks of "*administration*". It may be contended on behalf of the State that s.5G(8) can be construed so as to exclude the provisions of Chapter 5 from applying to a winding-up of a company to the extent that a provision of a law of a State provides for the "*administration*" of the company. Any such contention must fail for the following reasons:
- (a) the use of the word "*the*" (as opposed to, for example, the words "a" or "any") connects each reference to "*scheme, receivership, winding up or administration*" to the preceding words "*a scheme of arrangement, receivership, winding up or other external administration of a company*". Section 5G(8) thus provides that the provisions of Chapter 5 "*do not apply to a ... winding up ... to the extent to which the winding up ... is carried out in accordance with the provision of a law of a State or territory*". Section 5G(8) therefore has no application to a "*winding up ... of a company*" where what is "*carried out in accordance with the provision of a law of a State or territory*" is other than a "*winding up*" of a company;
- (b) in any event, the word "*administration*" where it second appears is clearly a reference back to the words "*other external administration*". The proper construction of the word "*administration*" where it second appears must therefore be a reference to "*external administration of a company*". What constitutes the "*external administration of a company*" is shaped by what is provided in Parts 5.1, 5.2 and 5.3 of Chapter 5 of the Corporations Act. What the Authority is enacted to do under the Act is not akin with or analogous to any "*external administration of a company*" provided for in Chapter 5 of the Corporations Act. Moreover, in no way can what is provided for in the Act properly be construed as

the external administration “of a company”. In this regard, the Plaintiff refers to and repeats paragraph 35 above.

Section 5G(11) of the Corporations Act does not operate to save the inconsistencies between the Act and the Corporations Act

60. The Plaintiff’s submissions with respect to s.5F apply equally with respect to s.5G(11).

**Section Five: The Bell Act is inconsistent with provisions of the TAA, ITAA 1936, ITAA 1997 applicable to Woodings, the Plaintiff and other Bell group companies**

10 61. The ITAA 1936, ITAA 1997 and TAA are enacted by the Commonwealth Parliament in reliance upon its legislative power with respect to taxation.<sup>75</sup> The general scheme of the Acts is to define the duties, obligations and liabilities of taxpayers in respect of income tax throughout the Commonwealth.<sup>76</sup>

62. The commencement of a winding up under the Corporations Act does not cause the company to cease to exist. This means incomes or gains are derived by the company and the company may continue to be the owner of assets for Capital Gains Tax purposes.<sup>77</sup> The company may continue to be a “franking entity” for dividend imputation purposes<sup>78</sup> and the liquidator may be subject to extensive duties arising from Commonwealth tax legislation.<sup>79</sup>

20 63. The Corporations Act does not give priority to debts owing by a company to the Commissioner.<sup>80</sup> Instead, the Commissioner ranks equally with other creditors.<sup>81</sup>

64. In terms of Commonwealth tax legislation and s.109 of the Constitution, it is possible to analyse the matter through the prism of “direct” inconsistency and “indirect” inconsistency.

Direct inconsistency

65. It is common ground between the parties that:

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<sup>75</sup> Constitution, s.51(ii).

<sup>76</sup> In the context of the ITAA 1936, see *Deputy Commissioner of Taxation v Moorebank* (1988) 165 CLR 55 at 64 per Mason CJ, Brennan, Deane, Dawson and Gaudron JJ. The decision in *Moorebank* was referred to approvingly in *Bui v Director of Public Prosecutions (Cth)* (2012) 244 CLR 638 at [25] per French CJ, Gummow, Hayne, Kiefel and Bell JJ.

<sup>77</sup> ITAA 1997, ss.106-35 and 108-5. As occurred in the facts of *Commissioner of Taxation v Australian Buildings Systems Pty Ltd (in Liq)* [2015] HCA 48.

<sup>78</sup> ITAA 1997, Pt 3-6, ss.202-15 and 960-115; Schomer, Schofield and Gates, *Tax & Insolvency* (3<sup>rd</sup> Edition, Thomson & Reuters 2011) at 25-26.

<sup>79</sup> E.g. Part 4-15 of Sch 1 of the TAA.

<sup>80</sup> *Corporations Act*, ss. 500(1), 555, 556(1), 556(2).

<sup>81</sup> Any priority was removed by the *Taxation Debts (Abolition of Crown Priority Act) 1980 (Cth)*. See further: *Bell Group Limited (in liq) v Deputy Commissioner of Taxation* [2015] FCA 1056 at [38]-[45] per Wigney J for explanation of the relevant sections.

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- (a) pre-liquidation and post-liquidation assessments issued by the Commissioner gave rise to tax related liabilities of certain Bell companies to the Commonwealth each of which is a debt due to the Commonwealth;<sup>82</sup>
  - (b) Woodings had a tax related liability in his capacity as liquidator of TGBL to the Commonwealth with respect to the post-liquidation assessment in respect of TBGL, which is a debt due to the Commonwealth;<sup>83</sup>
  - (c) the Commissioner has demanded that TBGL and Woodings as liquidator of TBGL and all other Bell group companies pay to the Commissioner tax alleged to be owing and deferred the date for payment;<sup>84</sup>
  - (d) Woodings in his capacity as liquidator of TBGL and the relevant Bell group companies objected to their assessments immediately before the transfer day;<sup>85</sup> and
  - (e) Woodings owed duties under the Commonwealth tax legislation regarding the payment of tax by the WA Bell Company.<sup>86</sup>

*Obligations arising under s.215 of the ITAA 1936*

- 20
66. For the WA Bell Companies that were wound up before 2006, s.215 of the ITAA 1936 is applicable.<sup>87</sup> It is common ground between the parties that s.215 requires Woodings to, amongst other things:
- (a) aside from the payment of extraordinary debts, not part with any assets of the company of which he is the liquidator without leave of the Commissioner until he has been notified by the Commissioner of the amount which appears to the Commissioner to be sufficient to provide for any tax which then is or will thereafter become payable by the company;
  - (b) set aside assets to the value of an amount calculated in accordance with former s.215(3)(b) of the ITAA 1936 (as it existed at the time); and

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<sup>82</sup> ASC [71A] [77] (SCB 127-132)

<sup>83</sup> ASC [78] (SCB 132)

<sup>84</sup> ASC [79] (SCB 132)

<sup>85</sup> ASC [80] (SCB 132)

<sup>86</sup> ASC, [82] (SCB 133); e.g. ss. 6(1) and 254 of the ITAA 1936. See further *Commissioner of Taxation v Australian Building Systems Pty Ltd (in Liq)* [2015] HCA 48 at [1], [41], [64], [104].

<sup>87</sup> Item 7 of Schedule 6 of the *Tax Laws Amendment (Repeal of Inoperative Provisions) Act 2006* (Cth); ASC at [82]. Save that s.260-45 of the TAA is applicable to Albany Broadcasters (due to the date it was wound up): ASC at [71C] and [81]. The terms of s.215 of the ITAA 1936 are similar to the provision that replaced it in Schedule 1, s.260-45 of the TAA.

- (c) comply with the terms of s.215 of the ITAA 1936 that are applicable or be personally liable and guilty of an offence.<sup>88</sup>

*Obligations arising under s.254 of the ITAA 1936*

67. It is common ground between the parties that Woodings, as liquidator of each WA Bell Company, is subject to a number of duties contained in s.254 of the ITAA 1936, which, in effect, require Woodings to retain sufficient funds to pay any tax liabilities of himself or the relevant Bell group companies.<sup>89</sup>

*Relevant inconsistency*

- 10 68. The operation of s.22 of the Bell Act is inconsistent with the operation of the former s.215 of the ITAA 1936 (and its successor in s.260-45 of Schedule of the TAA) and s.254 of the ITAA 1936 in that the compulsory transfer of property makes it impossible for Woodings to discharge his obligations arising under the ITAA 1936 and the TAA. Further, s.45 of the Bell Act compromises the Commissioner's ability to recover tax related liabilities.

- 20 69. In this regard, it is noted that there is a dispute between the parties as to whether the proofs of debt lodged by the Commissioner were sufficient to amount to notification within the meaning of former s.215(2) of the ITAA 36 or Schedule 1, s.260-45(3) of the TAA.<sup>90</sup> That is an issue of little consequence given that, even if such notice had been given, Woodings would still be statutorily obliged by former s.215(3)(b) of the ITAA 1936 (and s.260.45(4) of Schedule 1 of the TAA) to set aside assets to the value of the amount calculated in accordance with that section upon receipt of the Commissioner's notification.<sup>91</sup> As noted above, the effect of the Bell Act is to make it impossible for Woodings to discharge even that obligation.

Indirect inconsistency

- 30 70. The Commonwealth tax legislation provides for the orderly and clearly defined recovery of debts by the Commissioner in the context of a liquidation, with duties conferred on the liquidator and a pre-defined priority scheme. This clear system establishing rights, duties and liabilities is not a trivial conflict with the Bell Act, which imposes civil and criminal liability and enables the acquisition of property outside a predictable priority scheme.<sup>92</sup>

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<sup>88</sup> See further ASC at [81].

<sup>89</sup> ASC [82] (SCB 133)

<sup>90</sup> ASC [71G.2] (SCB 130)

<sup>91</sup> ASC [81.2] (SCB 133)

<sup>92</sup> Bell Act, ss.22, 25, 27-29, 35-44, 68-69, 71-72.

**Section Six: The Bell Act infringes Ch III of the Constitution and is inconsistent with the Judiciary Act**

There are limits upon the power of a State Parliament to interfere with court proceedings

71. The Plaintiff accepts that it is open to a State Parliament to legislate in a manner which affects court proceedings.
72. In *HA Bachrach Pty Ltd v Queensland*,<sup>93</sup> this Court quoted the following passage from *Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth*:
- 10       *"It is well established that Parliament may legislate so as to affect and alter rights in issue in pending litigation without interfering with the exercise of judicial power in a way that is inconsistent with the Constitution..."*
- It is otherwise when the legislation in question interferes with the judicial process itself, rather than with the substantial rights which are at issue in the proceedings".*
73. One way in which a State Parliament might affect a court proceeding is to legislate for the compulsory acquisition (on just terms or otherwise)<sup>94</sup> of the property which is the subject matter of a proceeding in respect of which there are competing claims. This would inevitably result in the legal proceedings being discontinued or dismissed on the basis that the proceedings were otiose.
- 20   74. In such as case, the acquisition of the property by the State will not have interfered with the exercise of judicial power or with the judicial process.
75. However, s.107 of the Constitution makes clear that the State Parliament's legislative power is subject to those limitations imposed by the Constitution, including Chapter III.
76. The Bell Act infringes limitations imposed by Chapter III and is inconsistent with the conferral of federal jurisdiction by the Judiciary Act upon the Supreme Court of Western Australia in three respects:
- 30       (a)       s.25(5) of the Bell Act prohibits the exercise of federal judicial power;
- (b)       ss.22 and 73 of the Bell Act interfere with or impair the exercise of federal judicial power; and
- (c)       the Bell Act transfers the exclusively judicial function of quelling a matter to the State Executive.

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<sup>93</sup> (1998) 195 CLR 547, 563 [19].

<sup>94</sup> *Darham Holdings Pty Ltd v State of New South Wales* (2001) 205 CLR 399.

How the Bell Act resolves the controversy between the creditors

77. The stated object of the Bell Act is to “*provide a mechanism, that avoids litigation, for the distribution of funds ... received ... as a consequence of the Bell litigation*”.<sup>95</sup> That is, the Bell Act is calculated to terminate the resolution of the dispute concerning the distribution of funds received as a consequence of the Bell litigation part of which is presently before the Supreme Court of Western Australia and have it resolved by the Executive. So much was acknowledged by the Treasurer and the Attorney General in their Second Reading Speeches.<sup>96</sup>
78. The Treasurer explained:<sup>97</sup>
- 10     “*Litigation over the distribution of these funds has been threatened and run since settlement, occupying the Western Australian Supreme Court and the English High Court, and threatening to consume a great deal more time and resources of this state. After two decades of incredibly expensive litigation, the government is not inclined to let a third decade of litigation pass.*”
79. The litigation which the Bell Act is intended to terminate includes Supreme Court proceedings COR 146 of 2014 and COR 208 of 2014.
80. Prior to the transfer day, the Available Assets (as defined in the ASC) were held by, for, or on behalf of the Bell group companies.<sup>98</sup>
- 20     81. At the beginning of the transfer day, all amounts held by, for or on behalf of the registered WA Bell Companies transferred to and vested in the Authority by force of s.22 of the Bell Act.<sup>99</sup>
82. The Bell Act then stays or prohibits litigation concerning liabilities of the WA Bell Companies. For reasons explained below, s.25(5) prohibits the continuation of COR 208 of 2014 and s.73 stays COR 146 of 2014.
83. Section 34 of the Bell Act provides for creditors to be given a notice requiring the creditor to give full particulars of the liabilities of WA Bell Companies.
84. Section 36(3) allows creditors to make submissions as to their liabilities.
85. Sections 39(2) and 40(3) provide for the Authority to apply something approximating the law in determining how the assets are to be distributed.

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<sup>95</sup> Bell Act, s.4(a). [Emphasis added.]

<sup>96</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 6 May 2015, 3167 (Dr M.D. Nahan, Treasurer). See also Western Australia, *Parliamentary Debates*, Legislative Council, 11 August 2015, 4963 (Michael Mischin, Attorney General). See further, Bell Act, s.4(g).

<sup>97</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 6 May 2015, 3167 (Dr M.D. Nahan, Treasurer).

<sup>98</sup> ASC [82A] (SCB 134)

<sup>99</sup> ASC [82C] (SCB 134)

86. Sections 39(1) and 40(2) provide for the Authority to make a 'recommendation' as to the distribution of the assets.
87. There is no meaningful prospect of judicial review of the Authority's recommendation for two reasons. First, ss.37(3) and 39(6) confirm the "absolute discretion" of the Authority in determining liabilities and making recommendations. Secondly, judicial review is excluded as far as constitutionally possible by s.74.
- 10 88. Sections 41(2) and 42(2) provide for the Governor to make a 'determination' as to the distribution of the assets. There can be no doubt that the Governor, in accordance with convention, would make her determination in accordance with the recommendation.
89. Section 44 then provides for the Authority to implement the Governor's recommendation.
90. During this time, the liabilities of WA Bell Companies to the creditors continue to exist.
91. However, in order to receive payment, creditors must execute a deed which provides for the release or discharge of any person from any liability that the Minister considers appropriate. The intention of that provision is made clear in the Treasurer's Second Reading Speech:<sup>100</sup>
- 20 *"No moneys will be paid to an entity unless litigation by that party or its associates anywhere in the world is terminated and releases provided by the relevant parties."*
92. Given that the creditors will be receiving a share of over \$1 billion, creditors will inevitably enter into this deed. If they do not, the liabilities of WA Bell Companies to those creditors are discharged and extinguished by the Bell Act.<sup>101</sup> The liabilities of creditors of WA Bell Companies who do not receive any payment under a determination are also discharged and extinguished by the Bell Act.<sup>102</sup>
- 30 93. The Authority's 'recommendation' therefore operates as the final decision as to the distribution of assets, which is given legal effect by the Governor's determination and all liabilities are extinguished by the Act on or following the making of the Governor's determination.
94. It is in this way that the Bell Act provides for the Western Australian Executive (through the Authority and the Governor) to resolve the controversy between the creditors.

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<sup>100</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 6 May 2015, 3167 (Dr M.D. Nahan, Treasurer).

<sup>101</sup> See s.44(5)(a) and (7)(a) of the Bell Act.

<sup>102</sup> See s.43(8) of the Bell Act.

The exercise of federal jurisdiction by the Supreme Court in COR 146 of 2014 and COR 208 of 2014

*Investing of federal jurisdiction in Supreme Court of Western Australia*

95. Sections 75 and 76 of the Constitution identify those matters which are in federal jurisdiction.<sup>103</sup>
96. Section 77(iii) of the Constitution empowers the Commonwealth Parliament to make laws investing any court of a State with federal jurisdiction.
- 10 97. Section 39(2) of the Judiciary Act invests the several Courts of the States with federal jurisdiction within the limits of their jurisdiction subject to ss.38 and 39(2)(a)-(c) of the Judiciary Act.
98. Within the identified limits, s.39(2) of the Judiciary Act therefore invests federal jurisdiction in the Supreme Court of Western Australia.

*COR 146 of 2014 and COR 208 of 2014*

99. Key features of COR 146 and 2014 and COR 208 of 2014 are identified in the ASC.<sup>104</sup>
100. Proceedings COR 146 of 2014 and COR 208 of 2014 both concern the same ‘matter’.<sup>105</sup> That ‘matter’ is the justiciable controversy that has arisen between creditors of various Bell group companies, namely the Plaintiff, BGNV, ICWA and the Commonwealth, as to how the Available Assets are to be distributed between the creditors.
- 20 101. That controversy is justiciable because it has led to those claims for relief under federal law made in COR 146 of 2014 and COR 208 of 2014. The justiciable controversy is in federal jurisdiction because the Commonwealth is a party and because it arises under laws made by the Commonwealth Parliament, namely the Corporations Act.

Section 25(5) of the Bell Act prohibits the exercise of federal judicial power

*State legislation cannot withdraw or prevent exercise of federal jurisdiction*

102. Section 71 of the Constitution invests the judicial power of the Commonwealth in such State courts as the Commonwealth Parliament invests with federal

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<sup>103</sup> As to the meaning of “federal jurisdiction”, see *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365. [6] (Gleeson and McHugh JJ); [68] (Gummow, Hayne and Heydon JJ)

<sup>104</sup> See ASC [42]-[47]; (SCB 104-105); [51]-[58A] (SCB 106-108)

<sup>105</sup> See ASC [45.1A] (SCB 105); [54] (SCB 108)

jurisdiction. A State court invested with federal jurisdiction is obliged to exercise that jurisdiction.<sup>106</sup>

103. In *ASIC v Edensor*, Gleeson CJ, Gaudron and Gummow JJ said:<sup>107</sup>

*“It should be emphasised that the law of a State cannot withdraw from this Court federal jurisdiction conferred by s 75 of the Constitution, nor the federal jurisdiction which a court (State or federal) otherwise may exercise under a conferral or investment of jurisdiction by a law made under s 76 or s 77 of the Constitution; nor may a State law otherwise limit the exercise of federal jurisdiction.”*

10 *Operation of s.25(5) of the Bell Act*

104. Section 25(5) of the Bell Act provides that specified actions, claims or proceedings may not be made or maintained against specified parties except in accordance with Part 4 Division 2 of the Bell Act. Part 4 Division 2 of the Bell Act establishes an executive rather than judicial process and so s.25(5) prohibits the commencement or continuation of any proceedings in a court of the specified kind against the specified parties.

105. The specified actions, claims or proceedings are those “of any nature arising out of, or relating to, a liability that may be proved in accordance with Part 4 Division 2”.

20 106. Section 25(1) of the Bell Act provides that a liability of a WA Bell Company that may be proved in accordance with Part 4 Division 2 of the Bell Act includes a liability that, immediately prior to the transfer day, was admissible to proof against the company in the winding up of the company under Part 5.6 of the Corporations Act.

107. The parties specified by s.25(5) are the Authority, the Fund, a WA Bell Company, the liquidator of a WA Bell Company, the Administrator or the State.

108. Therefore, s.25(5) prohibits the commencement or continuation or any legal proceedings which relate to a liability of a WA Bell Company against one of those parties.

30 109. Section 25(5) of the Bell Act draws no distinction between proceedings in federal jurisdiction and proceedings in State jurisdiction.

*Supreme Court proceeding COR 208 of 2014*

110. In proceeding COR 208 of 2014, ICWA seeks a declaration that ICWA is a creditor of BGF as that term is used in s.564 of the Corporations Act.<sup>108</sup>

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<sup>106</sup> *Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49, 62. See generally *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389, 398.

<sup>107</sup> (2001) 204 CLR 559, [59].

<sup>108</sup> ASC [52B.1] (106)

111. Section 564 of the Corporations Act is in Part 5.6 of the Corporations Act.
112. Section 553 of the Corporations Act, which is also in Part 5.6 of the Corporations Act, relevantly provides that all debts payable by, and all claims against, a company are admissible to proof against the company.
113. Therefore, in COR 208 of 2014, ICWA seeks a declaration that a WA Bell Company (namely BGF) has a liability to ICWA that, immediately prior to the transfer day, was admissible to proof against a WA Bell Company in the winding up of the company under Part 5.6 of the Corporations Act.
- 10 114. Supreme Court proceeding COR 208 of 2014 is therefore a legal proceeding which relates to a liability that may be proved in accordance with Part 4 Division 2.
115. As the Plaintiff and Defendant agree, in COR 208 of 2014, the Supreme Court of Western Australia is exercising federal jurisdiction.<sup>109</sup> This is because the Commonwealth is the twelfth defendant<sup>110</sup> and because COR 208 of 2014 arises under laws made by the Commonwealth Parliament, namely the *Trade Practices Act 1974* (Cth), the *Australian Securities and Investments Commission Act 2001* (Cth) and the Corporations Act.<sup>111</sup>
- 20 116. The defendants to COR 208 of 2014 include WA Bell Companies (namely TBGL, BGF and Bell Bros as second, fourth and sixth defendants) and the liquidator of WA Bell Companies (namely Woodings as liquidator of the TBGL, BGF and Bell Bros as first, third and fifth defendants).<sup>112</sup>
117. Accordingly, as Supreme Court proceeding COR 208 of 2014 is a proceeding which relates to a liability that may be proved in accordance with Part 4 Division 2 and is made and maintained against WA Bell Companies and the liquidator of WA Bell Companies, s.25(5) of the Bell Act purports to prohibit the maintenance of COR 208 of 2014.
118. That is, s.25(5) of the Bell Act prohibits the exercise of federal judicial power by the Supreme Court in COR 208 of 2014.

*Section 25(5) of the Bell Act is invalid*

- 30 119. Section 25(5) infringes s.71 of the Constitution by seeking to prohibit the exercise of the judicial power of the Commonwealth by the Western Australia Supreme Court, which has been vested with federal jurisdiction by s. 39(2) of the Judiciary Act.
120. Section 25(5) cannot be read down so as only to prevent the commencement or continuation of proceedings which are in State jurisdiction and so s.25(5) is wholly invalid because it infringes Chapter III of the Constitution.

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<sup>109</sup> ASC [60] (SCB 109).

<sup>110</sup> ASC [53.9] (SCB 107) and s.75(iii) of the *Commonwealth Constitution*.

<sup>111</sup> ASC [52A] (SCB 106).

<sup>112</sup> ASC [53] (SCB 107).

121. Section 25(5) of the Bell Act is also inconsistent with the conferral of jurisdiction by s.39(2) of the Judiciary Act and is therefore invalid to the extent that it purports to prevent the commencement or continuation of proceedings in federal jurisdiction in the Supreme Court of Western Australia given that a federal law imposes a duty to exercise that jurisdiction.

Sections 22 and 73 of the Bell Act interfere with or impair the exercise of federal jurisdiction by the Supreme Court of Western Australia

*Consequences of transfer of Available Assets by s.22 for Supreme Court proceedings*

- 10 122. The Plaintiff and the Defendant agree that in COR 146 of 2014 and COR 208 of 2014, the Supreme Court of Western Australia is exercising federal jurisdiction.<sup>113</sup>
123. Prior to the transfer day, the Supreme Court of Western Australia had jurisdiction to make an order in COR 146 of 2014 under s.564 of the Corporations Act and to issue a declaration in COR 208 of 2014 as to whether ICWA is a creditor of BGF as that term is used in s.564 of the Corporations Act.<sup>114</sup>
124. The transfer of assets effected by s.22 of the Bell Act does not alter the rights in issue between parties in the proceedings.
125. Instead, the transfer of assets interferes with or impairs the exercise of the Supreme Court of Western Australia of the judicial power of the Commonwealth because of its effect on the order sought in COR 146 of 2014 and the declaration sought in  
20 COR 208 of 2014.
126. The transfer of assets means that any order now made by the Supreme Court in COR 146 of 2014 under s.564 of the Corporations Act would be deprived of any operative effect and that any declaration now made by the Supreme Court in COR 208 of 2014 as to whether ICWA is a creditor of BGF as that term is used in s.564 of the Corporations Act is rendered abstract or hypothetical.<sup>115</sup>
127. In such circumstances, this Court should approach the matter on the basis that the Supreme Court should not and would not make such an order or issue such a declaration.<sup>116</sup>
- 30 128. At the time that the assets are transferred by s.22, the liabilities of creditors of the WA Bell Companies are not extinguished by the transfer of the Available Assets and the controversy between the creditors as to the division of assets remains unresolved but the Supreme Court is rendered powerless to quell the dispute.

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<sup>113</sup> ASC [59] - [60] (SCB 109).

<sup>114</sup> ASC [82F.1] - [82F.2] (SCB 135).

<sup>115</sup> ASC [82G.1] - [82G.2] (SCB 135-136).

<sup>116</sup> *CGU Insurance Limited v Blakeley* [2016] HCA 2, [83]; *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, [49].

129. By transferring the subject matter of the dispute, the Parliament has interfered with the judicial process itself by depriving the Supreme Court of the power to quell the controversy.

*Operation of s.73(1) of the Bell Act*

130. Section 73(1) of the Bell Act provides that on and from the transfer day, a person cannot continue proceedings in a court with respect to property that was, immediately before that day, property of a WA Bell Company except with the leave of the Court.
- 10 131. Supreme Court proceedings COR 146 of 2014 and COR 208 of 2014 are both with respect to property that was property of a WA Bell Company and both proceedings are therefore stayed by the stayed by force of s.73(1).
132. There is no conceivable prospect of the Court granting leave to continue either proceeding in circumstances where the Available Assets have been transferred to the Authority: the prospect of the grant of leave is illusory.
133. Section 73 of the Bell Act therefore amounts to a legislative direction for proceedings to be permanently stayed.

*Sections 22 and 73 of the Bell Act are invalid*

134. The transfer effected by s.22 of the Bell Act and the stay of proceedings imposed by s.73 interfere with or impair the exercise of the judicial power of the Commonwealth by the Supreme Court of Western Australia which is invested in that court by s.71 of the Constitution.
- 20 135. For this reason, ss.22 and 73 of the Bell Act infringe Chapter III of the Constitution and are invalid.
136. Further and alternatively, ss.22 and 73 of the Bell Act are inconsistent with the conferral of jurisdiction by s.39(2) of the Judiciary Act and therefore invalid by the operation of s.109 of the Constitution. Although s.109 only provides for invalidity to the extent of the inconsistency, ss.22 and 73 of the Bell Act are rendered wholly invalid by s.109 because there is no narrower operation of those provisions which would be consistent with the conferral of jurisdiction by s.39(2).

30 Transfer of exclusively federal judicial function to the State Executive

137. The invalidity of ss. 22, 25(5) and 73 of the *Bell Act* are symptomatic of a more fundamental constitutional infirmity which is at the heart of the scheme established by the Bell Act.
138. That fundamental constitutional infirmity is that the entire scheme of the Bell Act is to transfer the function of quelling of a matter which arises in federal jurisdiction from the Supreme Court, which is invested with federal judicial power, to the Western Australian Executive, which is not.

139. The attempt to transfer the function of quelling a ‘matter’ arising under ss. 75 and 76 of the Constitution from the Supreme Court to the Executive violates the principle of the separation of powers as it has been understood for over a century.<sup>117</sup>

*Purported transfer of function of resolving a ‘matter’*

140. The Bell Act is designed to transfer the function of quelling of the controversy that has arisen between the creditors as to the distribution of the Available Assets from the courts to the Executive.

10 141. The Bell Act achieves this transfer of function by first transferring the property which is the subject of the controversy to the Authority and then establishing a quasi-judicial process which is administered by the Authority to resolve the competing claims to the assets.

*Quelling of a ‘matter’ is an exclusively judicial function*

142. In *Duncan v New South Wales*, this Court observed that:<sup>118</sup>

*“Some functions of their nature pertain exclusively to judicial power. The determination and punishment of criminal guilt is one of them. The non-consensual ascertainment and enforcement of rights in issue between private parties is another.”*

20 143. One function which the Constitution requires only be performed by a court invested with federal judicial power is the quelling of a matter in federal jurisdiction.

144. In *R v Kirby; Ex parte Boilermakers*,<sup>119</sup> the Dixon CJ, McTiernan, Fullagar and Kitto JJ observed:<sup>120</sup>

*“An exercise of a legislative power may be such that “matters” fit for the judicial process may arise under the law that is made. In virtue of that character, that is to say because they are matters arising under a law of the Commonwealth, they belong to federal judicial power. But they can be dealt with in federal jurisdiction only as the result of a law made in the exercise of the power conferred on the Parliament by s. 76 (ii.) or that provision considered with s. 71 and s. 77.”*

30 145. The Bell Act establishes a precedent by which a State Parliament, being dissatisfied with the manner in which the judicial process is quelling in a particular ‘matter’, is

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<sup>117</sup> *New South Wales v Commonwealth (The Wheat Case)* (1915) 20 CLR 54, 62, 89, 90, 108 and 109, which judgment was approved in *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254, 270.

<sup>118</sup> [2015] HCA 13; (2015) 89 ALJR 462; 318 ALR 375 (footnotes omitted). See also *HA Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547, 562 [15]; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 27.

<sup>119</sup> (1956) 94 CLR 254.

<sup>120</sup> (1956) 94 CLR 254, 269.

able to wrest the ‘matter’ from the courts and set in train an executive process to quell it.

146. For this reason, the Bell Act calls to mind the warning of the Privy Council in *Liyanage v The Queen*.<sup>121</sup>

10           *“If such Acts as these were valid the judicial power could be wholly absorbed by the legislature and taken out of the hands of the judges. It is appreciated that the legislature had no such general intention. It was beset by a grave situation and it took grave measures to deal with it, thinking, one must presume, that it had power to do so and was acting rightly. But that consideration is irrelevant, and gives no validity to acts which infringe the Constitution. What is done once, if it be allowed, may be done again and in a lesser crisis and less serious circumstances. And thus judicial power may be eroded.”*

#### Section Seven: Severance

147. Section 7 of the *Interpretation Act 1984* (WA) provides:

20           *“Every written law shall be construed subject to the limits of the legislative power of the State and so as not to exceed that power to the intent that where any enactment thereof, but for this section, would be construed as being in excess of that power, it shall nevertheless be valid to the extent to which it is not in excess of that power.”*

148. The effect of the Commonwealth equivalent of s.7 was considered by this Court in *Victoria v Commonwealth (Industrial Relations Act Case)*.<sup>122</sup> The Court there observed that it was well settled that such provisions:<sup>123</sup>

*“cannot be applied to effect a partial validation of a provision which extends beyond power unless ‘the operation of the remaining parts of the law remains unchanged’.”*

149. In *New South Wales v Commonwealth (Work Choices Case)*,<sup>124</sup> Kirby J said that where the invalidation of an Act:<sup>125</sup>

30           *“is substantial and would strike down key provisions of a comprehensive and integrated legislative measure, the invocation of statutory or constitutional principles of severance will be inappropriate.”*

150. The provisions of the Bell Act which are invalid by virtue of inconsistency with Commonwealth taxation legislation are, on their proper construction, integral to the

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<sup>121</sup> [1967] 1 AC 259, 291.

<sup>122</sup> (1996) 187 CLR 416.

<sup>123</sup> (1996) 187 CLR 416, 502 quoting *Pidoto v Victoria* (1943) 68 CLR 87, 108.

<sup>124</sup> (2006) 229 CLR 1.

<sup>125</sup> (2006) 229 CLR 1, 240.

operation of the Act. Those provisions cannot and should not be severed from the Act and, as a result, the Bell Act is invalid in its entirety.

151. The position is the same in respect of those provisions of the Bell Act which are invalid by virtue of inconsistency with the Corporations Act.

152. When the combined effect of the inconsistency of the Bell Act with Commonwealth taxation legislation, the Corporations Act and the Judiciary Act is taken into account, it is clear that the Act should be declared wholly invalid.

**Part VII: Applicable Provisions**

153. The applicable legislative provisions are set out in the Plaintiff's List of Authorities.

10 **Part VIII: Orders Sought**

154. The Plaintiff contends that the questions reserved should be answered as follows:

Question 1: The Plaintiff has standing to seek relief in respect of the alleged invalidity of Parts 3 and 4 the Bell Act on the grounds alleged in paragraphs 56 to 58 of the statement of claim.

Question 2: A justiciable controversy exists in respect of the alleged invalidity of Parts 3 and 4 of the Bell Act on the grounds alleged in paragraphs 56.1 and 56.2 of the Statement of Claim insofar as the grounds rely upon s.215 of the ITAA 1936 (alternatively, s.260-45 of Schedule 1 to the TAA).

20 Question 3: Parts 3 and 4 and any of ss.51, 52 and 73 of the Bell Act invalid:

i) by the operation of s 109 of the Constitution by reason of:

(a) inconsistency between that provision (as a law of the State of Western Australia) and:

(b) the ITAA 1936, the ITAA 1997 or the TAA; further or alternatively

(c) the Corporations Act; further or alternatively

(d) s.39(2) of the Judiciary Act; further or alternatively

ii) because it infringes Chapter III of the Constitution.

30 Question 4: The invalid provisions of the Bell Act are not severable from the rest of the Bell Act and accordingly the Bell Act is in invalid in its entirety.

Question 5: The Bell Act invalid in its entirety because it infringes Chapter III of the Constitution.

Question 6: The Defendant should pay the costs of the Special Case.

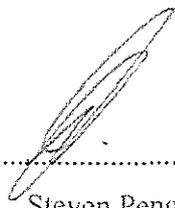
**Part IX: Estimated Time**

155. On the basis set out in footnote 1 to these Submissions, the Plaintiff estimates it will only require 45 minutes to present its oral submissions.

Dated: 4 March 2016

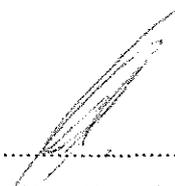
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Malcolm McCusker

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Pr Steven Penglis

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Adam Sharpe

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Pr Ben Gauntlett

ANNEXURE A

Subject to the determination of its validity, the Bell Act:

1. is intended to operate to the full extent of the extraterritorial legislative power of the State (s.6);
2. establishes the **Authority** (s.7(1)) with the status, immunities and privileges of the State (s.7(6)), which is to be governed by the **Administrator** (ss.7(5) and 8(1));
- 10 3. provides that the functions of the **Authority** include collecting, realising or otherwise dealing with the property of the **WA Bell Companies** in accordance with the objects of the Bell Act contained in s.4 (s.9(1)(a)) and administering each **WA Bell Company** until it is dissolved (s.9(1)(b));
4. establishes the **Fund** (s.16(1)) and provides that the **Fund** is to be administered by the **Authority** (s.16(2)) and provides that the following must be credited to the **Fund**:
  - (a) all money transferred to the **Authority** by virtue of the operation of the Bell Act and realised out of other property transferred to, or vested in, the Authority by virtue of the operation of the Bell Act (s.16(3)(a));
  - (b) money received from the investment of the **Fund** (s.16(3)(b)); and
  - 20 (c) any advances made to the **Authority** under s.28 of the *Financial Management Act 2006 (WA)* (s.16(3)(c));
5. provides that at the beginning of the **transfer day** (27 November 2015), all property, whether situated in or outside the State of Western Australia, that was at that time vested in a **WA Bell Company**, held by any person on behalf of or on trust for a **WA Bell Company** or held by Woodings on trust for any person other than property held in a capacity that does not relate to the liquidation of a **WA Bell Company** is, with two exceptions, transferred to and vested absolutely in the **Authority** freed from any encumbrance, trust, equity or interest to which it was subject immediately before so vesting (s.22(1) and s.22(8) to s.22(11)).  
30 The two exceptions are:
  - (a) first, the right of a **WA Bell Company** to make a taxation objection or the right or capacity of the company to seek the review of, or to appeal against a decision of the **Commissioner** in relation to a taxation objection (s.22(6) and s.22(7)); and
  - (b) secondly, a share in a company that was a subsidiary of **TBGL** either immediately before the transfer day or, if the company was deregistered before the **transfer day**, immediately before the time at which the company was deregistered (s.22(4)). Any such share is transferred to and vests in the **Authority** immediately before the earlier of the day

specified by the **Authority** or the day on which the **WA Bell Company** is dissolved (s.22(5));

6. provides that if, immediately before the **transfer day**, a liability of a **WA Bell Company** was admissible to proof against the company in the winding up of the company under Part 5.6 of the *Corporations Act*, that liability may be proved in accordance with Part 4, Division 2 of the Bell Act (s.25(1));
7. provides that if liabilities have been incurred by a **WA Bell Company** or a liquidator of a **WA Bell Company** in preserving, realising or getting in property of the company, in carrying on the company's business or in the conduct of the liquidation that have not been paid out of the assets of the company before the **transfer day**, the liabilities may be proved by the liquidated (or by a creditor of a **WA Bell Company** or the liquidator if they have not been paid or satisfied) in accordance with Part 4 Division 2, and may otherwise be the subject of a report, recommendation and determination under Part 3 Divisions 3, 4 and 5 (ss.25(2) and (3), 32(1));
8. provides that no action, claim or proceeding of any nature arising out of, or relating to, a liability that may be proved in accordance with Part 4, Division 2 of the Bell Act may, otherwise in accordance with that Part, be made or maintained against a **WA Bell Company**, its liquidator, the **Authority**, the **Fund**, the **Administrator** or the State (s.25(5));
9. provides for the voiding of various agreements, including the **BGF AFI**, the **TBGL AFI** and the **PTICA** (s.26(1));
10. provides that if an agreement made void by s.26(1) provided, according to its terms, for the repayment in specified circumstances of an amount of money paid to or for the benefit of a liquidator of a **WA Bell Company** in connection with the conduct of the liquidation or the funding of the **Bell litigation**, the claim that a person had, according to the terms of the agreement to be repaid, may be proved in accordance with Part 4 Division 2 and may otherwise be the subject of a report, recommendation and determination under Part 4 Divisions 3,4 and 5 (ss.26(2) and (3), 32(4));
11. appoints the **Authority** as the administrator of each **WA Bell Company** (s.27(1));
12. provides that while a **WA Bell Company** is under the administration of the **Authority**, the **Authority** has control of a **WA Bell Company's** property and affairs with power, amongst other things, to manage that property and those affairs and dispose of any of that property (s.28);
13. provides that a person, other than the **Authority**, cannot perform or exercise or purport to perform or exercise a function or power as an officer of the company (including as liquidator) without the **Authority's** written approval, unless the performance or exercise of the function or power is in the exercise of a power or duty under the Bell Act (s.29(1)) but the Bell Act further provides that that nothing in s.29(1) removes a director or the liquidator of a **WA Bell Company** from his or her office (s.29(3));

14. provides that the Governor may, by proclamation, dissolve a **WA Bell Company** (s.30(1)) and that, on dissolution, the WA Bell Company ceases to exist (s.30(2) and each person who is, or has been, a liquidator of the company and each person who has at any time acted for or on behalf of such a liquidator, is discharged from all liability arising out of or relating to anything done or not done by them in performing their duties (ss.45(1) and (2));
15. provides that the liquidator of a **WA Bell Company** must, within one month after the **transfer day**:
  - 10 (a) give to the Authority an account and statement of his receipts and payments of a kind that the liquidator would have been required to lodge with ASIC under s.539 of the Corporations Act if the Bell Act had not been passed and the liquidator had ceased to act as liquidator on the transfer day (s.33(1)); and
  - (b) give to, or as directed by, the Authority all such books of the WA Bell Company and of the liquidator that are relevant to the affairs of the company as at immediately before the transfer day (s.33(7));
16. provides that the **Authority** may, by notice given to a liquidator of a **WA Bell Company**, require the liquidator to prepare and give to it a report about the matters referred to in ss.33(8)(a)-(d) as at immediately before the **transfer day** (which includes information as to any liability of the company immediately before the **transfer day**), which report must be in the form and contain the information specified by the **Authority** (ss.33(8) and (9));  
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17. provides that the **Authority**:
  - (a) must give to each person whom it reasonably believes to have been a creditor of a **WA Bell Company** immediately before the transfer day a notice requiring the person to give to the Authority full particulars of all liabilities of the company in relation to the person (s.34(1));
  - (b) must publish in a daily newspaper circulating in Australia a notice requiring any person who believes that they were a creditor of a **WA Bell Company** immediately before the transfer day to give to the Authority full particulars of all liability of the company in relation to the person (s.34(2)); and  
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  - (c) may also publish the notice referred to in s.34(2) by any other means that the Authority thinks necessary to bring the notice to the attention of the persons referred to in s.34(2) (s.34(3)); and
  - (d) must specify in these notices the manner in which a liability may be proved or how that manner may be ascertained (s.34(4));
18. identifies in ss.33 and 34 the means by which a person may assert, through the liquidator under s.33 or directly under s.34, the liability of a **WA Bell Company** in relation to it and bring that liability to the attention of the **Authority** and provides that the methods set out in ss.33 and 34 of the Bell Act are the only  
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methods by which a liability may be proved for the purposes of s.25(5) of the Bell Act:

19. provides that if property is freed from an encumbrance, trust, equity or interest on being transferred to, and vested in, the **Authority** by s.22, whether on the **transfer day** under s.22(1) or after the **transfer day** under s.22(2), 22(3) or 22(5), that encumbrance, trust, equity or interest may be proved as a liability in accordance with Part 4 Division 2 and may be the subject of a report, recommendation and determination under Part 4 Divisions 3, 4 and 5 (ss.25(4) and 32(2) and (3));
- 10 20. provides that the rules of natural justice do not apply to the **Authority** or to the **Administrator** in discharging functions under Part 3 or 4 of the Bell Act (s.74(3)(c) and (d));
21. provides that the **Authority** must provide a draft report, setting out its preliminary determination of the property and liabilities of each **WA Bell Company** under s.37 and the recommendations that it is proposing to make under ss.39 and 40, to each person who gave particulars of liability under s.34 within 150 days of the **transfer day**, and a person to whom the draft report is provided may make a written submission to the **Authority** in respect of any matters relating to that person arising out of the draft report, which submission the **Authority** must have regard to in making a recommendation to the Minister under ss.39 and 40 (ss.36(2), (4), (5) and (6), 39(2)(c) and 40(3)(c));
- 20 22. provides that the **Authority** must determine the property and liabilities of each **WA Bell Company**, and in doing so must have regard to the matters in s.37(2) of the Bell Act, and that the **Authority** has an absolute discretion in determining the property and liabilities of each **WA Bell company** (s.37);
23. provides that before the **Authority** makes a final determination of the property and liabilities of each **WA Bell Company**, the **Authority** may make one or more interim reports to the Minister based upon its preliminary determination of the property and liabilities of each **WA Bell Company** (s.38(3));
- 30 24. provides that the **Authority** must recommend to the Minister the amount (if any) to be paid to a person or the property (if any) to be transferred to or vested in a person, in respect of the aggregate of all liabilities of all **WA Bell Companies** to that person as a creditor (s.39(1));
25. provides that the **Authority** may recommend to the Minister an amount to be paid to, or property to be transferred to or vested in a creditor of any kind of a **WA Bell Company** who, before the **transfer day**, provided funding for, or an indemnity against costs or liability in relation to, the **Bell litigation**, whether directly or indirectly, as compensation for providing that funding or indemnity (s.40(1) and (2));
- 40 26. provides that if the **Authority** makes an interim report to the Minister under s.38(3), a recommendation in that interim report that an amount be paid to a person, or property be transferred to or vested in:

- (a) a person, in respect of the aggregate of all liabilities of all **WA Bell Companies** to that person as a creditor; or
- (b) a creditor of any kind of a **WA Bell Company** who before the transfer **day**, provided funding for, or an indemnity against costs or liability in relation to, the **Bell litigation**, whether directly or indirectly, as compensation for providing that funding or indemnity.

is an interim recommendation (ss.39(3) and 40(4));

- 10 27. provides that the **Authority** must report to the Minister on the property and liabilities of each **WA Bell Company**, as finally determined by it, and this report must contain any final recommendations of the **Authority** with respect to the amount to be paid to, or the property to be transferred to or vested in, creditors of **WA Bell Companies** and creditors who provided funding or indemnities in relation to the **Bell litigation** and the final recommendations must take into account any amount or property that the Governor, under s.41(2), has determined is to be paid to, or transferred to or vested in, a person in respect of an interim report of the **Authority** under s.38(3) (ss.38(1) and (2), 39(4), 40(5));
- 20 28. provides that the **Authority's** recommendation does not need to provide that the aggregate value of all money recommended to be paid, and all property recommended to be transferred or vested, is equal to the value of the money or property held by the **Authority** or the total liabilities of all **WA Bell Companies** as determined by the **Authority** (s.39(7));
- 29. provides that in making its recommendations to the Minister the **Authority**:
  - (a) does not need to give reasons (ss.39(5) and 40(8));
  - (b) does not need to comply with the rules of natural justice (s.74(3)(c));
  - (c) has an absolute discretion as to the quantification of any liability, the amount recommended to be paid to a person or the property recommended to be transferred to, or vested in, a person, and the priority to give to that payment, transfer or vesting (s.39(6));
  - 30 (d) has an absolute discretion as to the quantification of any funding, indemnity, risk, benefit or detriment and the amount recommended to be paid to a person or the property recommended to be transferred to, or vested in, a person (s.40(6)); and
  - (e) may recommend that any amount payable to a creditor under the Bell Act reduce to a specific extent a liability of a **WA Bell Company** to the creditor, be in addition to any amount otherwise payable to the creditor under the Bell Act, or be in addition to any payments to the creditor in respect of liabilities that are the subject of a recommendation under s.39 (s.40(7));
- 40 30. provides that a failure by the **Authority** to comply with the provisions of ss.38, 39 or 40 (for example, a failure by the **Authority** to take into account matters to

which it is obliged to have regard under s.39(2)) does not invalidate a report or recommendation of the **Authority** (ss.38(7), 39(10) and 40(11));

31. provides that the Minister must submit to the Governor the report of the **Authority** under s.38(1) and the rules of natural justice do not apply to the Minister in discharging functions under Part 3 or 4 of the Bell Act (ss.42(1) and 74(3)(b));
32. provides that, following receipt of an interim report of the **Authority**, the Governor may make an interim determination of an amount to be paid, or property to be transferred to or vested in, a person (s.41(2));
- 10 33. provides that, following receipt of the final report of the **Authority**, the Governor may make a final determination of an amount to be paid to, or property to be transferred to or vested in, a person (s.42(2));
34. provides that the amount or amounts to be paid to, and the property to be transferred to or vested in, a person pursuant to a determination by the Governor is in respect of the aggregate of all liabilities of all **WA Bell Companies** to that person as a creditor and may be by way of compensation for providing funding or an indemnity (s.42(3));
35. provides that nothing in the Bell Act requires the Governor to determine that any amount is to be paid to, or property to be transferred to or vested in, a person  
20 (s.43(1)) and the Governor can make a determination that nothing is to be paid to a person (s.43(8));
36. provides that the Governor's determination does not need to provide that the aggregate value of all money determined by the Governor to be paid, and all property determined by the Governor to be transferred or vested, is equal to the value of the money or property held by the **Authority** or the total liabilities of all **WA Bell Companies** as determined by the **Authority** (s.43(2));
37. provides that in making a determination the Governor does not need to give reasons (s.43(4)) and does not need to comply with the rules of natural justice (s.74(3)(a));
- 30 38. provides that as soon as practicable after receiving the Governor's determination, the **Authority** must:
  - (a) notify each person specified in the determination to or in whom the Governor has determined an amount is to be paid or property is to be transferred or vested (s.44(1)(a)); and
  - (b) subject to each person's execution of a deed of release or discharge, in the form approved by the Minister and executed to the satisfaction of the **Authority**, and that provides for the release or discharge of any person from any liability that the Minister considers appropriate, pay out of the **Fund** the amounts specified, to each person specified in the determination  
40 (s.44(1)(b)) and transfer or vest the property specified, to or in each person specified in the determination (s.44(1)(c));

39. provides that a person is not entitled to have a payment made to them, or property transferred to or vested in them, unless that person has first given to the **Authority** a duly executed deed in a form approved by the Minister and executed to the satisfaction of the **Authority** (s.44(3)(b)) and providing for the release or discharge of any person from any liability that the Minister considers appropriate (s.44(3));
40. provides that at the end of the period of three months beginning on the day on which the Governor makes the final determination:
- 10 (a) every liability of every **WA Bell Company** to a person covered by the Governor's interim determination but not covered by the Governor's final determination is, by force of the Bell Act, discharged and extinguished (s.44(6) and (7)(a)); and
- (b) if the person has not given a duly executed deed of release or discharge in the form approved by the Minister and executed to the satisfaction of the **Authority**, and that provides for the release or discharge of any person from any liability that the Minister considers appropriate, the interim determination ceases to have effect in relation to that person (s.44(7)(b));
- 20 41. provides that at the end of the period of three months beginning on the day on which notice of the Governor's final determination is given to a person:
- (a) every liability of each **WA Bell Company** to a person covered by the Governor's final determination under s.42(2) is, by force of the Bell Act, discharged and extinguished (s.44(4) and (5)(a)); and
- (b) if the person has not given a duly executed deed of release or discharge in the form approved by the Minister and executed to the satisfaction of the **Authority**, and that provides for the release or discharge of any person from any liability that the Minister considers appropriate, the final determination ceases to have effect in relation to that person (s.44(5)(b));
- 30 42. provides that on the making of the Governor's final determination, if nothing is to be paid to and no property is to be transferred to or vested in a person, every liability of every **WA Bell Company** to that person is discharged and extinguished by force of the Bell Act (s.43(8));
43. provides that nothing in ss.39 to 43 of the Bell Act, including the recommendation of the **Authority**, the Minister's submission of that recommendation to the Governor and the Governor's determination, creates any right in, or for the benefit of a creditor of a **WA Bell Company** or any other person (ss.39(8), 40(9) and 43(6));
- 40 44. provides that the decisions made, and other things done, by the **Authority**, **Administrator**, Minister or Governor under or for the purposes of the Bell Act are final and conclusive, are not subject to review or remedy by way of prohibition, mandamus, injunction, declaration or certiorari or a remedy having

the same effect in any court on any account and cannot be challenged, appealed against, reviewed, quashed or called into question in any court except for jurisdictional error (ss.74(1) and (4));

45. provides that the **Fund** is closed when the **Administrator** certifies that all money that the **Authority** is required to pay out of the **Fund** has been paid or at the end of the period of 6 months beginning on the day on which the Governor makes the determination under s.42(2), whichever occurs first (s.46(1));
46. provides that any money standing to the credit of the **Fund** when it is closed is credited to the Consolidated Account of the Defendant and any property of a **WA Bell Company** accruing, payable or vesting after the closing of the **Fund** accrues, is payable to or vests in the Defendant (ss.46(2) and 48);
47. provides in s.54 of the Bell Act, which commenced operation on 5 May 2015, that it is an offence, punishable by a fine of \$200,000 or imprisonment for 5 years, or both, to enter into or carry out a "scheme" (as defined in s.54(1)) before or after the enactment of the Bell Act, which may but does not necessarily include commencing or maintaining proceedings in a court, for the purpose of directly or indirectly defeating, avoiding, preventing, or impeding the operation of the Bell Act or the achievement of its objects (s.54(2) and (3)(a));
48. provides that s.54 does not apply:
  - (a) to or in relation to proceedings in a court to challenge the constitutional validity of the Bell Act or proceedings in court contemplated by the Bell Act (s.54(6)); and
  - (b) to the extent (if any) to which it would infringe any constitutional doctrine of implied freedom of political communication (s.55(5));
49. provides that it is an offence for a person, other than the **Authority**, to take any step after 5 May 2015, without the written approval of the **Authority**, for achieving the reinstatement of the registration of a deregistered company listed in Schedule 1 of the Bell Act (s.55 read with s.2(1)(e));
50. provides that it is an offence, punishable by a fine of \$200,000 or imprisonment for 5 years, or both, to refuse or fail to 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** of property located outside the State under s.22 is made effective (s.56(3));
51. provides that it is an offence, punishable by a fine of \$50,000 or imprisonment for 2 years, or both, to fail to comply, without reasonable excuse, with a requirement made by the Bell Act or by the **Authority**, the **Administrator** or an employee, agent or delegate of the **Authority** under the Bell Act, where, when making the requirement, the **Authority**, the **Administrator** or an employee, agent or delegate of the **Authority** inform the person that a failure to comply with it may constitute an offence (s.58);

52. provides that the State, the Minister, the **Authority**, the **Administrator** or any person employed or engaged by the **Authority** is not liable for anything done by them in good faith, in the performance or purported performance of a function under this Act (s.69):
53. provides that "the State" (as defined in that section) the **Authority** and the **Administrator** are not liable to any action, liability or demand arising from, amongst other things, the operation of the Bell Act (s.72);
- 10 54. gives extensive protection to **ICWA**, the managing director of **ICWA** and **ICWA's** legal representatives, amongst others, from liability for anything done or omitted to be done in connection with the conduct and settlement of the **Bell litigation**, the liquidation of any **WA Bell Company** and preparing the Bill for the Bell Act or recommending its introduction into Parliament (s.70); and
- 20 55. provides that on and from the **transfer day** a person cannot begin or continue proceedings in a court with respect to property that was, immediately before that day, property of a **WA Bell Company**, except with the leave of the Supreme Court of Western Australia but further provides that this restriction does not apply to a right to make a taxation objection, or a right or capacity to seek the review of, or to appeal against, a decision of the **Commissioner** in relation to a taxation objections, to the extent such a right or capacity is the property of the company (s.73(1) and (2)).