IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S248/2015

BETWEEN: 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

and

THE STATE OF WESTERN AUSTRALIA
Defendant

ANNOTATED SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)

I. INTERNET PUBLICATION

1. This submission is in a form suitable for publication on the internet.

II. BASIS OF INTERVENTION

2. The Attorney-General for the State of Queensland intervenes in these proceedings pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of Western Australia.

III. REASONS WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

Intervener's submissions:

Filed on behalf of the Attorney-General for the State of Queensland (Intervening)
Form 27C

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Per James Potter
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IV. STATUTORY PROVISIONS

4. The relevant provisions are set out in rows 2 to 45 of the table in the Plaintiffs' Authorities Index.

V. SUBMISSIONS

5. These submissions focus on the issues described as issues 3 and 4 in paragraph 2 of the Plaintiffs' submissions. That is, they focus on the alleged inconsistency between the *Corporations Act 2001* (Cth) ('Corporations Act') and the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Act 2015* (WA) ('Bell Group Act') under s 109 of the *Constitution*, and whether ss 5F and 5G of the Corporations Act operate to avoid any such inconsistency.

6. The Attorney-General anticipates being in a position to adopt generally the position of the Defendant, and other intervening States, in relation to those other issues, and as such does not intend to make comprehensive submissions on those other issues. However, the Attorney-General recognises that the issue of the operation of ss 5F or 5G of the Corporations Act may not arise for consideration by the Court in the event that issues 1 and 5 described in paragraph 2 of the Plaintiffs' submissions are determined against the Defendant. As such, the Attorney-General makes the following brief submissions to supplement those of the Defendant in respect of those other issues before addressing the operation of ss 5F and 5G.

Construction of Bell Group Act and the income tax legislation

7. The proper approach to construction of the Bell Group Act is that set out by this Court in *Project Blue Sky v Australian Broadcasting Authority*.[1] Their Honours cited Dixon CJ in *Commissioner for Railways (NSW) v Agalianos*,[2] who pointed out that 'the context, the general purpose and policy of a provision and its consistency with fairness are surer guides to its meaning than the logic with which it is constructed'. As a result, the majority held that 'the process of construction must always begin by examining the context of the provision that is being construed'.[3] Such an approach is apt in the present case.

8. A crucial part of the context of the Bell Group Act is the remedial purpose of the legislation and the vice which the Western Australian legislature was seeking to address. In that regard, s 4(a) of the Bell Group Act lists as the first object of the Bell Group Act the need to provide a mechanism, which avoids litigation, for the distribution of funds recovered as a result of the extensive and long-running – two decades – litigation surrounding the liquidation of the Bell group of companies.

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[1] *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355.
[2] *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390 at 397.
[3] *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69] (McHugh, Gummow, Kirby and Hayne JJ).

9. The Bell Group Act therefore falls to be construed against the backdrop of the difficulties of finalising the complex external administration of a large number of multiple groups of companies, and the view of the Western Australia legislature that ss 5F and 5G of the Corporations Act provide an apt means to deal with this problem.

10. One particular aspect of construction of the Bell Group Act which the Plaintiffs put in issue is s 25(1). That provision allows a creditor to prove a liability of certain Bell Group companies (referred to as the WA Bell Companies) under the Bell Group Act if that liability was admissible to proof under Part 5.6 of the Corporations Act. The Plaintiffs' preferred construction of this section is that it does not apply to a creditor of a company ordered to be wound up before 23 June 1993, as the liabilities of those companies arise under transitional provisions of the Corporations Act rather than Part 5.6 of the Corporations Act.[4]

11. If correct, this construction would frustrate the intended operation of the Bell Group Act, as several WA Bell Companies were ordered to be wound up before 23 June 1993. On the Plaintiffs' preferred construction, no creditor of those companies, including the Commonwealth, is entitled to lodge a proof of debt under the Bell Group Act. Given the object of the Bell Group Act, which includes making reasonable provision for the satisfaction of liabilities owed to creditors of the WA Bell Companies,[5] it cannot have been the intention of the Western Australian Parliament that creditors of WA Bell Companies ordered to be wound up before 23 June 1993 would not be entitled to lodge a proof of debt. An interpretation which will ensure attainment of the object of the legislation is to be preferred to one which does not.[6]

12. This consideration favours a construction of s 25(1) of the Bell Group Act which allows lodgement of a proof of debt not only in relation to liabilities which were admissible to proof under Part 5.6 of the Corporations Act, but also to liabilities which were admissible to proof under corresponding provisions of the Corporations Law, before those provisions were substituted with rights arising under transitional provisions of the Corporations Act. In that regard, the Attorney-General anticipates being able to support generally the construction of these provisions of the Bell Group Act to be advanced by the Defendant.

[4] Plaintiffs' submissions (PS) [23].
[5] Section 4(f) of the Bell Group Act.
[6] *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014 at 1022 (Lord Simon).

Alleged inconsistency with s 39(2) of the Judiciary Act 1903 (Cth) and Chapter III

13. The Plaintiffs' submissions contend, in relation to the alleged inconsistency between the Bell Group Act and s 39(2) of the *Judiciary Act 1903* (Cth) ('Judiciary Act'), that the Bell Group Act has the legal and practical effect of rendering ineffective the exercise by the Supreme Court of the judicial power of the Commonwealth invested in it by s 39(2) of the Judiciary Act.[7] The Attorney-General submits that the Bell Group Act does not have this effect.

14. A majority of this Court has held that it would be inconsistent with s 109 of the *Constitution* for a State law to withdraw the effective authority to quell controversies from a court which is exercising federal jurisdiction conferred by s 77 of the Judiciary Act.[8] However, that judgment also held that it was well-established from decisions under s 79 of the Judiciary Act that a State law may be applicable as a source of rights and remedies in federal jurisdiction, even though that State law identifies only the courts of the enacting State as the courts to provide those remedies.

15. The categories of State laws which may apply to a court exercising federal jurisdiction include State statutes of limitations which bar causes of action after a certain time period.[9] By implication, a State law which prevents a cause of action being brought after expiry of a limitation period does not have the effect of withdrawing from the court effective authority to quell the controversy and would therefore not be inconsistent with the conferral of federal jurisdiction under s 77 of the Judiciary Act and not offend s 109 of the *Constitution*. Likewise, a State law such as s 25(5) of the Bell Group Act which prevents the making or maintenance of certain actions would also not offend s 109 on this basis.

16. The Plaintiffs' submissions also contend that other aspects of the Bell Group Act render ineffective the exercise by the Supreme Court of federal jurisdiction, such as s 22, which transfers property the subject of the Supreme Court proceedings to the WA Bell Companies Administrator Authority established by the Bell Group Act ('the Authority'), or s 26, which voids certain agreements relevant to the Supreme Court proceedings.[10] However, these provisions merely alter the factual circumstances and legal rights and obligations which apply to the parties to the proceedings, rather than affecting the Supreme Court's jurisdiction.

17. The Plaintiffs' submissions that the Bell Group Act infringes Chapter III of the *Constitution*[11] should be rejected for the same reasons. Although the relationship between the Plaintiffs' Chapter III argument and the argument of inconsistency with

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[7] PS [131]-[133].
[8] *Australian Securities and Investments Commission v Edensor Nominees* at [68] (Gleeson CJ, Gaudron and Gummow J).
[9] See for example *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65 at 88 (Gibbs J).
[10] PS [135].
[11] PS [137]-[145].

s 39(2) of the Judiciary Act is, respectfully, not entirely clear, the former argument also appears to rely on the assertion that the Bell Group Act prevents the Court from exercising the judicial power of the Commonwealth invested in the Court under Chapter III, which the Attorney-General submits is not the case for the reasons set out above.

Alleged inconsistency between Corporations Act and Bell Group Act

18. A State law which is inconsistent with a law of the Commonwealth will, by virtue of s 109 of the *Constitution*, be invalid (inoperative)[12] to the extent of the inconsistency. Section 109 inconsistency is sometimes categorised as 'direct' or 'indirect'.

19. A ***direct*** inconsistency will arise where:

- it is not possible to obey both the Commonwealth and State laws (the ***first kind*** of direct inconsistency);[13] or
- the State law, if valid, would 'alter, impair or detract from' the operation of the Commonwealth law (the ***second kind*** of direct inconsistency).[14]

20. An ***indirect*** inconsistency arises where the Commonwealth law evinces an intention to 'cover the field' of its operation, and completely, exhaustively or exclusively govern the relevant conduct or matters,[15] or be a 'complete statement of the law governing a particular matter or set of rights or duties'.[16]

21. The current matter concerns an alleged inconsistency between the Corporations Act and the Bell Group Act. Part 1.1A of Chapter 1 of the Corporations Act makes provision for the interaction between Corporations legislation and State laws.

No indirect inconsistency

22. Section 5E, in Part 1.1A provides as follows:

> **5E Concurrent operation intended**
>
> (1) The Corporations legislation is not intended to exclude or limit the concurrent operation of any law of a State or Territory.
>
> ...
>
> (4) This section does not apply to the law of the State or Territory if there is a direct inconsistency between the Corporations legislation and that law.

[12] *Carter v Egg & Egg Pulp Marketing Board (Vic)* (1942) 66 CLR 557 at 573 (Latham CJ).
[13] For example, where the State law requires a particular thing be done and a Commonwealth law prohibits that same particular thing being done: *R v Licensing Court of Brisbane; Ex parte Daniell* (1920) 28 CLR 23.
[14] *Victoria v Commonwealth* (1937) 58 CLR 618 at 630 (Dixon J).
[15] *Ex parte McLean* (1930) 43 CLR 472 at 483 (Dixon J).
[16] *Victoria v Commonwealth* (1937) 58 CLR 618 at 630 (Dixon J).

Note: Section 5G prevents direct inconsistencies arising in some cases by limiting the operation of the Corporations legislation.

23. It is clear that s 5E rules out any indirect inconsistency between the Corporations Act and a State law.

24. In *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation*,[17] Mason J held that a similar provision in the *Trade Practices Act 1974* (Cth) made clear that the Commonwealth law was not intended to cover the field, and left room for the operation of State laws which did not conflict with the Commonwealth law:[18]

> [A] Commonwealth law may provide that it is not intended to make exhaustive or exclusive provision with respect to the subject matter with which it deals, thereby enabling State laws, not inconsistent with Commonwealth law, to have an operation. Here again the Commonwealth law does not of its own force give State law a valid operation. All that it does is to make it clear that the Commonwealth law is not intended to cover the field, thereby leaving room for the operation of such State laws as do not conflict with Commonwealth law.
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> ... where there is no direct inconsistency, where inconsistency can only arise if the Commonwealth law is intended to be an exhaustive and exclusive law, a provision of the kind under consideration will be effective to avoid inconsistency by making it clear that the law is not intended to be exhaustive or exclusive.

25. It is true that the presence of a concurrent operation provision does not conclusively demonstrate an intention not to cover the field.[19] However, the Attorney-General submits that s 5E is a clear indication that the Commonwealth Parliament did not intend that the Corporations Act would cover the field, as it is not intended to be a "complete statement of the law governing a particular matter or set of rights or duties", in the sense referred to by Dixon J in *Victoria v Commonwealth.*

26. As Barrett J held in *HIH Casualty & General Insurance Ltd and Others v Building Insurers' Guarantee Corporation and Another*[20] about the effect of s 5E:

> The Commonwealth law thus contains its own explicit statement that it is not intended to be, according to Dixon J's formulation, a "complete statement of the law governing a particular matter or set of rights and duties". On the contrary, it is clear, at least so far as s 5E is concerned, that State and Territory laws may also regulate matters, rights

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[17] *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1977) 137 CLR 545.
[18] *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1977) 137 CLR 545 at 563-564 (Mason J).
[19] *Momcilovic v The Queen* (2011) 245 CLR 1, 121 [272] (Gummow J, French CJ and Bell J agreeing), 134 [316], 142 [344] (Hayne J diss), 189 [472-473] (Heydon J), 238-239 [654] (Crennan and Kiefel JJ).
[20] *HIH Casualty & General Insurance Ltd and Others v Building Insurers' Guarantee Corporation and Another* [2003] NSWSC 1083 (*HIH Case*).

and duties with which the Commonwealth law is concerned, provided that they do not do so in a way which involves "direct inconsistency".[21]

27. A similar conclusion was reached by the Court of Appeal of the Supreme Court of Victoria[22] and the Supreme Court of Victoria.[23]

28. The Attorney-General therefore submits that indirect inconsistency is not relevant to the current case, and only direct inconsistency can arise between the Corporations Act and the Bell Group Act.

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Direct inconsistency

29. The Attorney-General concedes that there would at least be some level of direct inconsistency between the Bell Group Act and the Corporations Act, were it not for s 5F, which allows a State law to exclude the operation of the Corporations Act in certain circumstances, and/or s 5G, which contains provisions aimed at avoiding direct inconsistency between the Corporations Act and State laws.

30. This is because the Bell Group Act and the Corporations Act cannot operate
20 concurrently. The Corporations Act, and in particular Part 5, establishes a scheme for external administration of companies, which contemplates the appointment of liquidators and the exercise of certain powers by the liquidators in order to realise the assets of the companies and distribute funds of the company to creditors.

31. The Bell Group Act establishes a separate legislative mechanism for winding up of the WA Bell Companies, vests the property of those companies in the Authority, and grants the Authority similar powers to those which the liquidator of those companies appointed under the Corporations Act have.

30 32. As both mechanisms for winding up of the WA Bell Companies are mutually exclusive and cannot operate together, it is clear that, setting aside the operation of ss 5F and 5G for the moment, there will be some level of direct inconsistency between the Bell Group Act and the Corporations Act.

33. The Attorney-General does not intend to make detailed submissions about the extent of the direct inconsistency which would, apart from ss 5F and 5G, exist between the Bell Group Act and the Corporations Act, and does not concede that all of the instances of inconsistency which are alleged in the Plaintiffs' submissions can properly said to give rise to inconsistency as a result of s 109 of the *Constitution*.

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[21] *HIH Case* at 190 [78] (Barrett J).

[22] *Loo v Director of Public Prosecutions (Vic)* (2005) 192 FLR 271 at 285, [2005] VSCA 161 at [25] (Winneke P, with whom Charles and Callaway JJA agreed), *Bow Ye Investments Pty Ltd (in liq.) v Director of Public Prosecutions & Ors* (2009) 299 FLR 102 at 116, [2009] VSCA 149 at [71] (Warren CJ, with whom Buchanan JA and Vickery AJA agreed).

[23] *IG Index plc v New South Wales* (2006) 198 FLR 132 at 142-143, [2006] VSC 108 at [39] (Bongiorno J) (reversed on appeal, but not on this point, in *New South Wales v IG Index plc* (2007) 17 VR 87, [2007] VSCA 212 (Buchanan, Nettle and Neave JJA)).

34. Instead, these submissions focus on the extent to which a State law such as the Bell Group Act can exclude the Corporations Act under s 5F, and the extent to which s 5G will operate to avoid what would otherwise be direct inconsistency between a State law such as the Bell Group Act and the Corporations Act.

Section 5F

35. Section 5F allows State legislation to declare a matter to be an excluded matter for the purposes of s 5F, in relation to:

- the whole of the Corporations legislation;[24]
- a specified provision of the Corporations legislation;[25]
- the Corporations legislation other than a specified provision;[26] or
- the Corporations legislation otherwise than to a specified extent.[27]

36. For the purposes of s 5F, a 'matter' includes an act, omission, body, person or thing.[28]

37. Section 51(1) of the Bell Group Act declares each WA Bell Company to be an excluded matter for the purposes of s 5F, in relation to the whole of the Corporations legislation, other than to the extent specified in s 51(2) and (3). This utilises the mechanism in s 5F(1)(d) of declaring a matter to be an excluded matter in relation to the Corporations legislation other than a specified provision.

38. If a State law makes a declaration as contemplated by s 5F(1)(d), then s 5F(2) applies and by force of s 5F(2) the provisions of the Corporations legislation, other than s 5F and otherwise than to the extent specified in the State law, do not apply *in the State or Territory* in relation to the matter.[29]

39. The declaration in s 51 of the Bell Group Act therefore means that, by force of s 5F(2), the Corporations Act, other than s 5F, does not apply in Western Australia in relation to the WA Bell Companies, other than to the extent specified in s 51(2) and (3) of the Bell Group Act.

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[24] Corporations Act, s 5F(1)(a). 'Corporations legislation' includes the Corporations Act, the *Australian Securities and Investments Commission Act 2001*, regulations made under it, and various rules of court. For the purposes of these submissions, it is sufficient to refer to the Corporations Act rather than other aspects of the Corporations legislation.

[25] Corporations Act, s 5F(1)(b).

[26] Corporations Act, s 5F(1)(c).

[27] Corporations Act, s 5F(1)(d).

[28] Corporations Act, s 5F(6).

[29] Corporations Act, s 5F(2)(d) (emphasis added).

40. The Plaintiffs' case, in relation to s 5F, rests upon the submission that the words 'in the State or Territory' in s 5F(2) mean that s 5F(2) only operates to dis-apply provisions of the Corporations Act if those provisions 'operate in a territorially defined or territorially ascertainable way'.[30]

41. The Plaintiffs submit that the provisions of the Corporations Act in question do not operate in a territorially defined or ascertainable way, and are therefore not dis-applied in Western Australia in relation to each WA Bell company.[31] The Plaintiffs submit, in the alternative, that s 5F only operates to dis-apply the relevant provisions of the Corporations Act from operating in Western Australia, and does not exclude these provisions from operating elsewhere in Australia.[32] As a result, the Plaintiffs submit that s 5F does not operate to avoid an inconsistency between the provisions of the Corporations Act and the Bell Group Act.[33]

42. Support for this view can be found from the judgment of Barrett J in the *HIH Case*. That case involved an inconsistency between ss 555 and 556 of the Corporations Act, which provide for certain unsecured debts to be paid in priority to other unsecured debts in a winding up of a company, and s 562A, which deals with reinsurance held by the company in the course of winding up in respect of insurances written by the company. Certain State and Territory laws were said to be inconsistent with these Corporations Act provisions as the State and Territory laws had the effect that assets of certain companies, consisting of contractual rights against a reinsurer, were unavailable for application in accordance with ss 555 and 556. Further, the State and Territory laws required the proceeds of reinsurance to be applied in a way which ranked in priority to other payments.[34]

43. His Honour held that s 5F would accommodate a provision of State law which had clear territorial attributes, such as a requirement of State law enabling a resident of that State to carry on a financial services business without obtaining the licence otherwise required under the Corporations Act. However, His Honour held that the circumstances of the *HIH Case* 'involve no such activity having or capable of having a territorial quality linked to a State or Territory'.[35]

44. The provisions of the Corporations Act in question in the *HIH Case* related to a company registered in 'this jurisdiction' as defined in s 9 of the Corporations Act, being the geographical area of all the States, the Australian Capital Territory and the Northern Territory. The company had 'one indivisible existence as a body corporate' throughout 'this jurisdiction'. The provisions of the Corporations Act which directed the manner of application of the property of in the course of winding up of such a company, and the order in which debts and claims were to be paid in such a winding

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[30] Amended Statement of Claim (ASC) [79], PS [95].
[31] ASC [80], PS [96].
[32] ASC [81], PS [98].
[33] ASC [82].
[34] *HIH Case* at 181-182 [71] (Barrett J).
[35] *HIH Case* at 193 [90] (Barrett J).

up, could therefore not be regarded as applying 'in' any particular State or Territory, but rather in the whole of the area to which the Corporation Act's territorial operation extends.[36] Section 5F could therefore produce no meaningful result in relation to the State and Territory laws which sought to alter the operation of the Corporations Act.[37]

45. The Attorney-General submits that this interpretation of the words 'in a State or Territory' is, with respect, too broad.

46. Prior to the enactment of the Corporations Act, legislation referred to as the 'national scheme law' but cited as the *Corporations Law*, and contained in s 82 of the *Corporations Act 1989* (Cth), was applied as a law of each State or Territory by virtue of a law enacted by that jurisdiction. The State and Territory legislation applying the *Corporations Law* contained provisions that allowed an Act of that State or Territory to provide expressly that the Act had effect despite the *Corporations Law*.[38] This allowed States and Territories to legislate to displace or modify the operation of the *Corporations Law*, as it applied as a law of the relevant State or Territory, but only if this was done expressly.

47. The referral by the States to the Commonwealth of power to legislate in respect of matters contained in the Corporations Act resulted in the Corporations Act replacing the national scheme law, and the Corporations Act then applied by force of Commonwealth legislation rather than as a law of each State or Territory as the *Corporations Law* had done.

48. However, the drafters recognised the pre-existing ability of States and Territories to modify the operation of the *Corporations Law* under provisions such as s 5(2) of the *Corporations (Queensland) Act 1990* (Qld), and recognised that such provisions would not have effect once the corporations legislation was enacted as a Commonwealth law. To ameliorate the effect of this, s 5F was inserted to allow States or Territories to modify provisions of the Corporations Act. However, to reflect the fact that States or Territories were only competent to amend or modify the operation of their own law, and not the law of the Commonwealth, the effect of s 5F was limited so that a matter excluded by a State or Territory would only be dis-applied in the State or Territory in relation to the declared matter. This intention is apparent from the Explanatory Memorandum to the Corporations Bill 2001 (Cth):

> 5.73 In addition to the issues arising from the potential operation of section 109 of the Constitution, there are also issues arising from the fact that it is not generally within the competence of a Parliament of a State to amend or modify the operation of legislation of the Commonwealth ... States have from time to time enacted legislation that modifies the operation of the Corporations Law of the State concerned; and there are provisions of the Corporations Law that

[36] *HIH Case* at 193-194 [90]-[91] (Barrett J).
[37] *HIH Case* at 194 [92] (Barrett J).
[38] See for example s 5(2 of the *Corporations (Queensland) Act 1990* (Qld). Identical provisions are to be found in the corresponding State and Territory legislation.

modify the operation of other legislation of the relevant State. However, provisions of this kind would not generally have effect once the corporations legislation is enacted as federal law.

5.74 In order to ameliorate this outcome in relation to State and Territory laws:

- a provision of a State or Territory law may declare a matter to be an excluded matter, in relation to either the whole of the corporations legislation or a specified provision of the legislation. As a result, the corporations legislation (or the provision specified) will not apply in the State or Territory in relation to the declared matter (clause 5F). It will then be open for the State or Territory to regulate the matter concerned.[39]

49. This reveals that the words 'in the State or Territory' in s 5F(2) were intended by the Parliament to reflect the limitation on State legislative power reflected under previous provisions such as s 5(2) of the *Corporations (Queensland) Act 1990* (Qld), rather than introduce a limitation on this power which restricts the power to provisions of the Corporations Act which involved an activity which has a 'territorial' quality, as Barrett J in the *HIH Case* put it, or to provisions that 'operate in a territorially defined or territorially ascertainable way', as the Plaintiffs put it.

50. This interpretation is further supported by s 5F(4), which preserves the effect of provisions such as s 5(2) of the *Corporations (Queensland) Act 1990* (Qld). While s 5F(2) allows State or Territory laws enacted after commencement of the Corporations Act to dis-apply the Corporations Act by declaring a matter to be an excluded matter, s 5F(4) preserves State or Territory laws which were in force at the time the Corporations Act commenced and had the effect that a provision of the *Corporations Law* did not apply to a matter. Section 5F(4) has the effect that the provision of the Corporations Act that corresponds to the excluded provision of the *Corporations Law* 'does not apply *in the State or Territory* to the matter until that law of the State or Territory is omitted or repealed'.[40]

51. Clearly, s 5F(4) is intended to operate to preserve the effect of provisions such as s 5(2) of the *Corporations (Queensland) Act 1990* (Qld). The use of the words 'in the State or Territory' in s 5F(4) should not be interpreted so as to impose an additional requirement that the operation of those laws should only be preserved in relation to matters which 'have a territorial quality linked to a State or Territory'. Likewise, the use of the same words in s 5F(2) should not be interpreted as imposing any additional limitation on the ability of a State or Territory to exclude by express provision the Corporations Act in relation to specified matters, by limiting the matters which can be excluded to matters which 'have a territorial quality linked to a State or Territory'.

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[39] Explanatory Memorandum to the Corporations Bill 2001 (Cth), [5.73]-[5.74].
[40] Emphasis added.

52. This interpretation of s 5F was adopted by the Court of Appeal of the Supreme Court of Victoria in *Loo v Director of Public Prosecutions (Victoria)*,[41] where Winneke P held that:

> Furthermore, s 5F(2) goes a step further than s.5E by permitting a state law to declare a matter to be an "excluded matter" in relation to the whole or specified provisions of the *Corporations Act*. In that respect s.5F(1) and (2) replicate s.5(2) of the *Corporations (Vic.) Act* 1990, except that now the state legislation must use the language of "excluded matter" rather than merely "an express provision" that the state law is to have effect despite specified provisions of the Corporations Law. Indeed, as the authors of Ford's Principles of Corporations Law point out:
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> > "The effect of State legislation enacted under s.5(2) of the *Corporations (Vic.) Act* 1990, before the commencement of the corporations legislation is preserved by s.5F(4), which has the effect that State ... laws of these kinds operate to exclude the provisions of the corporations legislation that correspond to the provisions of the old Corporations Law that have been excluded by the State ... law."[42]

53. This passage supports an interpretation of s 5F that the section preserves the rights of States or Territories to dis-apply the Corporations Act, both by continuing the effect of pre-existing State laws which expressly dis-applied the *Corporations Law* under s 5F(4), and by continuing to allow States to legislate in this manner under s 5F(2), albeit using the formulation of a declaration that a matter is an excluded matter, rather than the old requirement which merely required an express provision without any particular formulation.

54. This interpretation is also supported by judgments of the Supreme Courts of a number of States and the Federal Court which, although not expressly considering in detail the issue at hand, appear to have proceeded on the assumption that a State law made under s 5F can dis-apply the Corporations Act by declaring the Corporations Act to be an excluded matter in relation to particular bodies incorporated under State law. For example:

- the Supreme Court of Queensland appeared to accept that s 5F could be used to declare an association incorporated under the *Associations Incorporation Act 1981* (Qld) to be an 'excluded matter' for the Corporations Act, s 5F;[43]
- the Supreme Court of New South Wales has taken the same approach in relation to an association incorporated under the *Associations Incorporation Act 2009*

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[41] *Loo v Director of Public Prosecutions (Vic)* (2005) 192 FLR 271 at 285, [2005] VSCA 161.
[42] *Loo v Director of Public Prosecutions (Vic)* (2005) 192 FLR 271 at 285, [2005] VSCA 161 at [25] (Winneke P, with whom Charles and Callaway JJA agreed) (footnotes omitted).
[43] *Robson & Ors v Commissioner of Taxation* [2015] QSC 76 at [14]-[15] (Jackson J), *Gold Coast Commerce Club Inc & Anor v Body Corporate for Surfers Plaza Resort Community Titles Scheme 6388* [2008] QSC 323 at [82] (Dutney J).

(NSW),[44] as has the Full Court of the Federal Court in relation to the *Incorporated Associations Act 1987* (WA);[45]

- the Full Court of the Supreme Court of South Australia appeared to proceed on the basis that the South Australian Parliament could declare a co-operative under the *Co-Operatives Act 1997* (SA) to be an excluded matter for the purposes of s 5F in relation to the whole of the Corporations Act except to a specified extent,[46] and the Federal Court took a similar approach in relation to a co-operative under the *Co-operatives Act 1992* (NSW);[47] and
- the Court of Appeal of the Supreme Court of New South Wales,[48] and the Supreme Court of New South Wales,[49] apparently accepted that the New South Wales Parliament could, under s 5F, exclude the operation of the Corporations Act in relation to an owners corporation constituted under the *Strata Schemes Management Act 1996* (NSW).

55. True it is these cases all involved bodies corporate created under State laws, yet it could no more be said of these incorporated associations and the like that they 'operate in a territorially defined or ascertainable way' in relation to the particular State, than it could be said of many companies incorporated under the Corporations Act operating principally in one State.

56. In practice, the winding up of such bodies is prone to involve creditors or assets (in particular choses in action) which are located in other States. Excluding the winding up provisions of the Corporations Act from applying to a winding up of these bodies would affect legal rights and obligations which might apply in other jurisdictions, not just the State concerned.

57. The Attorney-General submits that there is no apparent reason to conclude that the words 'in a State or Territory' in s 5F should be interpreted to allow the winding up provisions of the Corporations Act to be excluded in relation to winding up of a body corporate incorporated under State law, but not allow these provisions to be excluded in relation to the winding up of a company incorporated under the Corporations Act.

58. The Plaintiffs' argument that the words 'in the State' in s 5F(2) mean that s 5F(2) only operates to dis-apply provisions of the Corporations Act if those provisions 'operate in a territorially defined or territorially ascertainable way' misconstrues the effect of those words. Those words do not require application of a test of whether particular

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[44] *Ahmed v Chowdhury* [2012] NSWSC 1452 at [88]-[89] (Lindsay J).

[45] *Australian Securities and Investments Commission v Medical Defence Association of Western Australia Inc* (2005) 143 FCR 125 at 128-129, [2005] FCAFC 173 at [13]-[15] (Finn, Emmett and Conti JJ).

[46] *Re Riverland Fruit Co-Operative (In Liq)* (2006) 203 FLR 310 at 313, [2006] SASC 302 at [8] (Debelle, Sulan and Layton JJ).

[47] *The Airtourer Co-operative Limited v Millicer Aircraft Industries Pty Limited* [2004] FCA 1400 at [3] (Branson J).

[48] *2 Elizabeth Bay Road Pty Ltd v The Owners – Strata Plan No 73943* (2014) NSWLR 488 at 503, [2014] NSWCA 409 at [69] (Leeming JA).

[49] *Eastmark Holdings Pty Limited v Kabraji* [2012] NSWSC 802 at [47] (Hallen AsJ).

provisions of the Corporations Act have an operation that can in some vaguely defined way be characterised as 'territorial'. Instead, the words reflect the ongoing ability of a State or Territory to exclude provisions of the Federal legislation, in the same way as States or Territories could previously exclude application of the State or Territory's own laws, when the *Corporations Law* was applied in each State by virtue of a law of that State.

59. The Attorney-General therefore submits that s 5F should not be limited in the way the Plaintiffs suggest, and that s 51 of the Bell Group Act is a valid use of the mechanism in s 5F to declare that the provisions of the Corporations Act is excluded in relation to WA Bell Companies. The provisions of the Bell Group Act which determine the manner in which the WA Bell Companies are to be wound up can therefore apply according to their terms, without any inconsistency arising with the winding up provisions of the Corporations Act.

60. To the extent that the judgment of Barrett J in the *HIH Case* held otherwise, the Attorney-General respectfully submits that that decision is wrong and should be overturned.

61. The Attorney-General recognises that this interpretation means that provisions of the Corporations Act which are capable of having ramifications Australia wide, including perhaps the provisions of Chapter 5, may be excluded by States, and this may detract from the operation of what is intended to be a national scheme for corporate regulation. That, however, is a result of the limit on Commonwealth constitutional power which means that the Commonwealth relies on State referral of power to implement the national scheme. Just as the States could detract from the national scheme by express State laws under previous provisions such as s 5(2) of the *Corporations (Queensland) Act 1990* (Qld), States are still able to detract from the national scheme by enacting State laws which utilise the mechanism under s 5F of the Corporations Act.

62. Although there may be situations where such a detraction may work against the national interest, s 5F(3) appears to provide an answer to such concerns as it allows the Commonwealth, by regulation, to restrict the States' power to exclude particular provisions of the Corporations Act under s 5F(2).[50] Any such concerns should be addressed through use of this mechanism rather than by a restrictive interpretation of State legislative power as a result of importing an additional requirement of a 'territorial' nature into States' ability to utilise the mechanism in s 5F.

Section 5G

63. The other main provision in Part 1.1A is s 5G, which is headed 'Avoiding direct inconsistency arising between the Corporations legislation and State and Territory laws'. Section 5G sets out the interaction between the Corporations Act and certain

[50] Section 5F(5) makes similar provision in relation to s 5F(4).

provisions of a law of a State or Territory which meet conditions set out in the table in s 5G(3).

64. It does not appear to be disputed that the provisions of Parts 3, 4 and 5 and ss 55 and 56(3) the Bell Group Act are each a 'post-commencement provision' as defined in s 5G(14) of the Corporations Act, as the provisions were enacted and came into force on or after the commencement of the Corporations Act and have not been materially amended after commencement.

65. The Plaintiffs also appear to accept that these provisions meet the condition set out in Item 3 of the table in s 5G(3), as s 52 of the Bell Group Act declares those provisions to be a 'Corporations legislation displacement provision' for the purposes of s 5G.[51]

66. It therefore appears to be common ground that the interaction of any direct inconsistency between the relevant provisions of the Bell Group Act and the Corporations Act is determined by s 5G, to the extent that the Corporations Act provisions are not effectively excluded as a result of s 5F.

67. Sub-sections (4) to (11) of s 5G set out various situations in which an inconsistency may arise between a State or Territory law to which s 5G applies and the Corporations Act. The main sub-section which would be applicable is s 5G(8), which provides:

> *External administration under State and Territory laws*
>
> (8) The provisions of Chapter 5 of this 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 a provision of a law of a State or Territory.

68. Section 5G(8) does not contain the words 'in a State or Territory' which are found in s 5F. To the extent that those words limit the scope of s 5F to Corporations Act provisions which have some 'territorial' operation, as the Plaintiffs suggest, no such limitation would apply to s 5G(8).

69. The Plaintiffs contend that s 5G(8) should be construed as only excluding the particular part of Chapter 5 which corresponds to the particular form of external administration contemplated by the law of the State.[52] In that regard, the Plaintiffs appear to contend for an interpretation of the terms 'external administration' and 'administration' in s 5G(8) which is limited to voluntary administration entered into under Part 5.3A of Chapter 5 of the Corporations Act. That interpretation is not apparent from the wording of s 5G(8), which uses the phrase 'External administration under State and Territory laws' in the heading to refer to different types of external

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[51] ASC, [83]-[84].
[52] PS [109]-[110].

administration referred to in s 5G(8) being 'a scheme of arrangement, receivership, winding up **or other external administration**' (emphasis added). That interpretation is also inconsistent with the Explanatory Notes to the Corporations Bill 2001 (Cth) which make clear by way of example that the whole of Chapter 5 can be excluded by a State law which provides for a winding up:

> For example, despite Bill clause 583, Bill 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 a provision of a law of a State.[53]
>
> (emphasis added)

70. In terms, the Explanatory Notes, consistently with the terms of s 5G, contemplate that a corporation such as a WA Bell Group Company, may by State legislation be withdrawn from the operation of Part 5.7 of the Corporations Act. Thus, 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.

71. The Attorney-General submits that s 5G(8) should be interpreted as allowing a State mechanism which provides for any form of external administration of a company to displace the whole of Chapter 5, to the extent of any inconsistency.

72. The Plaintiffs also contend that the legislative mechanism in the Bell Group Act does not constitute a 'winding up'. In the alternative, they contend that even if it does constitute a 'winding up', it constitutes the winding up of the Authority rather than the WA Bell Group Companies.[54]

73. The Attorney-General submits that those contentions should not be accepted. The Attorney-General submits that the relevant provisions of the Bell Group Act do allow for the carrying out of a form of external administration of the WA Bell Companies. Section 4(b) provides that one object of the Bell Group Act is:

> to provide a form of external administration of WA Bell Companies;

74. Part 3 of the Bell Group Act effects a transfer of property of the WA Bell Companies to the Authority, provides for the treatment of liabilities of WA Bell Companies, makes the Authority the administrator of each WA Bell Company and provides for the dissolution of WA Bell companies.

75. Part 4 is headed 'Completion of winding up of WA Bell Companies' and sets out how the Authority is to fulfil this role by obtaining information from liquidators of the WA Bell Companies, determining the property and liabilities of the WA Bell Companies,

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[53] Explanatory Memorandum to the Corporations Bill 2001 (Cth), [5.67].
[54] ASC [88].

and reporting to the Minister with information and recommendation as to the property and liabilities. Part 4 also provides for the Minister to submit reports of the Authority to the Governor, for the Governor to determine amounts to be paid in respect of liabilities, and for the Authority to give effect to those determinations.

76. Part 5 completes this process by closing the fund established by the Act, vesting any remaining property in the State of Western Australia, and reporting of the Administrator on the carrying out of the Authority's functions.

77. In effect, the Bell Group Act provides a mechanism by which the external administration of the WA Bell Group Companies is achieved. It involves the ascertainment of the property and liabilities of the WA Bell Group Companies, the realisation of that property and its distribution to creditors in satisfaction of the companies' liabilities. This is the essence of the process of winding up, as described by Barrett J in the *HIH Case*.[55] This is so notwithstanding that the winding up or external administration is achieved by the bespoke mechanism of the Bell Group Act, which creates a statutory authority to fulfil the role which would otherwise be fulfilled by liquidators under the Corporations Act. Indeed, once it is accepted that s 5G(8) allows a State to displace Chapter 5 of the Corporations Act in relation to a form of external administration carried out in accordance with State law, the plenary power of a State legislature suggests that it is a matter for the State legislature to determine the nature and form of the administration which is to apply in place of Chapter 5.

78. In the current circumstances, it is apparent that the Western Australian State legislature considered that the mechanism in the Bell Group Act was the most appropriate mechanism for completing the external administration of the numerous WA Bell Group Companies. In that regard, the difficulties of having different liquidators appointed to different members of the same corporate group has been long recognised by the Courts. For example, Lucas J of the Queensland Supreme Court, in *Re Keith Morris Pty Ltd & Ors*,[56] held that in the case of a number of companies in the same group, provided there was no conflict of interest: it would be:

> ... desirable from the point of view of ease of administration and expenses that the liquidation of each of the companies should be undertaken by the same liquidator or liquidators;[57]

79. This approach was also followed by the Supreme Court of Western Australia in *Re Bruton Pty Ltd and the Companies (WA) Code*,[58] and a similar approach has been adopted by the Federal Court in relation to the winding up of the failed Westpoint group of companies, where it was considered that appointment of a single set of

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[55] *HIH Case* at 195-196 [97] (Barrett J).
[56] *In the matter of Keith Morris Pty Ltd, K.D. Morris & Sons (NSW) Pty Ltd, Kirr Investments Pty Ltd* (1975-1976) ACLC 28,244.
[57] *In the matter of Keith Morris Pty Ltd, K.D. Morris & Sons (NSW) Pty Ltd, Kirr Investments Pty Ltd* (1975-1976) ACLC 28,244 at 28,246 (Lucas J).
[58] *Re Bruton Pty Ltd and the Companies (WA) Code* (1990) 2 ACSR 277 at 281 (Master Ng).

liquidators to wind up the numerous group companies would 'advance the efficiency of the liquidation'.[59]

80. Yet, the Courts have also recognised the potential for conflict of interest on the part of liquidators to arise, necessitating the removal and replacement of liquidators and adversely affecting the efficiency of the external administration.[60] The potential for a conflict of interest to arise in a situation where multiple group companies and multiple liquidators exist, and the mechanism in the Bell Group Act appears to be a reasonable policy response adopted by the Western Australian State legislature to attempt to avoid any such conflict.

81. Lastly, as the Attorney-General has submitted in paragraph 9 above, the fact that the *pari passu* distribution of assets is a feature of a winding up under Chapter 5 of the Corporations Act does not necessarily mean that this must also be a feature of a particular mechanism for external administration chosen by a State legislature.

82. It is a matter for the Western Australian State legislature to determine the mechanism of external administration most appropriate to the unique factual circumstances of the WA Bell Group Companies. The fact that the mechanism in the Bell Group Act does not reflect some aspects of the mechanisms in Chapter 5 of the Corporations Act does not deprive the State mechanism of its character as a mechanism for external administration to which s 5G is capable of applying. Indeed, to require a State mechanism to share the features of Chapter 5 of the Corporations Act would deprive s 5G of its effectiveness as it would limit a State legislature to implementing in State law a mechanism similar in effect to the mechanism that would apply in any event under the Corporations Act.

83. The Attorney-General therefore submits that the provisions of Parts 3 to 5 of the Bell Group Act provide for the carrying out of a winding up or other form of external administration of the WA Bell Group Companies. The provisions of Chapter 5 of the Corporations Act do not apply to the carrying out of that winding up or external administration as a result of s 5G(8), and this avoids inconsistency between the provisions of the Bell Group Act and the majority of the provisions of the Corporations Act which the Plaintiffs allege give rise to inconsistency.

84. Two other sub-sections of s 5G may apply to prevent any inconsistency with the Bell Group Act arising from the remaining provisions of the Corporations Act which are outside Chapter 5. First, s 5G(4) provides as follows:

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[59] *Australian Securities and Investments Commission v Westpoint Corporation Pty Ltd (ACN 009 395 751)* (2006) 56 ACSR 646 at 652 (Siopis J).

[60] See for example *Re Queensland Stations Pty Ltd (in liq); Re Coutts Finance Pty Ltd; Re Coutts Townsville Pty Ltd* (1991) 9 ACLC 1,341 which involved liquidation of three companies part of the Coutts Group of companies, *Re Club Superstores Australia Pty Ltd (in liq)* (1993) 10 ACSR 730 (Thomas J), applied in *Hughes v Westgem Investments Pty Ltd (recs and mgrs. Apptd) (No 3)* [2012] WASC 360, and *Re Giant Resources Ltd* [1991] 1 Qd R 107 (Ryan J) in which an alleged conflict of interest arose due to the conduct of the provisional liquidators failing to take steps to challenge securities granted by subsidiaries of the company being wound up.

State and Territory laws specifically authorising or requiring act or thing to be done

(4) A provision of the Corporations legislation does not:

(a) prohibit the doing of an act; or
(b) impose a liability (whether civil or criminal) for doing an act;

if a provision of a law of a State or Territory specifically authorises or requires the doing of that act.

85. Again s, 5G(4) does not contain the words 'in a State or Territory' so would apply despite any limitation on the scope of operation of the sub-section which the Plaintiffs allege those words create.

86. Second, s 5G(11) provides as follows:

State and Territory laws specifically authorising or requiring act or thing to be done

(11) A provision of the Corporations legislation does not operate in a State or Territory to the extent necessary to ensure that no inconsistency arises between:

(a) the provision of the Corporations legislation; and
(b) a provision of a law of the State or Territory that would, but for this subsection, be inconsistent with the provision of the Corporations legislation.

87. It is true that this sub-section contains the words 'in a State or Territory' and so its operation is confined by any limitation which those words impose. In the *HIH Case*, Barrett J held that these words should be interpreted in the same way as his Honour interpreted them in s 5F, that is, as meaning that s 5G(11) applies only in respect of provisions of the Corporations legislation which are capable of having a territorial operation.[61]

88. The Attorney-General however submits that these words should be construed in the same manner outlined above in relation to s 5F. That is, s 5G(11) is capable of operating in relation to any provisions of the Corporations Act rather than provisions which have a territorial operation. This means that, where a State law meets the conditions in s 5G(3), any inconsistency with the Corporations Act will be resolved in favour of the State law. In that regard, s 5G(4) to (10) can be seen as particular examples of inconsistencies which may arise, which s 5G(11) operating as a 'catch-

[61] *HIH Case* at 195 [94] (Barrett J).

all' provision which resolves any inconsistencies not specifically listed in s 5G(4) to (10).

VI. ESTIMATE OF TIME REQUIRED FOR ORAL ARGUMENT

89. The Attorney-General estimates that 30 minutes should be sufficient to present her oral argument.

Dated: 23 March 2016

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