

**IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY**

NO S248 OF 2015

**BELL GROUP N.V. (IN LIQUIDATION)
ARBN 073 576 502
First Plaintiff**

AND

**MR GARRY TREVOR AS LIQUIDATOR
OF BELL GROUP N.V. (IN
LIQUIDATION) ARBN 073 576 502
Second Plaintiff**

**THE STATE OF WESTERN AUSTRALIA
Defendant**

NO P63 OF 2015

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

AND

**THE STATE OF WESTERN AUSTRALIA
Defendant**

NO P4 OF 2016

**MARANOA TRANSPORT PTY LTD
(IN LIQ) (ACN 009 668393
First Plaintiff**

**ANTONY LESLIE JOHN WOODINGS
Second Plaintiff**

**ANTONY LESLIE JOHN WOODINGS IN
HIS CAPACITY AS TRUSTEE UNDER A
DEED OF SETTLEMENT DATED 17
SEPTEMBER 2013 IN RESPECT OF THE
INTERESTS OF BELL GROUP (UK)
HOLDINGS LIMITED (IN LIQ) AND
MARANOA TRANSPORT PTY LTD (IN
LIQ) (ACN 009 668 393)**

Filed on behalf of the Attorney General of the Commonwealth
of Australia (Intervening) by:

The Australian Government Solicitor
4 National Circuit Barton ACT 2600
DX5678 CANBERRA

Date of this document: 30 March 2016

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Third Plaintiff

AND

STATE OF WESTERN AUSTRALIA

First Defendant

**THE BELL GROUP LIMITED (IN LIQ)
(ACN 008 666 993) AND THE OTHER
COMPANIES NAMED IN SCHEDULE A**

Second Defendant

**ANNOTATED SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE
COMMONWEALTH OF AUSTRALIA (INTERVENING)**

Filed on behalf of the Attorney General of the Commonwealth
of Australia (Intervening) by:

The Australian Government Solicitor
4 National Circuit Barton ACT 2600
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PART I FORM OF SUBMISSIONS

1. The Submissions are in a form suitable for publication on the internet.

PART II BASIS OF INTERVENTION

2. The Attorney-General for the Commonwealth (**Commonwealth**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) (**Judiciary Act**) in each of the three proceedings. In that regard, the Commonwealth adopts and proposes to present the proposed Submissions of the Federal Commissioner of Taxation dated 8 March 2016,¹ which concern the question of inconsistency between the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Act 2015* (WA) (**Bell Act**) and the Tax Legislation.

3. The Commonwealth otherwise intervenes in respect of the following limited issues:

- a) the proper construction of ss 5F and 5G of the *Corporations Act 2001* (Cth) (**Corporations Act**) in respect of their operation “in this jurisdiction” and “in a State”, those matters falling within “Issue 4” of the plaintiffs’ submissions in the BGNV proceedings (**BGNV Submissions**); and
- b) whether the Bell Act is inconsistent with s 39(2) of the *Judiciary Act* within the meaning of s 109 of the Constitution, described in the BGNV Submissions as “Issue 5”; and whether the Bell Act is inconsistent with Chapter III of the Constitution, described in the BGNV Submissions as “Issue 6”.

PART IV APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

4. The plaintiffs in the BGNV Proceedings have set out applicable legislative provisions in a document entitled “Plaintiffs’ Authorities Index”.

PART V ARGUMENT

Sections 5F and 5G of the *Corporations Act*

5. The plaintiffs in the three proceedings, as well as WA (and each State intervening in support of WA) have put various competing submissions as to the proper interpretation and utility of s 5F and s 5G of the *Corporations Act*. The issues are of large significance beyond this case. The Court is urged not

¹ The Submissions are at EX AVM-1 of the affidavit of Mr Andrew Mills filed 8 March 2016 in support of motions for leave to intervene in each of the three proceedings. The Commissioner’s motion to intervene remains relevant while WA maintains its arguments in respect of standing.

rule on the submissions beyond the bare minimum necessary to decide whether the *Bell Act* is effective.

6. While the *Corporations Act* is Commonwealth legislation (and in relevant respects could have been provided for by an application of s 51(xx)), it was in fact arrived at inclusive of references of power from all of the States. In those circumstances the Commonwealth's interests are ones concerning the proper recognition of:

- 10
- a) the accommodation of State power to legislate in respect of company matters, recognised in ss 5F and 5G; and
 - b) the text, context and purpose of a nationally applicable *Corporations Act*, and the evident intent to provide for nationally consistent, practicable legislation, including in respect of persons and persons in different capacities regulated by the Act, such as companies, directors, shareholders, regulators, liquidators, and lenders or other creditors.

20 *Section 5F*

7. The crucial feature of s 5F is that any exclusion of provisions in relation to a matter from the application of the Corporations legislation or any provisions of it, is one which excludes the Act or provisions "in the State or Territory."

30 8. In this regard, the analysis of BGNV, adapting that of Barrett J in *HIH Casualty & General Insurance Ltd v Building Insurers' Guarantee Corporation* (2003) 188 FLR 153, is too narrow, and productive of uncertainty.² The *Corporations Act* does not define or indicate any mechanism to determine what would be "territorial" provisions (which can be excluded by a State), and what should constitute "Australia-wide" or national ones (which cannot be excluded).

40 9. The response of WA is correlatively too broad. On WA's case, the words "in the State or Territory" refer to the State or Territory where the matter is or "the *States and Territories* where the matter is".³ The plural is sought to be achieved by the device of s 23 of the *Acts Interpretation Act 1901* (Cth). However, the definite article in s 5F(2) is plainly referable to s 5F(1). The exclusion by State 1 operates "in" State 1. It does not operate "in" State 2.

10. The interpretation of WA: (a) does not correspond with the plain drafting and meaning of the text; and (b) has the consequence that any State can legislate to exclude the *Corporations Act* in respect of any matter, with the result that that exclusion is not only effective "in the State", but effective to exclude the legislation in all other States and Territories in respect of that matter, unless those other States and Territories positively legislate to the contrary.

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² BGNV Submissions, [93]-[98].

³ WA (BGNV) Submissions, [151].

11. These extreme consequences of WA's argument can be illustrated thus: any Australian entity with a strong local and territorial presence in most, if not all, States and Territories, (and its employees, agents, lenders, landlords, regulatory bodies, liquidators and so on), would find themselves in a position where rights and duties under the *Corporations Act*, perhaps even the continuing corporate existence of these bodies, are excluded for *all* States or Territories, by legislative act of any *one* polity absent positive legislation of other polities.

10 **Section 5G**

12. WA's argument on s 5G(11)⁴ suffers the same over-reach as the argument on s 5F.

Overall position on ss 5F and 5G

20 13. The Commonwealth's overall submission on ss 5F and 5G is as follows. Sections 5F(1) and 5F(2) permit a State to exclude the application of the Corporations legislation or provisions of it in relation to a matter "in" the State, meaning *within the State's own jurisdiction*. In all other jurisdictions, the *Corporations Act* remains in force in relation to the matter. If a State wishes to use s 5F to achieve a "roll back" of the *Corporations Act* for all jurisdictions of Australia, it needs to procure all other States and Territories to agree by enacting analogous legislation for their own jurisdictions.

30 14. Where a State wishes to use legislative power (including extra-territorial power where properly available) to pass a law which would otherwise generate an inconsistency with the *Corporations Act*, it must bring itself within s 5G. That is, it must either come within the provisions within s 5G(4)-(10), which if properly activated would remove inconsistencies between the State law and the *Corporations Act* across all Australian jurisdictions; or it must rely upon the fall-back provision in s 5G(11), which if properly activated would have the same limits as s 5F (ie the inconsistency is avoided only for the jurisdiction of that State).

Inconsistency with s 39(2) of *Judiciary Act* and Chapter III of the *Constitution*

40 15. On these issues, the Commonwealth supports only part of the plaintiffs' argument: namely, that relating to ss 25(5) and 73 of the *Bell Act*. In summary, the Commonwealth submits that ss 25(5) and 73 purportedly withdraw the federal jurisdiction conferred on the WA Supreme Court⁵ by s 39(2) of the *Judiciary Act*:

50 ⁴ WA (BGNV) Submissions, [156]-[159].

⁵ One possible construction of ss 25(5) and 73 is that they also apply to proceedings in federal courts. For substantially the same reasons that they could not apply to the exercise of federal jurisdiction by State courts, they could not apply to the exercise of federal jurisdiction by federal courts.

a) Section 25(5) precludes the commencement or continuation of any proceedings concerning liabilities of WA Bell Companies that would have been admissible to proof against the company in a winding up under Part 5.6 of the *Corporations Act*: s 25(1). In substance, s 25(5) denudes the Court's authority to decide proceedings relating to those liabilities, at least some of which (the parties accept) would involve the exercise of federal jurisdiction.

10 b) Section 73(1) precludes the commencement or continuation of proceedings concerning the property of WA Bell Companies. Although s 73(1) is subject to the grant of leave by the Supreme Court, that does not save s 73(1) from being an impermissible withdrawal of federal jurisdiction. Section 73(1) in effect establishes a general rule that the court's jurisdiction will not be exercised in relation to such proceedings, subject to the applicant demonstrating that the commencement or continuation of the proceedings is justified against certain unexpressed criteria. Given the express objects of the *Bell Act* include the avoidance of any further litigation in relation to the property of WA Bell Companies (s 4(a) and (h)), it is unclear whether or
20 when an applicant for leave under s 73(1) could succeed.

16. For those reasons, ss 25(5) and 73 are inconsistent with s 39(2) within the meaning of s 109 of the Constitution⁶ or, alternatively, are not picked up and applied by s 79 of the *Judiciary Act* because s 39(2) and/or Chapter III "otherwise provides".⁷

30 17. Contrary to the submissions of the Attorney-General for Victoria (at [40]), ss 25(5) and 73 are not limits of the kind contemplated by s 39(2). The limits contemplated by s 39(2) are limits imposed *on particular State courts* as to the scope of their jurisdiction. They include, for example, territorial and monetary limits on the jurisdiction of State courts and time limits governing the institution of certain proceedings in those courts.⁸ Such limits will have no more than an *incidental* effect on federal jurisdiction, in the sense that "the invested federal jurisdiction will shrink *pro tanto*".⁹ Section 39(2) does not contemplate limits denying the exercise of the very federal jurisdiction it seeks to invest. If it did, s 39(2) would be entirely self-defeating.

40 18. The Commonwealth does not support the other arguments regarding s 39(2) and Chapter III made by the plaintiffs in the BGNV and the WA Glendenning Proceedings, in particular:

⁶ Section 109 is a "threshold issue", and should be considered before the application of s 79 of the *Judiciary Act*: *Northern Territory v GPAO* (1999) 196 CLR 553 at 576 [38], 586 [76] per Gleeson CJ, Gummow J. See also *Dao v Australian Postal Commission* (1987) 162 CLR 317 at 331 per Mason CJ, Wilson, Deane, Dawson and Toohey JJ.

⁷ Chapter III implicitly prohibits the States from withdrawing federal jurisdiction conferred by Ch III or Commonwealth laws: see *ASIC v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 588 [59] Gleeson CJ, Gaudron and Gummow JJ; at 614 [145] per McHugh J.

50 ⁸ *Ly v Jenkins* (2001) 114 FCR 237 at 261 [82]-264 [91] per Sackville J (Moore and Kiefel JJ agreeing).

⁹ *Commonwealth v Rhind* (1966) 119 CLR 584 at 598 per Barwick CJ.

- a) *First*, the Commonwealth does not support the submission that s 22 (or, according to BGNV, s 26) renders COR 146 of 2014 and COR 179 of 2014 inutile and is thereby inconsistent with s 39(2) and/or contrary to Chapter III.¹⁰ Chapter III does not prevent Commonwealth or State Parliaments from passing legislation that affects the substantive rights at issue in pending litigation, even to the point of rendering that litigation inutile.¹¹
- b) *Secondly*, the Commonwealth does not support the plaintiff's argument in the WA Glendinning Proceedings that the *Bell Act* involves an exercise of judicial power by the executive. The Commonwealth supports the submissions of WA in the WA Glendinning Proceedings at [157]-[161] that the power conferred is not judicial. (Even if it were, that would not create a difficulty provided that the power conferred was State judicial power, there being no formal separation of powers at the State level.¹²)

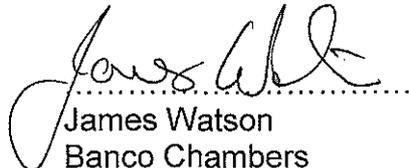
PART VI ESTIMATE OF TIME REQUIRED FOR ORAL ARGUMENT

19. It is estimated that 1 hour will be required for the presentation of oral argument.

Dated: 30 March 2016



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¹⁰ BGNV Submissions at [135], [141]; WA Glendinning Submissions at [122]-[136].

¹¹ *Duncan v Independent Commission Against Corruption* (2015) 324 ALR 1 at [26] per French CJ, Kiefel, Bell and Keane JJ; *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117 at 160 [78] per Gummow, Hayne and Bell JJ; *HA Bachrach P/L v Queensland* (1998) 195 CLR 547 at 563 [17]; *Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth* (1986) 161 CLR 88 at 96-97; *R v Humby*; *Ex parte Rooney* (1973) 129 CLR 231 at 250 per Mason J; *Nelungaloo Pty Ltd v The Commonwealth* (1948) 75 CLR 495 at 503 per Williams J, 579-580 per Dixon J.

¹² See *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 65 (Brennan CJ), 77-78 (Dawson J), 93-94 (Toohey J), 109 (McHugh J) and cases there cited.