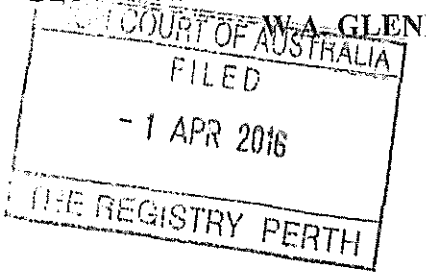
IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. P63 of 2015

BETWEEN:



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

AND

THE STATE OF WESTERN AUSTRALIA
Defendant

PLAINTIFF'S ANNOTATED SUBMISSIONS IN REPLY

PART I. CERTIFICATION

1. The Plaintiff certifies that this Reply is in a form suitable for publication on the internet.[1]

PART II. SUBMISSIONS IN REPLY[2]

Standing and justiciable controversy

2. The issue of standing is now moot: irrespective of whether or not the Federal Commissioner of Taxation is granted leave to intervene, the Commonwealth Attorney-General now adopts and proposes to present the proposed submissions of the Commissioner concerning the question of inconsistency between the Bell Act and the tax legislation.[3]

3. In any event, and contrary to the Defendant's submissions dated 25 March 2016 (**Defendant's Submissions**), the Plaintiff has a real and tangible commercial interest in whether, by reason of the operation of the ITAA 1936, Woodings is required to set aside amounts, and a real and tangible interest in the Commissioner's rights as creditor of certain WA Bell companies and its use of conclusive evidence provisions, because if the relevant provisions of the Bell Act are found to be inconsistent with the taxation

---

[1] The Plaintiff relies upon the definitions and defined terms used in the Plaintiff's submissions dated 4 March 2016 (**Plaintiff's Submissions**) in this Reply.

[2] On 24 March 2016, the Defendant informed the Plaintiff they would be seeking to amend the Bell Act by passing the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Amendment Bill 2016* (**Amendment Bill**). The Amendment Bill was passed by the Legislative Assembly of the Parliament of Western Australia on 24 March 2016 and will be before the Legislative Council on 5 April 2016. These submissions are made on the basis that leave may be sought to make further submissions if the Amendment Bill is passed by the WA Parliament or matter P4 of 2016 is adjourned or discontinued as a result of the Amendment Bill.

[3] Submissions of the Attorney-General of the Commonwealth of Australia dated 30 March 2016 (**Commonwealth's Submissions**) at [2].

Date of document: 1 April 2016
Filed on behalf of the Plaintiff by:

DLA Piper Australia
Level 31, Central Park
152-158 St Georges Tce
Perth WA 6000

Telephone: +61 8 6467 6254
Facsimile: +61 8 6467 6001
Reference: SZF/SZF/368925/1/AUM/1212638333.18
Contact: Sarah Fay

legislation, and if it were to be held that such inconsistency did not result in the invalidity of the whole of the Bell Act, one creditor of BGF (namely the Commissioner) would be dealt with preferentially to other creditors (including the Plaintiff) and with the further consequence of there being less available to the other creditors (including the Plaintiff) for distribution by the Authority.

4. As for justiciable controversy[4] with respect to former s.215 or s.260-45 of Schedule 1 to the TAA 1953, the issue raised is not merely hypothetical given that the Bell Act has been passed and that it intersects with an existing power which, on the agreed facts, can be lawfully exercised by the Commissioner at any time.

Inconsistency of the Bell Act with the Commonwealth tax legislation[5]

5. The Plaintiff has not suggested that s.215 or s.254 creates a right in the Commonwealth to receive any sum.[6] The Plaintiff's contention is that s.22 of the Bell Act makes it impossible for Woodings to discharge his tax obligations and compromises the Commissioner's ability to recover tax related liabilities.

6. The fact that the Authority now has assets which the liquidator was required (by s.215 of the ITAA 1936) to retain renders s.22 of the Bell Act no less inconsistent with the ITAA 1936.

7. Moreover, it is fallacious to assert that by the Authority having the same assets available for distribution to creditors of WA Bell Companies as the Commissioner, the Commissioner is in the same position as under the legislation that would otherwise be applicable.[7] Apart from again being irrelevant to the existence of inconsistency, the assertion ignores the fact that s.215 of the ITAA 1936 does not apply to the Authority (and there is nothing in the Bell Act that imposes upon the Authority an obligation similar to that imposed upon Woodings by s.215(3)).

8. Even if "*setting aside*" is to be given the meaning contended for by WA,[8] it is self-evident that, as a consequence of s.22 of the Bell Act, Woodings no longer maintains or has available the relevant funds. Again, to say that the Authority now holds them and therefore there is no real inconsistency is fallacious: the Authority is not a "*person*" to which s.215 applies and there is nothing in the Bell Act that preserves or even replicates vis-à-vis the Authority the obligations imposed upon Woodings by s.215.[9]

---

4 In *CGU Insurance Limited v Blakeley* [2016] HCA 2 at [27]-[30] and [63]-[68], French CJ, Kiefel, Bell and Keane JJ recently clarified the characteristics of a "*justiciable controversy*".

5 The Plaintiff adopts the proposed Submissions of the Federal Commissioner of Taxation dated 8 March 2016 (**Commissioner's Submissions**) concerning the question of inconsistency between the Bell Act and Commonwealth tax legislation.

6 Defendant's Submissions at [37].

7 Defendant's Submissions at [40] (and see also [71]).

8 Defendant's Submissions at [41].

9 The same comments apply to the Defendant's assertion (at [70]-[71]) that "*the only real difference between the two schemes is that the Commonwealth may not receive as much in a final distribution as it may have if the final distribution were made by a liquidator*" and "*so long as the Authority has the same assets available for distribution to creditors of WA Bell Companies, pursuant to the Bell Act, as did the liquidator, then the Commissioner is in precisely the same position in respect of the Bell Act as it would be under the legislation that would otherwise ... be applicable*".

9. The inconsistency between the Bell Act and the ITAA 1936 is not overcome by suggesting that the Authority, albeit under no legal obligation to do so (unlike Woodings) may retain funds sufficient to provide for tax.

10. Finally, the Defendant asserts a lack of real conflict between the State law and the Commonwealth law.[10] It relies upon *Attorney-General (Vic) v Andrews*,[11] which provides that there is no inconsistency for the purpose of s.109 where the proper construction of the federal statute demonstrates an intention that it is to act in a way that is supplementary to or concurrent with the State law in question. However, in a case not dealt with by the Defendant, namely *Deputy Commissioner of Taxation v Moorebank Pty Ltd*,[12] this Court noted the comprehensive terms of the ITAA 1936 (including recovery of tax debts)[13] which does not, except in exceptional circumstances, leave room for the operation of State law. Consequently, the reference to cases[14] by the Defendant previously decided under now non-existent State laws concerning the distribution of assets of insolvent companies does not demonstrate the present intended concurrent operation of Commonwealth taxation laws and State law.

Reading down

11. The identified inconsistencies between the Bell Act and the taxation legislation cannot be avoided by reading down the offending provisions of the Bell Act. First, as noted in the Commissioner's Submissions, "*the evident purpose of the Bell Act is to provide a comprehensive regime for dealing with all the property of the WA Bell Companies and to give the Authority and the Governor complete discretion as to how liabilities are to be determined and paid*".[15] Accordingly, to seek to read down the offending provisions would be inconsistent with the legislative purpose of the Bell Act.[16] Secondly, the nature and extent of the suggested reading down would require the Court to "*perform a feat which is in essence legislative and not judicial*".[17] Thirdly, the Bell Act has already taken effect and in a manner inconsistent with any reading down of the offending provisions (i.e., without exception, all assets of the WA Bell Companies have passed from Woodings to the Authority).

---

[10] Defendant's Submissions at footnote 38.

[11] (2007) 230 CLR 369 at 401-402 [54]; Defendant's submissions in P4 of 2016 at [26]. However, the footnotes have been removed from the quote relied upon, which refer to: *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 432 433, 449, 462; *Commonwealth v Western Australia* (1999) 196 CLR 392 at 416 417 [59], 441 [145]; *Dobinson v Crabb* (1990) 170 CLR 218 at 231; *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 at 76 [27]; *APLA Ltd v Legal Services Commissioner* (NSW) (2005) 224 CLR 322 at 401 [208]-[209], 449 [375].

[12] (1988) 165 CLR 55; Plaintiff's Submissions at footnote 76. Plaintiff's submissions in S248 of 2015 at [46]-[48].

[13] (1988) 165 CLR 55 at 66-67.

[14] *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd* (1940) 63 CLR 278; *In re Richard Foreman & Sons Pty Ltd; Uther v Commissioner of Taxation (Cth)* (1947) 74 CLR 508; *Commonwealth v Cigamatic Pty Ltd (in liq)* (1962) 108 CLR 372. See Defendant Submissions at [47]-[59].

[15] Commissioner's Submissions at [53].

[16] Defendant's Submissions at footnote 58.

[17] See the Defendant's Submissions at footnote 57. The Defendant's proposed reading down at [77]-[78] of the Defendant's Submissions amount to an attempt to make "*an insertion which is 'too big or too much at variance with the language in fact used by the legislature*'": compare *Taylor v Owners – Strata Plan 11654* [2014] HCA 9; (2014) 253 CLR 531 at 548 [38] (footnote omitted).

Inconsistency of the Bell Act with the Corporations Act

Sections 5F and 5G(11)

12. The Defendant, South Australia and some of the other States, contend that the words "*in the State*" in s.5F(2) should be given what South Australia describes as "*the broad construction*",[18] to mean "*within the law area of the State*", so as to permit a State to legislate with extraterritorial effect. That strains the plain meaning of the phrase "*in the State.*" In other words, the clear manner by which s.5F(2) operates is not by reference to the enactment of inconsistent State legislation, but providing that the relevant provisions of the Corporations legislation do not apply "*in the State*" in relation to the excluded matter. The clear result is that the Corporations legislation does not apply "*in the State*", but continues to apply outside the State.[19]

13. The Defendant further submits[20] that s.5F operates so as to disengage "*the Corporations legislation from the States and territories to which the law of State 1, in respect of the matter, applies*" so that that law operates "*in such States and Territories*" unless and until such other States and Territories themselves legislate in respect of the matter. Such a construction would result in consequences for which clear and unambiguous language would be required, namely to allow a State or Territory to impose upon other States and Territories the disengagement of specific provisions of the Corporations Law in those States and Territories.

14. As to [97] of the Defendant's Submissions, there is no warrant to construe s.5F(2) on the basis that "*a State will not declare a matter to be an excluded matter, and thereby 'to disapply' the Commonwealth legislation, unless the State fills the gap*". (Nor is there any reason to assume, as the Defendant asserts, that this would be "*inevitable*".) Section 5F operates to disapply the Commonwealth legislation by the passage of State legislation identifying a relevant "*excluded matter*", irrespective of whether the State "*fills the gap*".

15. As for what is described by South Australia as "*the intermediate construction*", the logical consequence of such a construction is that the Corporations Act would not apply in Western Australia to the WA Bell Companies, but would continue to apply to them outside of Western Australia. Accordingly, because the subject matter is not capable of territorial limitation, it would result in two vastly different laws applying to the same subject matter. That is a clearly an unsatisfactory, unworkable and unintended result, for the reasons given by Barrett J in *HIH*.[21]

16. In support of both the "*broad*" and "*intermediate*" constructions, some States submit that the construction contended for by the Plaintiff leaves s.5F "*practically meaningless*".[22] That is plainly erroneous. In this regard, the Plaintiff refers to the various examples given by Barrett J in *HIH*.[23]

---

[18] Submissions of the Attorney-General for South Australia dated 23 March 2016 (**SA's Submissions**) at [26]-[32].
[19] This analysis applies equally to s.5G(11).
[20] Defendant's Submissions at [99].
[21] *HIH v Building Insurers* (2003) 202 ALR 610 at [88]-[92].
[22] SA's Submissions at [24].
[23] *HIH v Building Insurers* (2003) 202 ALR 610 at [88]-[92].

17. In any event, even "*the intermediate construction*"[24] does not support the Defendant's endeavour to define as an "*excluded matter*" specific corporations (without further limitation).

18. The "*intermediate construction*" would, for example, allow Western Australia to disapply the provisions of the Corporations Act dealing with the prohibition against insider trading within the territorial limits of Western Australia, so that someone who did within the territorial limits of Western Australia what would constitute 'insider trading', if done in other States, would not commit an offence under the Corporations Act.

19. Similarly, it would be possible for Western Australia to disapply the relevant sections of the Corporations Act with respect to the duties of company officers and enact different laws. This would mean that, within the territorial limits of Western Australia, what an officer of a company must do in respect of a corporation, wherever that corporation is situated, would be governed by the State law, but the Corporations Act would continue to govern the officer's conduct outside Western Australia.

20. Suppose, however, that Western Australia sought to legislate with respect to, not particular provisions of the Corporations Act, but the activities of all Australian mining companies, enacted legislation purporting to govern the conduct of all Australian mining companies and identified all Australian mining companies as an "*excluded matter*" for the purpose of the Corporations Act. The "*intermediate construction*" would not permit a State to legislate so as to exclude the operation of the Corporations Act in respect of all Australian mining companies, save with respect to conduct within the territorial limits of the State.

21. The States also seeks to support their contentions by reference to the pre-Corporations Act regime of each State and Territory, and the passing of uniform legislation in the form of the Corporations Law. The Plaintiff accepts that the statutory text should be considered in its context (including its legislative history). However, "*understanding context has utility if, and insofar as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself*".[25]

22. Furthermore, the pre-Corporations Act regime was that each State and Territory could legislate as it saw fit and, to the extent that they were inconsistent in regard to any particular matter, the inconsistency would be resolved by application of well settled conflict of law rules. However, if a State wishes to 'opt out' of the Corporations Act (in whole or in part), it must do so within the present legal framework, not that which existed previously. Accordingly, any inconsistency with the laws of the Commonwealth would be resolved, not by reference to conflict of law rules, but by reference to s.109 of the Commonwealth Constitution. In other words, s.109 provides "*an effective statutory overriding requirement*" to the "*choice of law rules*".[26]

23. At [134] of the Defendant's Submissions, the Defendant deals with the Plaintiff's Submissions with respect to the location of various bank accounts outside of Western

---

[24] Which appears to be supported by the Commonwealth's Submissions at [7]-[12].

[25] *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; (2012) 250 CLR 503 at [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ).

[26] *Sweedman v Transport Accident Commission* (2006) 226 CLR 362, as cited at [31] of SA's Submissions.

Australia.[27] The rule that the *situs* of the debt is to be paid in the ordinary course of business does not apply with respect to these bank accounts for the reasons stated by the Maranoa Plaintiffs in their written submissions in P4 of 2016.[28]

Section 5G(4)

24. Section 5G(4) of the Corporations Act cannot save the Bell Act. It provides no more than if a State law specifically authorises or requires the doing of an act, a provision of the Corporations legislation that would prohibit the doing of the act or impose a liability for doing it, will not apply. The Plaintiff otherwise refers to and respectfully adopts [100]-[104] of the BGNV Plaintiffs' Submissions dated 4 March 2016 in S248 of 2015.

Section 5G(5)

25. The only particularisation given by the Defendant of the sections in the Bell Act which are said to be saved by the operation of s.5G(5) are ss.27, 28, 29 and 33.[29] Of those sections, only ss.29 and 33(7) are alleged by the Plaintiff to be inconsistent with the Corporations Act.[30]

26. Section 29 of the Bell Act provides that a person (other than the Authority) cannot perform or exercise, and must not purport to perform or exercise, a function or power as an officer of a WA Bell Company. There is nothing in s.5G(5) which extends to such matters (i.e., s.29 is not a provision that authorises a person to give instructions to an officer of a company, requires the directors of a company to comply with instructions given by a person or have regard to matters communicated to the company or body by a person, or provides that a company is subject to the control or direction of a person).

27. Section 33(7) of the Bell Act imposes an obligation upon the liquidator to provide to the Authority all books of the WA Bell Company and of the liquidator. Again, there is nothing in s.5G(5) that comes close to extending to the subject matter of s.33(7).

Section 5G(8)

28. Contrary to the Defendant's contention,[31] the Plaintiff does not submit that a State law can only displace Chapter 5 to the extent that the State replaces the Commonwealth's regime with an identical regime (and nor is that the logical consequence of the Plaintiff's Submissions).

29. On the Defendant's contention, "*so long as that which is provided for in State law meets the description of a scheme of arrangement, receivership, winding-up or other external administration of a company*",[32] the provisions of Chapter 5 do not operate. In other words, so long as it can be said that a company is carrying out a scheme of

---

[27] The Plaintiff refers to footnote 90 of the Defendant's submissions in P4 of 2016. To confirm, the accounts the subject of the Plaintiff's Submissions are the same accounts as are the subject of Maranoa Plaintiffs' submissions, namely the Westpac term deposits concerning the Uncontested Amounts and the Westpac term deposit comprising part of the Trust Property (as to which see Amended Special Case at [33]-[34], [39] and [40]).

[28] Plaintiffs' submissions dated 3 March 2016 in P4 of 2016 at [48]-[50].

[29] Defendant's Submissions at [131].

[30] Statement of Claim at [72.5]-[72.6].

[31] Defendant's Submissions at [111].

[32] Defendant's Submissions at [113].

arrangement, receivership, winding-up or administration in accordance with a provision of a law of the State, the whole of the provisions of Chapter 5 of the Act does not apply to that company. For example, the Defendant contends that, insofar as a company is carrying out an "*external administration*" pursuant to a State Act, the provisions of Chapter 5 of the Corporations Act do not apply to that company. So even if the State Act only deals with, say, administration, the consequence is that the whole of Chapter 5 would not apply to the company and a lacuna exists with respect to schemes of arrangement, receiverships and winding-up. Alternatively, a company is pursuing a scheme of arrangement pursuant to a provision of a law of a State or territory which deals with no more than schemes of arrangement. The Defendant's contention means that the provisions of Chapter 5 do not apply to the company. Again, a lacuna would exist.

30. As to [116] of the Defendant's Submissions, the distinction drawn by the Plaintiff is real and of substance: the point is not only one of timing, but the fact that the assets are not distributed by the company to its creditors or shareholders, but transferred to a third party, not being a creditor of the company. The fact that the assets were formerly the assets of the company is not to the point: the transfer to the Authority is inconsistent with the statutory concept of "*winding-up*", particularly where the third party ultimately has no obligation whatsoever to distribute any property to the former creditors of the company.

31. Dealing specifically with a number of the Submissions for the Attorney General of Queensland dated 23 March 2016 (**Queensland's Submissions**):

    (a) as to [69], the reproduced sections of the Explanatory Notes are wholly consistent with the Plaintiff's submission that Chapter 5 does not apply to the winding-up of a Part 5.7 body to the extent that the winding-up is carried out in accordance with the provision of a law of a State, but that the provisions of Chapter 5 do apply to the winding-up of a Part 5.7 body notwithstanding that the State may have passed laws with respect to the administration of a company, but not its winding-up;

    (b) as to [70], (a) above is repeated. Moreover, that s.5G reflects the distribution of powers between the Commonwealth and the States, reserving to the States the prerogative in respect of a corporation to "*withdraw its winding-up or external administration from the operation of the Corporations Act*" is not inconsistent with the Plaintiff's submission that, on a proper reading of s.5G, if the State wishes to exercise that prerogative in respect of a corporation, it can only do so by a State law that provides for that which would have otherwise applied in respect of a corporation. So a State law that deals with administration of a corporation does not withdraw the company's winding-up from the operation of the Corporations Act; and

    (c) as to [77], the Bell Act does not involve the ascertainment of the assets of WA Bell Group Companies or the realisation of that property and, insofar as it provides for the distribution to creditors. It is entirely discretionary as to whether such distribution occurs at all. It is also manifestly inaccurate to describe the role of the Authority as fulfilling that "*which would otherwise be fulfilled by liquidators under the Corporations Act*".

32. Dealing specifically with the Submissions of the Attorney General for New South Wales (**NSW's Submissions**):

(a) as to [35], it is unrealistic to speak of the transfer of property to the Authority as being an administrative mechanism aimed to facilitate the collection of the property of the WA Bell Companies. That property has already been "*collected*" by the liquidator. There is nothing further to "*collect*". It is also unrealistic to describe such conduct as being "*in aid of the winding up of those companies*";

(b) the analogy in [36] is illusory: unlike the examples given, not only are the Authority and Administrator not acting on behalf of the companies or the creditors, but their purpose is not the "*bringing in and preserving the property*" of the WA Bell Companies; and

(c) in addition to failing to address the issue identified at paragraph 59(a) of the Plaintiff's Submissions, NSW's Submissions at [38]-[41] overlook the operation of the words "*of a company*". Even if (which is disputed by reason of the matters set out in paragraph 59(b) of the Plaintiff's Submissions) there is no warrant to limit the words "*external administration*" by reference to the types of external administration contemplated by the provisions of Chapter 5 of the Corporations Act, on no basis could what has been established under the Bell Act constitute the external administration "*of a company*": the so-called "*administration*" established by the Bell Act operates entirely separately from the WA Bell Companies, and does not comprise an "*administration*" of them.

Inconsistency of the Bell Act with the Judiciary Act and infringement of Chapter III of the Constitution

Section 25(5) of the Bell Act

33. The Defendant contends[33] that s.25(5) of the Bell Act does not withdraw jurisdiction from any Court. The Defendant characterises s.25(5) as having its "*most obvious analogy*" with s.471B of the Corporations Act. The flaw with the analogy is that s.471B prevents the bringing of a claim against a company that is being wound up "*except with the leave of the Court and in accordance with such terms (if any) as the Court imposes.*" Section 25(5) has no equivalent provision for the grant of leave by a court and therefore does invalidly purport to withdraw jurisdiction from the Supreme Court of Western Australia.

34. With respect to Defendant's assertion to the contrary, the *BLF Case* is irrelevant to the validity of s.25(5).[34] The *BLF Case* concerned the deregistration of a union by an Act of Parliament. Legislating for a union's deregistration is entirely different from legislating expressly to prohibit making or maintaining actions of a particular kind against specified defendants.

35. Similarly, *Commonwealth v Rhind*[35] is distinguishable. *Rhind* concerned s.2A(1) of the *Landlord and Tenant Act 1899* (NSW) which restricted the circumstances in which a landlord could seek possession in the Supreme Court of New South Wales. However, s.2A(2) provided that a proceeding could be brought in the Local Court under Part 4 of

---

[33] Defendant's Submissions at [139].
[34] Defendant's Submissions at [141].
[35] (1966) 119 CLR 584.

the Act. Section 2A was therefore a provision concerning the jurisdictional limits applicable to the New South Wales Supreme Court. It is entirely different from s.25(5) of the Bell Act, which prevents the making or maintaining of specified actions in any court.

36. Victoria's submission that s.25(5) merely alters the jurisdiction of State courts is incorrect.[36] Section 25(5) does not address the jurisdiction of State courts and equally applies to actions in federal and State courts.[37] Queensland's submission that s.25(5) operates like a limitation period should similarly be rejected.[38] A limitation period sets a time by which an action must be commenced but never provides that an extant action may not be maintained. Moreover, it is a trite proposition that a limitation period provides a defence to an action, but does not go to the Court's jurisdiction to hear and determine the action.

Section 22 of the Bell Act

37. The Defendant contends that s.22 of the Bell Act is supported by the line of authority commencing with *R v Humby*[39] that legislation may alter substantive rights without interfering with the exercise of judicial power.[40] But s.22 of the Bell Act is not directed to the substantive rights of the parties. The liabilities of creditors of WA Bell Companies are not altered by s.22.[41] Section 22 of the Bell Act provides for the transfer of the assets of the Bell Companies so that they are beyond the reach of the orders which the Supreme Court would have made in proceedings COR 146 of 2014 and COR 208 of 2014. Section 22 finds no support in *Humby* and its progeny.

38. The Defendant asserts that the Plaintiff contends that the Bell Act has extinguished the subject matter of COR 146 of 2014.[42] The Plaintiff does not make this contention. The Plaintiff contends that the subject matter of the dispute, namely the assets of the WA Bell Companies, has been *transferred* and that it is this transfer which interferes with the judicial process by depriving the Supreme Court of the power to quell the controversy between the creditors.

Nature of the infringement of Chapter III

39. The Defendant erects a straw man by responding to an argument that winding up is an exclusively judicial function.[43] The Plaintiff does not submit that winding up is an exclusively judicial function. The Plaintiff *does* submit that the quelling of a matter arising in federal jurisdiction is an exclusively judicial function.[44] The Defendant does not appear to cavil with this proposition.

40. The exceptional feature of the Bell Act is that it transfers the function of quelling a matter arising in federal jurisdiction from a court invested with federal jurisdiction to the Western Australian Executive. Unlike *Humby* and the cases following it, in which the substantive law was altered but the courts were still able to apply the law as

---

[36] Submissions of the Attorney General for Victoria's dated 23 March 2016 at [39]-[40].
[37] The Plaintiff adopts the Commonwealth's Submissions at [17] on this issue.
[38] Queensland's Submissions at [15].
[39] *R v Humby; Ex parte Rooney* (1973) 129 CLR 231.
[40] Defendant's Submissions at [146]-[148].
[41] The process for extinguishing the creditors' liabilities is set out in the Plaintiff's Submissions at [90]-[92].
[42] Defendant's Submissions at [151] referring to the Plaintiff's Submissions at [128]-[129].
[43] Defendant's Submissions at [140]-[141].
[44] Plaintiff's Submissions at [142]-[146].

altered, the transfer effected by s.22 deprives the Supreme Court of the jurisdiction to resolve the matter arising in federal jurisdiction.

41. The Plaintiff does not advance the transfer of the function of quelling a matter in federal jurisdiction from the Supreme Court to the Western Australian Executive as an independent argument. The Plaintiff contends that the fact that the dispute between the creditors remains to be resolved after the transfer effected by s.22 is demonstrated by the elaborate mechanism established by Part 4 of the Bell Act for the quelling of the dispute.

42. The observation by the Commonwealth that there is no formal separation of powers at the State level is uncontroversial but not to the point.[45] The Bell Act interferes with the exercise of federal judicial power not State judicial power.

43. The Bell Act is invalid because, by the seizure of the subject matter of a matter in federal jurisdiction, it impermissibly prevents the Supreme Court from exercising federal judicial power to resolve a matter arising in federal jurisdiction.

Dated: 1 April 2016

Malcolm McCusker
Telephone: (08) 9323 2222
Email: mccuskerqc@iinet.net.au

Steven Penglis
Telephone: (08) 9221 4050
Email: steven@penglis.com.au

Adam Sharpe
Telephone: (08) 9220 0444
Email: asharpe@15fbc.com.au

Ben Gauntlett
Telephone: (03) 9225 8444
Email: ben.gauntlett@vicbar.com.au

[45] Commonwealth's Submissions at [18(b)].