IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY **No. S248 of 2015**

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

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

No. P63 of 2015

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

and

STATE OF WESTERN AUSTRALIA
Defendant

No. P4 of 2016

MARANOA TRANSPORT PTY LTD
(IN LIQ) (ACN 009 668 393)
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
Third Plaintiff

Filed on behalf of Attorney-General for the State of Tasmania
Date of document: 23 March 2016
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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 Defendants

ANNOTATED SUBMISSIONS OF THE ATTORNEY-GENERAL OF TASMANIA, INTERVENING

PART I: CERTIFICATION

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

PART II: BASIS OF INTERVENTION

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

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not Applicable

PART IV: APPLICABLE CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

4. The applicable legislative provisions are set out in a separate volume prepared by the parties.

PART V: SUBMISSIONS

5. The Attorney-General of Tasmania intervenes under s 78A of the *Judiciary Act 1903* (Cth) in the interests of the State of Western Australia as Defendant in each of the proceedings.

6. This submission is limited to the issues raised by the parties with respect to the operation of Part 1.1A (and particularly s 5F and s 5G) of the *Corporations Act 2001* (Cth)[1].

7. In that context, Tasmania generally supports the position of Western Australia.

8. It is specifically contended that in determining the application of those provisions to the questions raised for determination in these proceedings the provisions ought not be given the narrow interpretation afforded to them by Barrett J in *HIH Casualty and General Insurance Ltd. (in liq.) v Building Insurers' Guarantee Corporation* [2003] NSWSC 1083; (2003) 202 ALR 610 as suggested by the plaintiffs.

9. In *HIH Casualty and General Insurance Ltd. (in liq.)*, Barrett J interpreted s 5F(2), s 5F(4) and s 5G(11) as imposing territorial limitations on the exclusion of the *Corporations Act* by the legislative act of a State or Territory[2].

10. Rather, it is submitted that the provisions are to be read more broadly according to the purpose and intention of Part 1.1A in accordance with settled principles of statutory construction.

Purposive Construction

11. It is trite to say that whilst an exercise in statutory interpretation must always commence with a consideration of the text, the meaning of the text may require consideration of the context, which includes the general purpose and policy of the provision in question[3]. As Crennan and Bell JJ noted in *Travelex v Commissioner of Taxation* (2010) 241 CLR 510 at 531:

> As observed by this court, the surest guide to legislative intention is the language which has actually been employed in the text of the legislation. A decision on the meaning of the language employed must begin by examining the context, considered in its widest sense, which will include the general purpose and policy of the provision.

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[1] In proceedings P4/2016, see question 3(b) of the Questions Reserved for the Consideration of the Full Court in the Amended Special Case (SCB pg 130); In proceedings P63/2015, see question 3(a)(i)(2) of the Questions Reserved for the Consideration of the Full Court in the Amended Special Case (SCB pgs 137-8); In proceedings S248/2015, see questions 2 and 3 of the Questions Reserved for the Consideration of the Full Court in the Amended Special Case (SCB pg 192).

[2] At [88] and [94].

[3] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [4] per French CJ and at [47] per Hayne, Heydon, Crennan and Kiefel JJ; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69] per McHugh, Gummow, Kirby and Hayne JJ).

12. In addition, it is well understood that in interpreting a provision of a Commonwealth Act, a construction that would best achieve the purpose or object of the Act is to be preferred (s 15AA of the *Acts Interpretation Act 1901* (Cth)).

13. Accordingly, it is submitted that the meanings of s 5F and s 5G are only properly understood in the context of the general purpose and policy of Part 1.1A.

14. The plain purpose of Part 1.1A is to reduce the area of potential conflict between State laws and the *Corporations Act*[4].

15. Making legislative provision for the avoidance of conflict between State laws and the national corporations regime was nothing new at the time when the States made their text based referrals to the Parliament of the Commonwealth for the purposes of enacting the *Corporations Act 2001*. Provisions of that nature were already in place to deal with potential inconsistencies under the national cooperative scheme legislation[5].

16. The replacement of the cooperative scheme in response to the High Court's findings as to its constitutional validity[6] sought to preserve the status quo as far as possible. The intention, it is submitted, was to bring constitutional validity to the national scheme, not to (in relevant terms) give effect to any new policy to deal with inconsistent State legislation.

17. The point of difference is that any inconsistency was previously a matter dealt with at the State level given the status of the *Corporations Law* as a State law. In particular, inconsistency was dealt with under the State Acts which gave effect to the national cooperative scheme[7] by allowing, another Act to amend, repeal or alter the effect or operation of the State Act so long as that later Act expressly provided for that to occur[8]. Such powers did not operate as a limitation on the legislative power of a State, including a State's ability to legislate with extra-territorial effect.

18. The referral of powers by the States to the Commonwealth Parliament and the resulting enactment of the *Corporations Act* to replace the national cooperative scheme was not, in our submission, intended to alter the ability of State Parliaments to legislate to opt out of the operation of the national scheme (as now effected by the *Corporations Act* and the State referral legislation[9]). In our submission, the purpose of Part 1.1A was to ensure

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[4] *Loo v DPP (Vic)* (2005) 12 VR 665; [2005] VSCA 161 at [5], [24].

[5] Consisting of the adoption of the *Corporations Law* as set out in s 82 of the *Corporations Act 1989* (Cth) by the States and the Northern Territory – in the case of Western Australia by the *Corporations (Western Australia) Act 1990* (WA) and by equivalent legislation in the other jurisdictions.

[6] *Re Wakim; Ex parte McNally* (1999) 198 CLR 511; *R v Hughes* (2000) 202 CLR 535.

[7] Including the *Corporations (Western Australia) Act 1990* and the *Corporations (Tasmania) Act 1990* as in effect until the commencement of the *Corporations (Commonwealth Powers) Act 2001* in each of the States.

[8] See, for instance, s 5 *Corporations Act (Western Australia) 1990*; *Loo* v *DPP (Vic)* at [5].

[9] Section 3(1)(b) and (2) *Corporations Act* and the *Corporations (Commonwealth Powers) Act 2001* of each of the States and Commonwealth.

that the States retained their rights to enact inconsistent laws into the future.

19. The words "does not apply in the State or Territory" in s 5F(4) (and, similarly, the references to "in the/a State or Territory" in s s5F(2) and s 5G(11)) should be understood against that background. When so understood, those words do nothing more than provide a nexus between the relevant State or Territory and the exclusion of the Corporations legislation. Thus, it is submitted that so far as a law of a State or Territory operated with extra-territorial effect, s 5F(4) preserves that effect.

20. The purpose of Part 1.1A is not served by imposing a restrictive and literal interpretation upon its provisions which operates in effect to limit the plenary powers of a State to legislate, including with extra-territorial effect.

21. To suggest that only those limited aspects of the Corporations legislation which possess a truly territorial quality are capable of being displaced or excluded[10] undermines the very purpose of Part 1.1A.

Operation of s 5F and s 5G in regards to extra-territorial matters

22. If s 5F and s 5G operate as we say Parliament intended, ultimately no question of inconsistency arises because the Commonwealth law accommodates the operation of relevant State laws and so the State laws cannot therefore be said to alter, impair or detract from the operation of the Commonwealth Act[11].

23. We do not go so far as to argue that by declaring a matter to be an excluded or displaced matter for the purposes of s 5F or s 5G, the Corporations legislation, as a general rule, thereby ceases to apply in all other States and Territories in relation to the particular subject matter.

24. In general, it may be accepted that, if, by operation of s 5F or s 5G, the Corporations legislation does not apply in one State or Territory in relation to the excluded matter, the Corporations legislation will nevertheless continue to operate in other jurisdictions according to its terms.

25. However, it is anticipated that a State will legislate in the gap left by the exclusion effected in accordance with s 5F or a displacement under s 5G. It will do so in accordance with its plenary powers to make laws for the peace, order and good government of the State (s 2(2) of the *Australia Act 1986* (Cth)). There is no apparent legal reason why the State could not so legislate with extra-territorial effect (s 2(1) of the *Australia Act*) in relation to the particular subject matter, provided that there is a real connection between the State and the subject matter.

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[10] See, for instance, the Plaintiff's submission in S248/2015 at [95] –[96].

[11] *Victoria v Commonwealth* (1937) 58 CLR 618 at 630 per Dixon J; *HIH Casualty and General Insurance Ltd. (in liq.)* at [80].

26. As Gaudron, Gummow and Hayne JJ wrote in *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1; [2002] HCA 27 at [48][12]:

> It is clear that legislation of a State parliament "should be held valid if there is any real connection — even a remote or general connection — between the subject matter of the legislation and the State". This proposition has now twice been adopted in unanimous judgments of the Court and should be regarded as settled. That is not to say, however, that there may not remain some questions first, about what is meant in a particular case by "real connection" and, secondly, about the resolution of conflict if two States make inconsistent laws.

27. Thus, it is submitted, the exclusion or displacement of the Corporations legislation (under s 5F or s 5G) "in the State" simply facilitates the passing of laws by the Parliament of that State, including with extra-territorial operation (provided that a proper nexus exists between the provisions and the State).

28. There is no requirement for the Corporations legislation provisions themselves to have a distinct and separate territorial operation in order for s 5F or s 5G to operate to exclude or displace such provisions. The only territorial nexus required, in our submission, is that which underpins the plenary powers of the legislature of the State to legislate for the peace, order and good government of the State.

The narrow approach and plenary power

29. It is submitted that Barrett J in *HIH Casualty and General Insurance Ltd. (in liq.) v Building Insurers' Guarantee Corporation* took too narrow a view of s 5F and s 5G by placing restrictions upon the words "in a State or Territory" in such a way as to require that the excluded subject matter or displaced provision have a territorial quality.

30. He opined at [88] that the corollary to the effect of s 5F(2) and (4), was that "such application as the *Corporations Act* has to or in relation to the particular matter that cannot be classified as application "in" the State or Territory is not negated".

31. With respect, it is submitted that in doing so, Barrett J improperly interpreted the provisions so as to limit the plenary powers of a State to legislate for the peace, order and good government of the State (including with extra-territorial effect) in the legislative sphere the State had opened up for itself by making a declaration in accordance with s 5F or s 5G. In our submission, there is no basis for limiting the meaning of s 5F and s 5G so that they only function to remove the operation of the Corporations legislation where the provisions of the Corporations legislation have a territorial impact.

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[12] See also *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 14; *Lipohar v R* (1999) 200 CLR 485 at 534–535 [123] per Gaudron, Gummow and Hayne JJ.

32. In light of the legislative history discussed above, the words "in a State" in s 5F and s 5G should not be understood as imposing a limitation on State legislative power. Rather, it is submitted that they provide a means by which a State is able to pave the way for the exercise of its own legislative powers in relation to the subject matter. The State's legislative powers in those circumstances are not, it is submitted, subject to any ongoing limitation imposed by the *Corporations Act* but are available as fully as they might otherwise have been absent a referral of power to the Commonwealth Parliament in respect of that subject matter (and this necessarily includes a power to make laws with extra-territorial operation in relation to that subject matter if a real connection exists between the subject matter of the legislation and the State).

33. The right of a State to legislate extra-territorially in relation to the matters so excluded or covered by the provisions so displaced is not cut down by s 5F or s 5G.

34. The reference to "in a State or Territory" in s 5F and s 5G does no more than make the exclusion or displacement referable to the particular State which has made the declaration as distinct from other States and Territories.

35. It follows that it is a matter for the State to determine, through the exercise of its legislative powers, whether its laws are to have extra-territorial operation. It is not a function of the *Corporations Act* to determine whether the State's laws should operate with extra-territorial operation. We submit that the *Corporations Act* does not seek to do so but merely operates to remove the application of that Act in that State, thereby allowing the State Parliament the room to legislate in the gap. It is silent on the question whether the application of the *Corporations Act* in other jurisdictions may be impacted and does not seek, by its own terms, to broaden the ambit of the exclusion or displacement. If it did, its consequences may well be inadvertent. For instance, if the *Corporations Act* provided that the Corporations legislation provisions did not apply "in relation to the State" it may well have broader and unintended implications in that the *Corporations Act* may well have operated to automatically disengage the Corporations legislation in other jurisdictions in circumstances in which it was simply unwarranted or unnecessary for the purposes of the State Act.

Choice of laws

36. Assuming that the provisions of the Corporations legislation do not require a distinct and separate territorial operation in order to be excluded or displaced under s 5F or s 5G, such provisions may be excluded or displaced within the jurisdictional boundaries of the legislating State and, so far as the legislative competence of that State permits, outside that State.

37. It is accepted that the exclusion or displacement of provisions outside the State may give rise to choice of law issues.

38. Depending upon the nature of the conflict, those issues may be resolved by recognising the concurrent operation of both sets of laws.

39. If that is not possible and, having exhausted the utility and operation of Part 1.1A of the *Corporations Act*, a true conflict nevertheless arises between the laws of Western Australia (or a State or Territory) and the Corporations legislation, it is submitted that the usual rules under s 109 of the Constitution will be called into play in order resolve the conflict.

40. It is also possible, although less likely, that the State law may give rise to a conflict with the laws of the other State or Territory. Such conflict will fall to be determined according to choice of law rules[13]. However, that is not a matter which arises in these proceedings.

PART VI: ESTIMATE OF TIME FOR ORAL ARGUMENT

41. Tasmania estimates that it will require not more than 10 minutes for presentation of oral argument.

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[13] It is recognised that the law is not settled in relation to the resolution of conflict between inconsistent State laws; see *Sweedman v Transport Accident Commission* (2006) 226 CLR 362 at 398-407.