IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No.S248 of 2015**

BETWEEN:

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

STATE OF WESTERN AUSTRALIA
Defendant

ANNOTATED WRITTEN SUBMISSIONS OF THE DEFENDANT

PART I: SUITABILITY FOR PUBLICATION

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

PART II: ISSUES

2. Is the *Bell Act* in its entirety, or are parts of it, inconsistent with the scheme of s.215 of the *Income Tax Assessment Act 1936* (Cth) or s.260-45 in Schedule 1 to the *Taxation Administration Act 1953* (Cth)[1] in that the *Bell Act* alters, impairs or detracts from such scheme? If so, can provisions of the *Bell Act* be read down?

3. Do the provisions of the *Bell Act* alter, impair or detract from s.215(3)(b) *ITAA 1936*? If so, can provisions of the *Bell Act* be read down?

4. Is the *Bell Act* in its entirety, or are parts of it, inconsistent with the scheme of s.254 of the *ITAA 1936* (Cth) in that the *Bell Act* alters, impairs or detracts from such scheme? If so, can provisions of the *Bell Act* be read down?

5. Do the provisions of the *Bell Act* alter, impair or detract from ss.254(1)(d) and 254(1)(e) of the *ITAA 1936*? If so, can provisions of the *Bell Act* be read down?

6. Do the provisions of the *Bell Act* alter, impair or detract from ss.177, 208 and 209 of the *ITAA 1936*? If so, can provisions of the *Bell Act* be read down?

[1] The plaintiffs accept that former s.215 continues to apply in respect of all of the WA Bell Companies except for Albany Broadcasters Ltd, in respect of which s.260-45 applies; and that nothing turns on this distinction — BGNV's Submissions at [46].

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7. Are the provisions of the *Bell Act* inconsistent with s.1408 of the *Corporations Act 2001*?

8. To the extent that s.51 of *Bell Act* invokes s.5F of the *Corporations Act 2001* (Cth), does this operate to avoid any inconsistency that would otherwise arise between the *Bell Act* and the *Corporations Act 2001*?

9. To the extent that s.52 of *Bell Act* invokes s.5G of the *Corporations Act 2001*, do any or all of ss.5G(4), 5G(8) or 5G(11) operate to avoid any inconsistency that would otherwise arise between the *Bell Act* and the *Corporations Act 2001*?

10. Are ss.22, 25(5), 26, 27, 29 and 73 of the *Bell Act* inconsistent with s.39(2) of the *Judiciary Act 1903* (Cth)?

11. Are provisions of the *Bell Act* incompatible with requirements of Chapter III of the Commonwealth *Constitution* and thereby invalid?

12. Does BGNV have standing, and is there a justiciable controversy, to bring a challenge in respect of the alleged inconsistencies between the *Bell Act* and the Commonwealth taxation legislation?

PART III: SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

13. The plaintiffs have given notice in compliance with s.78B of the *Judiciary Act 1903* (Cth).

PART IV: MATERIAL FACTS

14. These are agreed as set out in the Special Case Book.

PART V: RELEVANT CONSTITUTIONAL PROVISIONS AND LEGISLATION

15. These are collected in a Court Book that will be filed.

PART VI: SUBMISSIONS

16. The submissions put by BGNV, as identified in the above issues, will be addressed in turn.

STANDING AND THE JUSTICIABLE CONTROVERSY

17. The State denies that BGNV has standing in respect of the alleged invalidity of Parts 3 and 4 of the *Bell Act* on the grounds of the alleged inconsistency with the Commonwealth taxation regime[2].

18. BGNV has no interest in whether or not Mr Woodings, as liquidator of WA Bell Companies (where BGNV and WAG are not WA Bell Companies), should set aside amounts under former s.215 and s.254(1)(d) of the *ITAA 1936* and whether or not he will be held personally liable if he fails to do so. Similarly, BGNV has no interest in

[2] See State's Amended Defence at [56] (SCB at 157).

whether the Commonwealth's rights as creditor of certain WA Bell Companies and its use of conclusive evidence provisions are affected. They are not likely to gain any advantage by the outcomes of those arguments in the sense described by Gibbs J in *Australian Conservation Foundation*[3]. In respect of such taxation arguments, BGNV is not seeking clarification as to its rights, but the rights of unrelated parties; Mr Woodings and the Commonwealth. It lacks standing on those issues.

19. The State does not concede that if others have standing to agitate issues concerning rights of the Commissioner, that the Commissioner then has standing to intervene. The foreshadowed submissions of the Commissioner do not add to those of the plaintiffs, such that the Commissioner's involvement is unlikely to add to the submissions to be presented to the Court[4].

20. The State accepts the Maranoa plaintiffs have standing to contend that the *Bell Act* undermines Mr Woodings' obligation to retain money to meet the taxation liabilities of the relevant company under s.254(1)(d) of the *ITAA 1936*[5]. Consistent with *Williams v Commonwealth*[6], because of this, the Court does not need to determine whether BGNV has standing in respect of s.254(1)(d) issues. Similarly, if and to the extent that this Court concludes that a Maranoa plaintiff or the Commissioner of Taxation has standing and is granted leave to raise any grounds in which standing is in dispute, then the Court does not need to determine whether in respect of that same issue BGNV has standing.

21. There is a question as to whether there is a justiciable controversy for this Court to determine in respect of former s.215 of the *ITAA 1936* or s.260-45 of Schedule 1 to the *TAA 1953*[7] in circumstances where it is not alleged by Mr Woodings that he has at any material time received a notification in accordance with former s.215 or s.260-45 of Schedule 1 to the *TAA 1953*[8]. The State denies that any such notice has issued and therefore any liabilities arising under former s.215 and s.260-45 are merely hypothetical questions.

22. Contrary to BGNV's submissions[9], the proofs of debt do not constitute notice under s.215 of the *ITAA 1936*. Given the legislative purpose of s.215, the notice should at least put the liquidator properly on notice of the tax liability and inform the liquidator of the courses open to him or her[10]. Lodgement of a proof of debt does not do this.

23. In any event, whether or not a proof of debt constitutes notice for s.215 may not need to be determined here because the original proofs of debt were issued prior to

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[3] *Australian Conservation Foundation v Commonwealth* [1980] HCA 53; (1980) 146 CLR 493 at 530.
[4] *Roadshow Films Pty Ltd v iiNet Ltd (No 1)* [2011] HCA 54; (2011) 248 CLR 37 at 39 [3] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).
[5] See the State's Amended Defence at [56.1.1] (SCB at 99).
[6] [2012] HCA 23; (2012) 248 CLR 156 at 181 [9] (French CJ), 223 [112] (Gummow and Bell JJ), 240 [168] (Hayne J), 341 [475] (Crennan J), 361 [557] (Kiefel J).
[7] Question 1A in the Amended Special Case (SCB at 192).
[8] State's Amended Defence at [56.2.2] (SCB at 100).
[9] BGNV's Submissions at [55].
[10] See, by analogy, *Deputy Commissioner of Taxation v Woodhams* [2000] HCA 10; (2000) 199 CLR 370 at 384 [33]–[38] (Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ) which dealt with the liability under s.222AOC of the *ITAA 1936* of a director to pay the Commissioner of Taxation the unpaid amount of the company's unpaid liability.

Mr Woodings becoming the liquidator of those companies[11], and the replacement proofs of debt issued after Mr Woodings became the liquidator were all under the cover of a letter stating that "this advice should ***not*** be taken as notification pursuant to section 215(2) of the" *ITAA 1936*[12].

24. Curiously, BGNV submit that the post-liquidation assessments and demand for payment of the post-liquidation tax made on 26 November 2015 also constituted such notice for the purposes of s.215 *ITAA 1936*[13]. This is plainly wrong. As discussed below, former s.215 of the *ITAA 1936* and s.260-45 of Schedule 1 to the *TAA 1953* relate only to pre-liquidation tax liabilities and s.254 of the *ITAA 1936* applies to post-liquidation tax liabilities.

25. Because no notice was given to Mr Woodings enlivening the obligation to set aside money, he had no such obligation and any liability under s.215(3)(b)–(c) is hypothetical. There is no justiciable controversy because no immediate question of right, interest or liability arises. While this Court has accepted a party has standing if he or she will "in the immediate future probably" be affected by the impugned law[14], there is nothing to suggest imminence here.

INCONSISTENCY OF THE *BELL ACT* WITH SECTIONS 215 AND 254 OF THE *ITAA 1936*

26. Neither s.215 nor s.254 of the *ITAA 1936* creates a right in the Commonwealth to receive any sum. Neither provision assures that the Commonwealth will receive anything in a winding up. Indeed, for much of the time that the provisions have operated, the Commonwealth would, in a winding up, receive less than the sum of monies the subject of the operation of each provision. Properly understood neither provision is inconsistent with a law that provides for the distribution of funds available to creditors or others entitled to a distribution from insolvent companies (or former companies).

27. Section 215 of the *ITAA 1936*, from its first iteration in 1918 up to 2001, and s.254 (and its precedents), from its enactment in the first Commonwealth income tax Act in 1915 until 2001, operated as part of a legal regime by which the amounts that the Commonwealth would receive in a winding up in respect of Commonwealth tax liabilities were determined by State law. The validity of such regimes has been confirmed by this Court on at least three occasions.

The text of ss.215 and 254 of the *ITAA 1936*

28. Section 215 of the *ITAA 1936*[15] applies in respect of pre-liquidation liabilities and requires the following. *First*, that a liquidator give notice to the Commissioner within

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[11] Amended Special Case at [71B] (SCB at 185–186).
[12] Amended Special Case at [71D] (SCB at 186–187), Annexure 12 (SCB at 411–472).
[13] BGNV's Submissions at [55].
[14] *Kuczborski v Queensland* [2014] HCA 46; (2014) 254 CLR 51 at 87 [99] (Hayne J).
[15] In the terms it provided immediately prior to its repeal on 14 September 2006 (by item 161, Sch.1 to *the Tax Laws Amendment (Repeal of Inoperative Provisions) Act 2006* (Cth)), which, as explained above, continue to apply to Mr Woodings as liquidator of each of the WA Bell Companies, save for Albany Broadcasters.

fourteen days of his appointment (s.215(1)(a)). In this matter this occurred[16]. There is nothing in the *Bell Act* that is inconsistent with this.

29. *Second*, the Commissioner is then required to notify the liquidator of the amount sufficient to provide for tax (s.215(2)). In this matter it appears that the Commissioner did not, in fact, do this[17]. Even so, had this occurred, there is no inconsistency between any provision of the *Bell Act* and this provision. By force of s.22(1) of the *Bell Act* on the transfer day all property vested in or held on behalf of a WA Bell Company, including all property held by a liquidator of a WA Bell Company, vested in the Authority. By s.33(8)(d) of the *Bell Act* the liquidator of all WA Bell Companies is to give a report, if requested, as to the liabilities of WA Bell Companies. Any such report will inevitably include details of the liability for any tax payable by any WA Bell Company the subject of a notification under s.215(2) of the *ITAA 1936*. By s.25(1) and (3) of the *Bell Act* the Commissioner can seek to prove the liability for any tax payable by any WA Bell Company the subject of a notification under s.215(2) of the *ITAA 1936*. Section 34 of the *Bell Act* facilitates the Commissioner advising of the liability for any tax payable by any WA Bell Company the subject of a notification under s.215(2) of the *ITAA 1936*. So, the holder of the funds that are available for distribution to the creditors of the WA Bell Companies will necessarily have notice, prior to distribution, of the amount which the Commissioner claims for the pre-liquidation tax liabilities of the WA Bell Companies.

30. *Third*, the liquidator of a WA Bell Company is not to part with assets of a WA Bell Company without the leave of the Commissioner until he is notified of the amount sufficient to provide for tax (s.215(3)(a)) and is to "set aside" an amount provided for in s.215(3)(b) of the *ITAA 1936*; in essence a sum reflecting the proportion which the amount notified under s.215(2) bears (excluding the notified amount) to the aggregate of other (unsecured) debts. There is no inconsistency between any provision of the *Bell Act* and this provision, and nothing in the *Bell Act* undermines its operation. This is because the Authority has the assets and property transferred to it pursuant to s.22 of the *Bell Act*. 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, by reason of s.215(3)(a) and (b) of the *ITAA 1936*, is in precisely the same position in respect of the *Bell Act* as it would be under the legislation that would otherwise (that is, but for the *Bell Act*) be applicable. To the extent that the Commissioner has notified the liquidator of the amount sufficient to provide for tax in terms of s.215(2) of the *ITAA 1936*, and assuming that all the proofs of debt submitted, including those submitted prior to Mr Woodings becoming the liquidator, constitute notice for s.215(2), this amount is approximately $167,706,491[18]. The sum held by the Authority immediately following the transfer day is in excess of $1.7 billion[19]. So any set aside amount is actually held by the Authority, in the same way that it was putatively held (or but for the *Bell Act* would putatively have been held) by a liquidator.

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[16] Amended Special Case at [71C] (SCB at 186).

[17] See [20]–[24] of the State's Submissions.

[18] Amended Special Case at [21] (SCB at 169–170).

[19] The bank accounts holding the trust property immediately before the transfer day held $1,038,359,017.21 and the bank accounts holding the uncontested amount immediately before the transfer day held $689,300,429.72 — Amended Special Case at [40] (SCB at 176–177), Attachment F (SCB at 209–210).

31. There is little authority on what is meant or comprehended by the notion of "setting aside". Plainly it does not mean quarantining or placing in a separate account or holding in a separate place. Such a meaning would defy logic and be meaningless in current times. Setting aside can only mean maintaining or having available. So, because the *Bell Act* Authority has the same assets available for distribution as did the liquidator, then the Commissioner is in precisely the same position in relation to the assets. Any inconsistency is not real[20].

32. *Fourth*, the liquidator of a WA Bell Company is, by reason of ss.215(3)(c) and (4) of the *ITAA 1936*, liable to the Commissioner to pay the set aside amount. As will be seen, this liability is, in fact, not real. This is because the liquidator does not have a personal liability under ss.215(3)(c) or (4) so long as a process exists by which distributions to the Commissioner, in respect of liability for tax to which s.215(2) of the *ITAA 1936* relates, can be made. This process is effected by the *Bell Act*. If it is contended that ss.215(3)(c) and (4) of the *ITAA 1936* are aspects of a scheme to "ensure" that the set aside amount is available to distribute to the Commissioner, and provisions of the *Bell Act* alter, impair or detract from this, such a contention should be rejected, for the following reasons. *First*, as will be explained, nothing in s.215 of the *ITAA 1936* "ensures" that the set aside amount is distributed to the Commissioner. *Second*, the statutory purpose of s.215(3)(c) has been fulfilled if the liquidator in fact sets aside the amount. The incentive to do so that is provided by s.215(3)(c) has been effected. *Third*, any such inconsistency is not real. Here there is no reason to think that, if the liquidator had been notified by the Commissioner in terms of s.215(2), that he did not set aside the relevant amount, in the manner explained above. This set aside sum is now held by the *Bell Act* Authority. The total sum held by the Authority is greater than any notional set aside amount. This total sum is available to the Authority to distribute according to law. Again, any theoretical inconsistency is not real.

33. Section 254 of the *ITAA 1936* operates in respect of post liquidation income and requires the following.

34. *First*, that the liquidator is authorised and required to retain a sum sufficient to pay tax which is or will become due on such income (s.254(1)(d)), and is personally liable for the tax payable to the extent of any amount retained, or that should have been retained. In respect of the retention obligation, it is the same as the setting aside and not parting with obligations of s.215(3)(a) and (b) of the *ITAA 1936*. For the same reasons as stated above, in respect of these provisions, there is no inconsistency between any provision of the *Bell Act* and s.254(1)(d). The Authority has the assets and property transferred to it pursuant to s.22 of the *Bell Act*. They are the same assets available for distribution to the creditors of the WA Bell Companies, pursuant to the *Bell Act*, as would have been available to a liquidator for distribution. As such, the Commissioner is in precisely the same position in respect of the *Bell Act* as it would have been but for the *Bell Act*. To the extent that the liquidator, prior to the transfer day, retained an amount sufficient to provide for tax in terms of s.254 of the *ITAA 1936*, this amount is $298,190,348.70[21]. The sum held by the Authority immediately following the transfer

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[20] In the sense that there is "no real conflict between the State law and the Commonwealth law" — *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* [2011] HCA 33; (2011) 244 CLR 508 at 529 [60] (French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ).

[21] Amended Special Case at [73] (SCB at 188).

day is $1.7 billion[22]. So, an amount at least equivalent to the retained amount is held by the Authority and available for distribution according to law.

35. *Second*, the liquidator of a WA Bell Company is, by reason of s.254(1)(e), liable to the Commissioner to pay the retained amount, or an amount that should have been retained. Like the equivalent obligation under ss.215(3)(c) and (4) of the *ITAA 1936*, this liability is illusory, because, for so long as a process exists by which distributions to the Commissioner, in respect of liability for tax to which s.254 of the *ITAA 1936* relates, can be made, there is no liability; and the *Bell Act* effects such a process. As with ss.215(3)(c) and (4) of the *ITAA 1936*, to the extent that it is contended that s.254(1)(e) is part of a scheme to "ensure" that the retained amount is available to distribute to the Commissioner, and provisions of the *Bell Act* are contended to alter, impair or detract from this[23], the same responses apply. As with s.215, s.254 does not "ensure" that the retained amount will be paid to the Commissioner. Indeed the purpose of s.254 is not to ensure this. As with the set aside amount for the purpose of s.215 (if it has been invoked) the s.254 retained amount is now held by the *Bell Act* Authority. The total sum held by the Authority is greater than any notional retained amount. This total sum is available to the Authority to distribute according to law.

36. The *Bell Act* provides for the setting aside and retention, prior to final distribution, of any amount found to be payable to the Commissioner.

Section 215 of the *ITAA 1936*

37. The manner in which this provision operated with the various corporate insolvency provisions of certain State Acts prior to the (relatively) uniform States' *Companies Act 1961* will be seen in the consideration below of *Farley*[24], *Uther*[25] and *Cigamatic*[26].

***Farley*[27] and *Uther*[28]**

38. *Farley* and *Uther* are authority for the following propositions. *First*, a provision of Commonwealth law that requires that a liquidator "set aside" a sum notified by the Commissioner; and provides that a liquidator who "fails to provide for payment of the tax as required ... shall be personally liable for" it — is not inconsistent with a provision of State law that does not give a priority in a winding up to the payment of this sum. *Second*, that the described setting aside and personal liability provisions of Commonwealth law are not inconsistent with State laws that provide that the sum to be received by the Commonwealth in a winding up is less than the sum to be set aside. *Third*, that nothing in such setting aside and personal liability obligations in Commonwealth law is inconsistent with a State law that provides that the Commonwealth receive nothing or no more than any other creditor. *Fourth*, that the

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[22] The bank accounts holding the trust property immediately before the transfer day held $1,038,359,017.21 and the bank accounts holding the uncontested amount immediately before the transfer day held $689,300,429.72 — see Amended Special Case at [40] (SCB at 176–177), Attachment F (SCB at 209–210).
[23] See BGNV's Submissions at [51]–[54].
[24] *Commissioner of Taxation (Cth) v Official Liquidator of EO Farley Ltd (In Liq)* [1940] HCA 13; (1940) 63 CLR 278 ('*Farley*').
[25] *Richard Foreman & Sons Pty Ltd, Re; Uther v Commissioner of Taxation (Cth)* [1947] HCA 45; (1947) 74 CLR 508 ('*Uther*').
[26] *Commonwealth v Cigamatic Pty Ltd (in liq)* [1962] HCA 40; (1962) 108 CLR 372 ('*Cigamatic*').
[27] [1940] HCA 13; (1940) 63 CLR 278.
[28] [1947] HCA 45; (1947) 74 CLR 508.

provisions of Commonwealth law imposing personal liability on a liquidator for various sums are not inconsistent with State laws that provide that the sum to be received by the Commonwealth is less than the sum to be set aside and so less than the sum for which the liquidator is personally liable.

39. These propositions are referable to this matter. Unless departed from or overruled, *Farley* and *Uther* compel the conclusion that the *Bell Act* is not inconsistent with s.215 of the *ITAA 1936*, even if it is engaged. As with the State legislation considered in *Farley*, that the *Bell Act* creates a mechanism for distribution of the assets of (what were) insolvent companies, of which the Commonwealth was a creditor, is not inconsistent with the setting aside provisions of s.215 of the *ITAA 1936*, nor the imposition (by s.215) of personal liability on a former liquidator for any set aside amount. The entitlement of the Commissioner to receive funds *qua* creditor is distinct from the obligation of a liquidator to set aside amounts required by Commonwealth law and from the personal liability of the liquidator for the payment of such amounts.

40. If s.215 has been engaged in this matter, so long as the Administrator under the *Bell Act* holds any sum notified prior to final distribution under the *Bell Act*, any requirement of s.215 has been met.

Cigamatic[29]

41. *Cigamatic*, in respect of this issue of construction. is to the same effect as *Farley* and *Uther*. This was stated expressly by Menzies J[30], with whom Dixon CJ[31], Kitto J[32], and Owen J[33], in this respect, agreed. It follows that *Cigamatic*, with *Farley* and *Uther*, is authority for the propositions stated above as arising from *Farley*.

42. None of these propositions have been doubted since. For the plaintiffs to succeed in their contention that the *Bell Act* is inconsistent with s.215 of the *ITAA 1936*, the Court must (at least) depart from the essential reasoning of *Farley*, *Uther* and *Cigamatic*.

43. Following *Cigamatic*, s.215 of the *ITAA 1936* did not give rise to any priority of the Commonwealth in a winding up, but a law such as s.292 of the *Companies Act 1961* did not apply to the Commonwealth. This was because of the broader principle as to State legislative power found in *Cigamatic* (and in relation to certain tax debts, because of s.221 of the *ITAA 1936*).

44. The more recent operation of s.215 arises out of the abolition of the priority of Commonwealth Crown debts, and changes made to priorities in winding up — see the *Taxation Debts (Abolition of Crown Priority) Act 1980* (Cth) and *Crown Debts (Priority) Act 1981* (Cth). Section 3 of the latter Act provided that: the Commonwealth was subject to any provision of a law of a State or Territory "relating to the order in which debts or liabilities of company were to be paid or discharged".

45. When considering the purpose and effect of s.215 of the *ITAA 1936*, to determine whether the *Bell Act* undermines it, s.215 is not concerned with receipt, let alone does

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[29] [1962] HCA 40; (1962) 108 CLR 372.
[30] *Cigamatic* [1962] HCA 40; (1962) 108 CLR 372 at 388–389.
[31] *Cigamatic* [1962] HCA 40; (1962) 108 CLR 372 at 379.
[32] *Cigamatic* [1962] HCA 40; (1962) 108 CLR 372 at 381.
[33] *Cigamatic* [1962] HCA 40; (1962) 108 CLR 372 at 390.

it confer on the Commonwealth a right to receive anything. As found in *Farley*, *Uther* and *Cigamatic*, s.215 is consistent with State laws that provide nothing to the Commonwealth, and State laws that provide a payment to the Commonwealth of less than an amount set aside by a liquidator.

46. That the *Bell Act* creates a mechanism for distribution of assets of (formerly) insolvent companies, of which the Commonwealth was a creditor, that may result in the Commissioner receiving less than any set aside amount for the payment of which a liquidator is personally liable does not give rise to any inconsistency with s.215 of the *ITAA 1936*.

47. So long as a State law provides a means by which any notified amount is available to be distributed in the final distribution of a winding up, it is not inconsistent with s.215 of the *ITAA 1936*.

48. This is the effect of ss.16(3) and 17 of the *Bell Act*. The funds previously held by the liquidator are vested in the Authority by force of s.22 of the *Bell Act*. This includes any amount that was (if it was) "set aside" by reason of s.215 of the *ITAA 1936*. This amount is now held by the Administrator. The Administrator holds it until amounts are paid under s.44 of the *Bell Act*, which is the final distribution provision.

Section 254 of the *ITAA 1936* (Cth)

49. In *Australian Building Systems* Keane J observed, in considering the purpose of s.254, that[34]:

> Section 254 is addressed to a risk to the revenue posed by a class of persons identified by two essential characteristics: first, they are persons actively involved in deriving income, profits or gains on behalf of a principal or beneficiary; and second, they are persons whose relationship with the principal or beneficiary is such that they may be obliged to pay away to it the income, profits or gains derived on its behalf.

50. Neither of these two essential characteristics of "trustees" for the purpose of s.254 applies to liquidators. The reasoning of Keane J[35] and Gordon J[36] in *Australian Building Systems* that the retention obligation ensures that there is sufficient money in the hands of the agent or trustee to pay his or her liability too is inapposite to liquidators. Unsecured creditors are different, in this respect, to the beneficiaries of a trustee or the principal of an agent.

51. Central to an understanding of the purpose of the provision, in respect of liquidators, is that it does not ensure that the Commissioner will receive the amount that is lawfully payable in tax, or the sum actually retained or that should have been retained. This can be illustrated. Assume that the amount properly to be retained was $500 on total income, profit or gain of $1,200. The sole assets available for distribution in the winding is that sum up of $1,200. The liquidator's expenses (excluding deferred

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[34] *Federal Commissioner of Taxation v Australian Building Systems* [2015] HCA 48; (2015) 326 ALR 590 at 619 [130] ('*Australian Building Systems*').
[35] *Australian Building Systems* [2015] HCA 48; (2015) 326 ALR 590 at 619–620 [130]–[132].
[36] *Australian Building Systems* [2015] HCA 48; (2015) 326 ALR 590 at 631 [193]. Both her Honour and Keane J considered that s.254(1)(a) imposes an ancillary liability for tax on an agent or trustee for the purpose of ensuring the payment of the tax — see *Australian Building Systems* [2015] HCA 48; (2015) 326 ALR 590 at 614 [104] (Keane J), 627 [171], 628 [176] (Gordon J).

expenses) of the winding up, other than tax, are $1,000. Assume that the $1,200 is to be distributed pursuant to (say) the current s.556(1) of the *Corporations Act 2001*. Sections 556(1)(a) and 559 require that the tax liability of $500 and expenses of $1,000 rank *pari passu*. So, the Commissioner would receive 1/3(500/1500) of $1,200; that is, less than the retained amount.

52. This scenario illustrates that the position of liquidators under s.254 of the *ITAA 1936* is different to that of others who fall within the definition of trustee. This is so because s.254, like s.215 of the *ITAA 1936*, "do[es] not give a right to the Commonwealth to receive the sum which is set aside"[37] or retained, actually or putatively. This is because the entitlement of the Commissioner to receive from the liquidator is not determined by s.254, and never has been.

53. That the *Bell Act* creates a mechanism for distribution of the assets of an insolvent company, of which the Commonwealth is a creditor, that is less than any retained amount (for the payment of which a liquidator is personally liable) does not undermine s.254 of the *ITAA 1936* in the same way that it does not undermine s.215.

54. The example above also illustrates the operation of the personal liability provision of s.254. In the example, even if the liquidator initially retained $500 in respect of the tax liability, the Commissioner would receive only $400. The liquidator is not personally liable for the $100 difference.

55. Section 254(1)(e) does not impose a liability to pay the retained amount (of $500) or the difference between the retained amount and any sum actually received by the Commissioner. The provision simply caps the maximum liability of the liquidator to this amount if, as with s.215, the liquidator does not finally distribute assets according to law.

56. As in respect of s.215 of the *ITAA*, an interpretation of s.254 that would require that the Commissioner receive tax due on post liquidation income in priority to all other creditors is inconsistent with s.3 of the *Crown Debts (Priority) Act 1981* (Cth).

Conclusion on ss.215 and 254 of the *ITAA 1936*

57. In this matter, the personal liability of the liquidator imposed by ss.215 and 254 of the *ITAA 1936* was, prior to the *Bell Act*, illusory while the liquidator held funds sufficient to discharge the taxation liabilities, which he did. To the extent that any such personal liability provided an incentive to the liquidator to perform his duties according to law, this incentive to collect and distribute assets according to law is not undermined by the *Bell Act*. Like duties are imposed on the Administrator. The Administrator has received all property that the liquidator had. 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 a final distribution were made by a liquidator.

58. 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 (that is, but for the *Bell Act*) be applicable.

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[37] *Farley* [1940] HCA 13; (1940) 63 CLR 278 at 289 (Latham CJ).

Because the amounts notified by the Commissioner to the liquidator sufficient to provide for tax in terms of s.215 ($167,706,491) and s.254 ($298,190,348.70) is less than the sum held by the Authority (being in excess of $1.7 billion) the Commissioner is in precisely the same position under the *Bell Act* as it would be otherwise. Any sums that were to be putatively set aside or retained by the liquidator are actually held by the Authority.

INCONSISTENCY OF THE *BELL ACT* WITH SECTIONS 177, 208 AND 209 OF THE *ITAA 1936*

Sections 208 and 209 of the *ITAA 1936*

59. The purpose of ss.208 and 209 of the *ITAA 1936* derives from the nature of the Crown prerogative. In times prior to and shortly after federation, the manner of establishing or proving a taxation liability as a debt that was due and payable was rather haphazard[38]. Section 208 and its predecessor provisions established the relevant tax liability not only as a debt, but as a Crown debt to which the prerogative of priority, *prima facie*, applied[39].

60. Sections 208 and 209 did not provide a means by which the taxation debts of the Commonwealth were removed from the priorities provided for in windings up and bankruptcy. The provisions in effect provided that the Commissioner could sue on behalf of the Crown in respect of a tax liability and that the debt when due attracted the Crown priority, if not otherwise inapplicable. No "special privilege" as a 'Crown debt' now exists, following the *Taxation Debts (Abolition of Crown Priority) Act 1980* (Cth) and s.3 of the *Crown Debts (Priority) Act 1981* (Cth).

What this means

61. The *first* contention of inconsistency with ss.208 and 209 is that s.25(5) of the *Bell Act* is inconsistent with (in the sense that it "takes away"[40]) the Commissioner's right under ss.208 and 209 to pursue recovery proceedings against, relevantly, the WA Bell Companies or in respect of Mr Woodings' personal liability under ss.215 and 254 of the *ITAA 1936*. Why this submission should be rejected is dealt with below.

62. BGNV (*secondly*) contends[41] that the Commissioner's rights to pursue recovery proceedings under ss.208 and 209 of the *ITAA 1936* against Mr Woodings in respect of his personal liability, for instance under s.254(1)(e) of the *ITAA 1936*, have been rendered nugatory by s.45 of the *Bell Act*. This contention should be rejected. For the reasons outlined above, any personal liability of a liquidator under ss.215(3)(c) and (4) (or s.260-45 of Schedule 1 to the *TAA 1953*) or s.254(1)(e) of the *ITAA 1936* is illusory where the *Bell Act* effects a process by which a distribution to the Commissioner can be made.

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[38] See *Commissioner of Taxation (NSW) v Palmer* [1907] AC 179 at 183.
[39] *Commissioner of Stamps (WA) v West Australian Trustee Executor & Agency Co Ltd* [1925] HCA 20; (1925) 36 CLR 98 at 116 (Higgins J); *Commissioner of State Taxation v Pollock* (1993) 11 WAR 64 at 68–69 (Pidgeon J), 74–77 (Ipp J); *Re Smith; Ex parte Commissioners of Taxation* (1908) 8 SR (NSW) 246 at 250–251 (Street J); *Deputy Commissioner of Taxation (Cth) v Peacock* [1980] 2 NSWLR 130 at 134 (Hutley JA).
[40] BGNV's Submissions at [60].
[41] BGNV's Submissions at [60].

63. BGNV (*thirdly*) contends[42] that s.25(5) of the *Bell Act* prevents the Commonwealth from lodging any proof of debt in the winding up of a WA Bell Company and that any such proof of debt would be rendered inutile. This contention too should be rejected. Section 25(5) does not preclude the Commissioner from lodging a proof of debt with the Authority. Sections 208 and 209 of the *ITAA 1936* relate to the commencement of proceedings "in any Court of competent jurisdiction".

64. BGNV (*fourthly*) contends[43] that the *Bell Act* (in particular ss.22 and 29) is inconsistent with ss.208 and 209 of the *ITAA 1936* because they render inutile any pursuit of tax related liabilities. This is on the contended basis that there are no funds in the winding up and the liquidator cannot exercise any of his powers in the winding up.

65. This contention, and perhaps others, requires an understanding of the 'right' of a creditor to sue and company in liquidation. The right of the Commissioner under ss.208 and 209 of the *ITAA 1936* is not a priority. So, in respect of a company in liquidation — what is it? Neither section removes tax liabilities (even though by the terms of s.208 they remain Crown debts) from the operation of companies legislation providing for distributions to creditors.

Section 177 of the *ITAA 1936*

66. There is a further contended for inconsistency with the *ITAA 1936*, namely s.177. The State accepts that a notice of assessment to which s.177 of the *ITAA 1936* applies requires a liquidator who receives it to accept it as a proof; and that it is conclusive evidence of the making of the assessment and, except in proceedings under Part IVC of the *TAA 1953* on a review or appeal relating to the assessment, that the amount and all particulars of the assessment are correct.

67. The defendant accepts that provisions of the *Bell Act* are to be read down so as to not be inconsistent with s.177. The reading down is dealt with below.

68. BGNV's contention is that s.30 of the *Bell Act*, which provides that a WA Bell Company may be dissolved, means that the liabilities of a WA Bell Company (including of the Commissioner) would be extinguished upon dissolution and this is inconsistent with s.177 of the *ITAA 1936*[44]. Such liability is not extinguished. It remains a liability to be dealt with in accordance with Part 4, Division 2 of the *Bell Act*.

69. The contention that ss.42, 43 and 44 of the *Bell Act* provide for the release, discharge and extinguishment of liabilities of a WA Bell Company, which is contended to be inconsistent with s.177 of the *ITAA 1936*[45], should also be rejected. The release, discharge and extinguishment of liabilities of an insolvent company at the expiration of its winding up is not inconsistent with any right of the Commissioner. The process for releasing and discharging liabilities to creditors provided for in the *Bell Act* is in substance the same as that under the *Corporations Act 2001*. Upon the distribution of

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[42] BGNV's Submissions at [60].
[43] BGNV's Submissions at [60].
[44] BGNV's Submissions at [62].
[45] BGNV's Submissions at [62].

a final dividend to creditors, ASIC would deregister the company and the liabilities of the company are extinguished[46].

70. The only circumstance of material difference is where, at the date of dissolution or deregistration, assets remain. At common law, the Crown would take as *bona vacantia*[47]. This has been modified by statute to provide for the vesting of such property of a dissolved company in an officer the Crown or a statutory corporation, most recently, ASIC[48].

71. This is relevant to provisions of the *Bell Act* which contemplate an amount may remain in the Fund after all distributions have been made in accordance with a determination of the Governor[49]. This would be credited to the Consolidated Account[50]. Further, any property of a WA Bell Company accruing, payable or vesting after closure of the Fund vests in the State[51].

72. If there are surplus assets of the company in liquidation after all of its debts and liabilities have been paid out of the assets of the company, necessarily there are no tax debts.

73. There is one further contention (unpleaded) made by BGNV in relation to inconsistency with the Commonwealth taxation legislation. That is; the *Bell Act* prevents TBGL from utilising carry forward losses of each of the TBGL consolidated group members in the manner permitted by the *ITAA 1997*, which is a right conferred on TBGL by force of Commonwealth law. This contention is based on an assertion that TBGL's right to utilise those tax losses is "property" within the meaning of s.3, which is transferred to the Authority by force of s.22 of the *Bell Act*[52].

74. A tax loss is "utilised" including to the extent that it is deducted from an amount of assessable income[53]. TBGL and Mr Woodings as liquidator of TBGL have objected to the post liquidation notices of assessment issued in August 2015 including on the ground that TBGL had available tax losses in excess of the assessable income derived by TBGL.[54] Section 22(6) of the *Bell Act* excludes from the transfer of property effected by s.22(1) or (2) a right to make a taxation objection, or a right or capacity to seek the review of, or appeal against, a decision of the Commissioner in relation to a taxation objection. Contrary to BGNV's submission[55], the purpose of that subsection includes "to clarify that such a right to object or to seek review or repeal [sic] is <u>not</u>

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[46] *Taylor v Sanders* [1937] VLR 62 at 65 (Mann CJ, Lowe and Duffy JJ); *Holli Managed Investments Pty Ltd v Australian Securities Commission* (1998) 90 FCR 341at 348 (Finkelstein J).
[47] *Holli Managed Investments Pty Ltd v Australian Securities Commission* [1998] FCA 1657; (1998) 90 FCR 341 at 348–349 (Finkelstein J)
[48] *Holli Managed Investments Pty Ltd v Australian Securities Commission* [1998] FCA 1657; (1998) 90 FCR 341 at 349 (Finkelstein J).
[49] See s.43(2) of the *Bell Act.*
[50] See s.46(2) of the *Bell Act.*
[51] See s.48(1).of the *Bell Act.*
[52] BGNV's Submissions at [63].
[53] *ITAA 1997* s.960-20(2).
[54] Amended Special Case at [73], [80] (SCB at 188–190).
[55] BGNV's Submissions at [63] and fn.94.

property for the purposes of the [*Bell Act*]"[56] (emphasis added). Consequently, any right of TBGL to utilise the tax losses has not been transferred to the Authority.

READING DOWN — *ITAA* INCONSISTENCY

75. Section 7 of the *Interpretation Act* 1984 (WA) is in a common form. As stated by Gummow, Crennan and Bell JJ in *Pape*[57], having cited *Victoria v Commonwealth*[58]; an Act can be read down to preserve validity unless "it was designed to operate fully and completely according to its terms or not at all".

76. Certain provisions of the *Bell Act* can be readily read down without affecting the Act's purpose or requiring a strained or unnatural meaning or effect. No reading down here requires that the Court "perform a feat which is in essence legislative and not judicial"[59] or seeks to depart from or undermine the legislative purpose of any provision[60].

77. If notice has been, or is, given by the Commissioner in terms of s.215(2), then in respect of s.215(3) of the *ITAA*, and having regard to ss.215(3B) and (3C) of the *ITAA*, s.16(2) of the *Bell Act* can be read down such that:

> There shall be set aside in the Fund an amount as notified by the Commissioner pursuant to s.215 of the *ITAA*, until final distribution pursuant to Part 4 Division 5 of the Act.

78. In respect of s.254(1)(d) of the *ITAA 1936*, s.16(2) of the *Bell Act* can be read down such that:

> The Authority shall retain in the Fund $298,190,348.70 or such other amount notified by the Commissioner pursuant to s.254 of the *ITAA*, until final distribution pursuant to Part 4 Division 5 of the Act.

79. As noted above, it is accepted that the *Bell Act* is to be read down in light of s.177 of the *ITAA 1936* so that if a notice of assessment to which s.177 of the *ITAA 1936* applies had been received by a liquidator of a WA Bell Company that notice is conclusive evidence of the making of the assessment and, except in proceedings under Part IVC of the TAA on a review or appeal relating to the assessment, the amount and all particulars of the assessment are correct. Sections 25(1), 34(1), 35, 37(1), 37(3), 39(6) of the *Bell Act* can be read down to accommodate this.

THE BGNV INCONSISTENCY CONTENTION — SECTION 25 OF THE *BELL ACT*

80. BGNV alone contends that immediately before the transfer day, liabilities of certain WA Bell Companies were admissible to proof but not under the *Corporations Act 2001* Part 5.6. Rather, the liabilities of these WA Bell Companies were admissible to

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[56] Western Australia, *Parliamentary Debates*, Legislative Council, 17 November 2015 at 8284 (Michael Mischin, Attorney General).
[57] *Pape v Commissioner of Taxation* [2009] HCA 23; (2009) 238 CLR 1 at 93 [248].
[58] [1996] HCA 56; (1996) 187 CLR 416 at 502–503 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).
[59] *Pidoto v Victoria* [1943] HCA 37; (1943) 68 CLR 87 at 109 (Latham CJ).
[60] *Victoria v Commonwealth* [1996] HCA 56; (1996) 187 CLR 416 at 502 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ). See also *Pidoto v Victoria* [1943] HCA 37; (1943) 68 CLR 87 at 108 (Latham CJ); *Re Dingjan; Ex parte Wagner* [1995] HCA 16; (1995) 183 CLR 323 at 348 (Dawson J).

proof under s.1401[61] or s.1408[62] of the *Corporations Act 2001*. BGNV contend that certain consequences flow from this.

81. *First*, it is argued that s.25(1) of the *Bell Act* is inconsistent with the *Corporations Act 2001* because BGNV (amongst other creditors) is unable to lodge a proof of debt with the Authority in respect of liabilities owing to it by these WA Bell Companies. Because s.25(1) of the *Bell Act* allegedly prevents creditors of WA Bell Companies from lodging proofs of debt in respect of liabilities of such WA Bell Companies, the *Bell Act* is not a law of "winding up" for the purpose of s.5G(8) of the *Corporations Act 2001*[63]. If the *Bell Act* is a law of "winding up" (or "external administration") for the purpose of s.5G(8) of the *Corporations Act 2001*, then the argument falls away. Submissions in respect of this are put elsewhere and nothing more needs to be said of this.

82. *Second*, BGNV puts a related contention; even if the *Bell Act* is a law of "winding up" for the purpose of s.5G(8) of the *Corporations Act 2001*, s.5G(8) only displaces "Chapter 5" of the *Corporations Act 2001*; it does not displace s.1408 or other provisions of the *Corporation Act 2001* that are not in Chapter 5[64].

83. The issues which this contention raise also involve an issue of construction of s.25(1) of the *Bell Act*. The contention is that if the winding up of the WA Bell Company prior to the transfer day was not being conducted under the *Corporations Act 2001* Part 5.6, but pursuant to something else, then the *Bell Act* precludes the creditor from proving under the *Bell Act*. In this event s.25(1) is inconsistent with that something else.

84. This contention requires analysis of the transition provisions of the *Corporations Act 2001*, but there is a short answer that avoids this. It derives from the purpose of s.25(1). The section posits a hypothetical, and is to be understood as follows:

> If, prior to the transfer day, a liability of a WA Bell Company was admissible to proof against the company in the winding up of the company [as if this winding up was taking place] under the *Corporations Act* Part 5.6, that liability may be proved in accordance with Part 4 Division 2 of this Act.

85. The purpose of the section is to transfer a hypothesised pre transfer day provable liability "under the *Corporations Act* Part 5.6" to a liability provable under Part 4 Division 2 of the *Bell Act*. The determination of the provable liability under the *Bell Act* does not depend upon the liability having in fact been one "under the *Corporations Act* Part 5.6". This much is clear for s.37 and more so s.39(2), in particular (d), of the *Bell Act*.

86. If the answer to all of this is not this simple, there is a further answer. Properly construed, s.25(1) includes Part 5.6 of the *Corporations Law* as in force immediately before 23 June 1993. This is because the provision of Part 5.6 of the *Corporations Law* creating the right to prove, being s.533, was, in effect, incorporated into the *Corporations Act 2001* by s.1401 of the *Corporations Act 2001*. Alternatively,

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[61] BGNV's Submissions at [23].
[62] BGNV's Submissions at [24]–[26].
[63] BGNV's Submissions at [27].
[64] BGNV's Submissions at [111], [125].

the *Bell Act* is to be read as including s.533 of the *Corporations Law* pursuant to s.11(5) of the *Corporations (Ancillary Provisions) Act 2001* (WA), or, on its proper construction, s.25(1) of the *Bell Act* had that effect in any event.

87. All of this requires a deal of explanation.

88. The BGNV contention applies to a particular group of WA Bell Companies only. This contention requires a division of the WA Bell Companies into two categories: the WA Bell Companies ordered to be wound up prior to 23 June 1993[65] (call them the "pre-1993 WA Bell Companies") and those WA Bell Companies ordered to be wound up after 23 June 1993[66] (the "post-1993 WA Bell Companies").

89. The importance of this requires some further understanding. In 1990 the Commonwealth Parliament amended the *Corporations Act 1989* (Cth). By s.7 of the *Corporations (Western Australia) Act 1990* (WA) the *Corporations Law* was applied as a law of Western Australia[67]. The *Corporations Law* so adopted was State law[68].

90. The *Corporate Law Reform Act 1992* (Cth) (it assists to refer to this as the *1992 Reform Act*) commenced on 23 June 1993. It amended and repealed substantial parts of the *Corporations Law*. In particular, Parts 5.4 to 5.6 (relating to the winding up of companies) were repealed and replaced by new Parts 5.4 to 5.7B. Section 185 of the *1992 Reform Act* inserted transitional provisions into the *Corporations Law*, including ss.1382 and 1383. Section 1382 effectively provided that (subject to, relevantly, s.1383) provisions including Parts 5.4 to 5.6 as in force after 23 June 1993 applied, according to their tenor, in relation to acts done, omissions made, events occurring, and matters and things arising, whether before, at or after 23 June 1993. Section 1383(2), to which s.1382 was subject, provided for the "old winding up law" (Parts 5.4 to 5.6 as in force immediately before 23 June 1993) "to continue to apply for the purposes of the winding up" of a company ordered to be wound up under the *Corporations Law* prior to 23 June 1993. Where the "old winding up law" continued to apply pursuant to s.1383, s.1383(7)(f) provided that the "old winding up law" continued to apply as if certain sections of the *1992 Reform Act* that made changes to Part 5.4 to 5.6 and inserted Part 5.7B into the *Corporations Law* "had not been enacted".

91. The effect of this was that certain provisions of the *Corporations Law* including, relevantly, Parts 5.4 to 5.6 that were in force immediately before 23 June 1993 continued to apply to the winding up of companies ordered to be wound up prior to 23 June 1993[69].

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[65] Being TBGL, BGF, Albany Broadcasters, Bell Publishing Group, Bell Bros Holdings and Wigmores.

[66] Being Ambassador Nominees, Belcap Enterprises, Bell Bros, Bell Equity Management, Dolfinne, Dolfinne Securities, Harlesden Finance, Industrial Securities, Neoma Investments, TBGL Enterprises, Wanstead, Wanstead Securities, and WAON.

[67] Each State did likewise.

[68] *Macleod v Australian Securities and Investments Commission* [2002] HCA 37; (2002) 211 CLR 287 at 290–291 [1] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

[69] Section 1383 (and other transitional provisions) did not preserve, completely and for all purposes, Parts 5.4 to 5.6 of the Corporations Law as in force prior to 23 June 1993, or in their complete pre-June-1993 context in isolation from all other legislative change made by the *1992 Reform Act*. By way of illustration, ss.1383(7)(a)–(e) provided for certain amendments to the "old" Parts 5.4 to 5.6 to permit, for example, the availability of the new Part 5.3A voluntary administration procedure that was enacted by the *1992 Reform Act* to companies that were already in the process of being wound up when the *1992 Reform Act* took effect.

92. This was the position until the 2001 changes to corporations legislation. The *Corporations Act 1989* (Cth) was repealed with effect from 15 July 2001[70]. On the same date, consequential changes were made to State legislation and the *Corporations (Ancillary Provisions) Act 2001* (WA) commenced. The *Corporations Act 2001* (Cth) also commenced on that date. It does not contain specific transitional provisions preserving the application of the *Corporations Law* that applied after 23 June 1993 to companies wound up between 23 June 1993 and 15 July 2001. This circumstance is dealt with in Part 10.1 of the *Corporations Act 2001*.

93. Section 1408(1) provides that the *Corporations Act 2001* has the same effect as it would have if certain transitional provisions of the old *Corporations Law* set out in s.1408(6), which includes Chapter 11 (other than s.416) of the *Corporations Law*, which contains ss.1382 and 1383, "had been part of" the *Corporations Act 2001* and those transitional provisions produced the same results or effects (to the greatest extent possible) for the purposes of the *Corporations Act 2001* as they produced for the purposes of the (old) *Corporations Law*.

94. The effect of s.1408(1) of the *Corporations Act 2001* is that s.1383 of the *Corporations Law* continued to have the same force and effect that it had while the *Corporations Law* was in force. This force and effect was, though, created by the *Corporations Act 2001*. So, the windings up of the pre-1993 WA Bell Companies are governed (in substance) by the relevant provisions of Parts 5.4 to 5.6 of the *Corporations Law* as in force before 23 June 1993[71].

95. A further consequence of all of this is that, in the absence of any specific "carve out", such as provided for in ss.1383(2) and (7) of the *Corporations Law*, the law as in force from time-to-time applied according to its terms and with effect from the date of commencement. As a result, the *Corporations Act 2001*, being the applicable 'Corporations legislation' in force from time to time, applied in relation to the post-1993 WA Bell Companies[72].

96. Section 1408(5) of the *Corporations Act 2001* means that nothing in ss.1408(1) or (2) is taken to "produce a result" that a right or liability in fact exists — that relates to things that occurred before 15 July 2001 — under a transitional provision of the *Corporations Law*, even though the transitional provision continues by reason of ss.1408(1) or (2). The note to s.1408(5) 'clarifies' by stating that equivalent rights and liabilities to those that were continued by the transitional provision of the *Corporations Law* (in effect between 1993 and 2001) were "created by" ss.1400 and 1401 of the *Corporations Act 2001*.

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[70] *Corporations (Repeals, Consequentials and Transitionals) Act 2001* (Cth).

[71] *Shaw v Goodsmith Industries Pty Ltd* [2002] NSWSC 406; (2002) 41 ACSR 556 at [8] (Barrett J); *Re Emilco* [2002] NSWSC 1124 at [9]–[11] (Barrett J); *Re Bell Group Ltd (in liq); Ex parte Woodings (as liquidator of Bell Group Ltd (in liq)* [2015] WASC 88; (2015) 294 FLR 204 at 208 [13]–[18] (Pritchard J).

[72] Except to the extent provided for by ss.1480(2), (7), (15), (16), (18) and (20) and that, subject to Part 10.13 of the *Corporations Act 2001*, the amendments made to the *Corporations Act 2001* by the *Personal Property Securities (Corporations and Other Amendments) Act 2010* (Cth) do not and did not apply in relation to the winding up, provisional winding up, or the subsequent liquidation of those companies, by reason of s.1510 of the *Corporations Act 2001*. With the possible exception of the effect of the operation of s.1480(20) (which provides that the pooling under Part 5.6 Division 8 is unavailable in respect of the post-1993 WA Bell Companies), these exceptions do not appear to be relevant to any issues in these proceedings.

97. Section 1400 provides that on commencement of the *Corporations Act 2001*, a person who had a "right" or "liability" that was acquired, accrued or incurred under a "carried over provision" of the *Corporations Law* and was in existence immediately before the commencement of the *Corporations Act* (the "pre-commencement right or liability") acquires, accrues or incurs — in effect is vested with — an equivalent right or liability (the "substituted right or liability") under the provision of the *Corporations Act 2001* that corresponds to the carried over provision. The substituted right or liability is deemed to be equivalent to the pre-commencement right or liability. The section (in s.1400(2)) also provides that the substituted right or liability under the corresponding provision of the *Corporations Act 2001* exists as if that provision "applied to the conduct or circumstances that gave rise to the pre-commencement right or liability".

98. Sections 1401(1) and (3) of the *Corporations Act 2001* provide that on commencement of the *Corporations Act 2001*, a person who had a "right" or "liability" that was acquired, accrued or incurred under a provision of the (old) *Corporations Law* and which existed immediately before the commencement of the *Corporations Act 2001* (the "pre-commencement right or liability") acquires, accrues or incurs a right or liability (the "substituted right or liability"). Section 1401(2) provides the *Corporations Act 2001* is taken to include that provision of the (old) *Corporations Law* (for the purposes of s.1401(3) and (4))[73]. The substituted right or liability is acquired, accrued or incurred under that provision[74]. The substituted right or liability is equivalent to the pre-commencement right or liability under the (old) *Corporations Law*. A procedure, proceeding or remedy in respect of the substituted right or liability may be instituted after the commencement under the provisions taken to be included in the *Corporations Act 2001* by s.1401(2)[75].

99. Section 1371 defines necessary things for these sections, such as "carried over provision"[76], "liability", "right" and "corresponds". Sections 1400 and 1401 of the *Corporations Act 2001* are essentially equivalent. Section 1400 deals with the creation of equivalent rights and liabilities to those that existed under carried over provisions of the *Corporations Law*. Section 1401 deals with the creation of equivalent rights and liabilities to those that existed under repealed provisions of the *Corporations Law*[77]. Relevantly, s.1401 applies in respect of rights and liabilities under the *Corporations Law* in force before 23 June 1993 as applied by s.1383 of the *Corporations Law*[78].

100. In *Forge v Australian Securities and Investments Commission*, Gummow, Hayne and Crennan JJ explained the operation of s.1401[79]. The effect of s.1401(2) is to incorporate into the *Corporations Act 2001* a "substituted, carbon copy" of the

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[73] (with such modifications (if any) as are necessary). The *Corporations Act 2001* is also taken to include for those purposes the other provisions of the (old) *Corporations Act* (with such modifications (if any) as are necessary) that applied in relation to the pre-commencement right or liability — see s.1401(2).

[74] (with such modifications (if any) as are necessary).

[75] *Corporations Act 2001* (Cth) s.1401(3).

[76] Defined to mean a provision of the old corporations legislation of that State or Territory that was in force immediately before commencement and corresponds to a provision of the new corporations legislation.

[77] *Kennedy v Australian Securities and Investments Commission* [2005] FCAFC 32; (2005) 142 FCR 343 at 354 [46] (Black CJ, Merkel and Emmett JJ).

[78] See, eg, *Shum Yip Properties v Chatswood Investment & Development* [2002] NSWSC 13 at [9]–[12] (Austin J); *Australian Securities and Investments Commission v Plymin* [2003] VSC 123 at [335] (Mandie J).

[79] [2006] HCA 44; (2006) 228 CLR 45 at 92 [114]. See also BGNV's Submissions at [20].

provisions of the *Corporations Law* that had given rise to rights or liabilities in existence immediately before the commencement of the *Corporations Act 2001*[80].

101. To finish this off, it is necessary to note the *Corporations (Ancillary Provisions) Act 2001* (WA). At the same time as the *Corporations Act 1989* (Cth) was repealed, the *Corporations (Ancillary Provisions) Act 2001* (WA) commenced. It amended s.7 of the *Corporations (Western Australia) Act 1990* (WA) to provide that the *Corporations Law* set out in s.82 of the *Corporations Act 1989* (Cth) that was in force immediately before the repeal of that section applies as a law of Western Australia[81]. Section 6 of the *Corporations (Ancillary Provisions) Act 2001* (WA) provides however that the *Corporations Law* is only to operate in relation to matters arising before 15 July 2001 (and matters arising, directly or indirectly, out of such matters) in so far as those matters are not dealt with by (*inter alia*) the *Corporations Act 2001*. Other than pursuant to this provision of the *Corporations (Ancillary Provisions) Act 2001* (WA), the *Corporations Law* has no operation of its own force after the commencement of the *Corporations Act 2001*.

102. Section 7(2) of the *Corporations (Ancillary Provisions) Act 2001* (WA) then provides that if by force of Chapter 10 of the *Corporations Act 2001* a person acquires, accrues or incurs a right or liability in substitution for a pre-commencement right or liability, the pre-commencement right or liability is cancelled at the relevant time and ceases at that time to be a right or liability under a law of the State. Otherwise, s.7(1) provides that the *Corporations Law* ceasing operation of its own force because of s.6 has the same effect as if the *Acts Interpretation Act 1901* (Cth) as in force on 1 November 2000 applied.

103. In *Director of Public Prosecutions (WA) v Mansfield*, McLure JA described the operation of ss.6 and 7 of the *Corporations (Ancillary Provisions) Act 2001*[82].

104. So, upon the coming into operation of the *Corporations Act 2001* on 15 July 2001, in respect of the winding up of post-1993 WA Bell Companies, the *Corporations Law* ceased to apply. Rights and liabilities under the *Corporations Law* as in force immediately prior to 15 July 2001 were substituted for rights and liabilities under the *Corporations Act 2001* (pursuant to s.1400 of the *Corporations Act 2001*); and the *Corporations Act 2001* commenced application to such rights and liabilities.

105. For the windings up of pre-1993 Bell Companies, the relevant law is to be found in the text of Parts 5.4 to 5.6 of the *Corporations Law* that was in force prior to 23 June 1993. That law continues to apply, as if those Parts were incorporated into the *Corporations Act 2001*. Pre-existing rights and liabilities ceased and were replaced by substituted rights and liabilities acquired, accrued or incurred under those provisions of

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[80] *Braysich v The Queen* [2011] HCA 14; (2011) 243 CLR 434 at 440–441 [6] (French CJ, Crennan and Kiefel JJ), 461 fn.78 (Bell J); *Forge v Australia Securities and Investments Commission* [2006] HCA 44; (2006) 228 CLR 45 at 92 [114]–[115] (Gummow, Hayne and Crennan JJ). In relation to this issue, in *Forge* each of Kirby, Callinan and Heydon JJ agreed with Gummow, Hayne and Crennan JJ — see 112 [160], 136 [237], 150 [278].

[81] *Corporations (Ancillary Provisions) Act 2001* (WA) s.30(2).

[82] *Director of Public Prosecutions (WA) v Mansfield* [2008] WASCA 5; (2008) 35 WAR 431 at 453 [99]. Buss JA agreed at 462 [150].

the *Corporations Law* taken to be included in the *Corporations Act 2001*. This follows both from the operation of s.1408 and 1401[83].

The application of this to the *Bell Act*

106. Section 25(1) of the *Bell Act* operates if immediately before the transfer day, a liability of a WA Bell Company "was admissible to proof against the company in the winding up of the company under the Corporations Act Part 5.6". If that section applies the consequence is that the liability may be proved in accordance with Part 4 Division 2 of the *Bell Act*.

107. If s.25(1) of the *Bell Act* does not operate upon an hypothesised basis, as suggested above, then what flows from all of this is as follows.

108. *First*, it is accepted that, upon a pre-1993 WA Bell Company being ordered to be wound up, a person to whom the company was indebted acquired a right under the version of s.533 of the old winding up law (i.e. pre 23 June 1993 *Corporations Law*) to prove in the winding up. *Second*, it is accepted that for such pre-1993 WA Bell Companies, s.1401 of the *Corporations Act 2001* operates in respect of that right. *Third*, the right does not exist under s.1383 of the *Corporations Law* as that section has effect because of s.1408(1) of the *Corporations Act 2001*. *Fourth*, that a substituted right is acquired or accrues as a consequence of the operation of s.1401. These four propositions are put by BGNV[84]. What is disputed is BGNV's contention regarding the conclusions that follow from this and the operation of ss.1401 and 1408 of the *Corporations Act 2001*.

109. The effect of s.1401 is that a copy of provisions of Parts 5.4 to 5.6 of the pre 23 June 1993 *Corporations Law* under which a "right" or "liability" was acquired, accrued or incurred, is read and incorporated into the *Corporations Act 2001*. A substitute right or liability is acquired, accrued or incurred under that copy provision. A procedure, proceeding or remedy may be instituted under that copy provision (and the other provisions that applied in relation to that right and which are also incorporated by the effect of s.1401) as if they applied to the conduct or circumstances that gave rise to the pre-commencement right or liability.

110. BGNV contend that it follows from this — for the purpose of s.25(1) of the *Bell Act* — that a liability of a pre-1993 WA Bell company is not admissible to proof against the company in the winding up "under" the *Corporations Act 2001* Part 5.6. BGNV contends that the "source" of the relevant right to prove was a right in the winding up under s.1401 of the *Corporations Act 2001*, applying the text of the pre-23 June 1993 version of s.553 of the *Corporations Law* as a provision of the *Corporations Act 2001*. So, BGNV contend, for the purpose of s.25(1) of the *Bell Act,* a person's substituted right to prove was "given to them" under s.1401 and 1408 of the *Corporations Act 2001* and not "given to them" under Part 5.6 of that Act[85].

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[83] The fact that both s.1401 and 1408 may affect the rights or liabilities of the pre-1993 WA Bell Companies is contemplated by s.1398 of the *Corporations Act*, which expressly states some of the provisions in Part 10.1 Division 6 (in which both ss.1401 and 1408 appear) will overlap and interact and should not be regarded as mutually exclusive.

[84] BGNV's Submissions at [16], [20], [26].

[85] BGNV's Submissions at [21], [29].

111. This contention should not be accepted. It proceeds on an incorrect understanding of the operation of s.1401. The substituted right to prove is acquired or accrued under the copy of s.553 of the *Corporations Law* that is read into and incorporated into the *Corporations Act 2001*[86]. The person with the right may institute a procedure in respect of the substituted right under the copied in provisions of the *Corporations Act 2001*. The effect of s.1401 — by which the text of the provision of the *Corporations Law* are copied into the *Corporations Act* — is that the provision is then treated as being part of the *Corporations Act*. Moreover, it is to be treated as being the part of the *Corporations Act 2001* that corresponds most obviously to the part of the corresponding *Corporations Law* part from which it was taken.

112. This accords with established principles of interpretation dealing with the effect of incorporating one Act into another. This is to transpose the earlier into the later (or write every provision of the earlier into the later) as if they had been actually printed into it[87]. The expression "moulding the two Acts into one"[88] is often used.

113. This results in the provisions of Parts 5.4 to 5.6 of the *Corporations Law* being "printed into" Parts 5.4 to 5.6 of the *Corporations Act 2001* and a reference to those Parts including those 'read in' provisions[89].

114. On this (correct) understanding, the *Corporations Act 2001* is therefore taken to include, within Part 5.6, s.533 of the old winding up laws, in relation to the winding up of pre-1993 WA Bell Companies. The reference in s.25(1) of the *Bell Act* to Part 5.6 of the *Corporations Act 2001* includes Part 5.6 of the *Corporations Law* as taken to be included in the *Corporations Act 2001* by s.1401(2).

115. There is another way of reaching the same (correct) result. If the rights and liabilities of the pre-1993 WA Bell Companies are properly to be understood as arising under Parts 5.4 to 5.6 of the *Corporations Law*, s.25(1) of the *Bell Act* still applies to them. This is because the reference to Part 5.6 of the *Corporations Act 2001* is taken to include a reference to Part 5.6 of the *Corporations Law* by reason of s.11(5) of the *Corporations (Ancillary Provisions) Act 2001* (WA). Part 5.6 of the *Corporations Act 2001* is substantially the same as Part 5.6 of the *Corporations Law* (including as that Part was in force prior to 23 June 1993)[90]. This is accepted by BGNV[91]. Those parts therefore correspond for the purpose of s.11(5) above.

116. BGNV contend in response to this that s.11(5) of the *Corporations (Ancillary Provisions) Act 2001* (WA) does not apply. This is because, it is contended, s.25(1) of

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[86] *Director of Public Prosecutions (WA) v Mansfield* [2008] WASCA 5; (2008) 35 WAR 431 at 453–454 [101] (McLure JA, Buss JA agreeing).

[87] *Cadbury Fry-Pascall Pty Ltd v Federal Commissioner of Taxation* [1944] HCA 31; (1944) 70 CLR 362 at 388 (Williams J); *Amalgamated Television Services Pty Ltd v Australian Broadcasting Tribunal* [1984] FCA 144; (1984) 1 FCR 409 at 413 (Lockhart J). See also Dennis C Pearce and Robert S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) at [7.27].

[88] Dennis C Pearce and Robert S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) at [7.27].

[89] See, Dennis C Pearce and Robert S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) at [7.32].

[90] The Explanatory Memorandum to the *1992 Reform Act* states that Part 5.5 and 5.6 of the Corporations Law are "generally unamended" by the *1992 Reform Act* — Explanatory Memorandum, Corporate Law Reform Bill 1992 (Cth), [662].

[91] BGNV's Amended Statement of Claim ('ASOC') at [72] (SCB at 46).

the *Bell Act* is directed to the right of a person to lodge a proof in a winding up as at 26 November 2015[92]. That is wrong. Section 25(1) of the *Bell Act* has as its subject the liabilities of the WA Bell Companies admissible to proof in the winding up, which are events, circumstances or things that happened or arose before 15 July 2001. Section 25(1) is to the effect that a liability of a pre-1993 WA Bell Company may be proved under the *Bell Act* if it was admissible to proof under Part 5.6 of the *Corporations Law*.

117. In any event, any doubt ought be resolved to give effect to the evident purpose of the provision and of the *Bell Act*. The construction advanced by BGNV is inconsistent with the plain and obvious purposes of s.25(1) and the *Bell Act* more generally. It also gives rise to absurd consequences. The essential purpose of the *Bell Act* is to provide an alternative process for external administration by winding up the WA Bell Companies and making reasonable provision for the satisfaction of liabilities owed to creditors[93]. BGNV's contention has the absurd consequence that creditors of the pre-1993 WA Bell Judgment Creditors[94] could not prove under the *Bell Act*, while creditors of post-1993 WA Bell Judgment Creditors could. Further to this, this is the effect of BGNV's contention notwithstanding that the property of the companies of which they are all creditors has transferred to and vested in the Authority as part of the winding up of those WA Bell Companies.

118. BGNV's alternative contention[95] can be shortly disposed of. It relies on an argument that the liabilities of WA Bell Companies were not admissible to proof under Part 5.6 of the *Corporations Act* but under s.7(1) of the *Corporations (Ancillary Provisions) Act 2001* (WA) and s.8(c) of the *Acts Interpretation Act 1901* (Cth). As stated above, s.7(1) of the *Corporations (Ancillary Provisions) Act 2001* (WA) provides that the *Corporations Law*, ceasing operation of its own force because of s.6 of the Act, has the same effect as if the *Acts Interpretation Act 1901* (Cth) as in force on 1 November 2000 applied.

119. Section 8(c) of the *Acts Interpretation Act 1901* (Cth) as in force on 1 November 2000 provides that where an Act repeals in whole or in part a former Act[96], then unless the contrary intention appears the repeal shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under any Act so repealed.

120. These provisions only apply where a person has <u>not</u> acquired, accrued or incurred a substituted right or liability under Ch.10 of the *Corporations Act 2001*. So, BGNV's alternative contention is based on the erroneous premise that s.1401(2) does not operate to create substituted rights in relation to proofs of debt. Section 1401(2) does so operate, as explained above.

121. Even if it did not, s.7(1) of the *Corporations (Ancillary Provisions) Act 2001* (WA) and s.8(c) of the *Acts Interpretation Act 1901* (Cth) provide for the effect on rights and

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[92] BGNV's Submissions at [34].
[93] *Bell Act* s.4(f). See also *Interpretation Act 1984* (WA) s.18.
[94] In respect of whose admitted proofs of debts in two of those companies, TBGL and BGF, exceed $0.5 billion — see Amended Special Case in P4 of 2016 at Attachments B and C (SCB at 139–142).
[95] BGNV's Submissions at [30]–[33].
[96] Section 8A of the *Acts Interpretation Act 1901* (Cth) as in force on 1 November 2000 provides that "repeal" of an Act or part of an Act includes a repeal effected by implication, the abrogation or limitation of the effect of the Act or part and the exclusion of the application of the Act or part to any person, subject-matter or circumstance.

liabilities resulting from (*inter alia*) the *Corporations Law* ceasing to operate. That effect does not alter the character of rights in relation to proofs of debt from being rights arising under the *Corporations Law* to being rights arising under those provisions (or any other law). This is particularly so in circumstances where those provisions (as opposed to ss.1401 and 1408 of the *Corporations Act 2001*) do seek to incorporate or give force or effect to the existing provisions under which the rights and liabilities arose.

THE FURTHER BGNV INCONSISTENCY CONTENTION — *BELL ACT* INCONSISTENCY WITH SECTION 1408 *CORPORATIONS ACT*

122. The plaintiffs contend that numerous sections of the *Bell Act* are inconsistent with Parts 5.4B and 5.6 of the *Corporations Act*. Those arguments are dealt with elsewhere. The plaintiffs contend that those sections of the *Bell Act* are inconsistent with Parts 5.4 and 5.6 of the pre-23 June 1993 *Corporations Law* for the same reasons stated in relation to the corresponding provisions in Parts 5.4B and 5.6 of the *Corporations Act 2001*. Section 1408 of the *Corporations Act 2001* has the effect that, with respect to the pre-1993 WA Bell Companies, the *Corporations Act 2001* is taken to include the provisions of Parts 5.4 and 5.6 of the pre-23 June 1993 *Corporations Law*. Consequently, it is contended, the relevant provisions of the *Bell Act* are inconsistent with s.1408[97]. This is the same argument as addressed above. In any event, if the *Bell Act* is not inconsistent with the operation of Parts 5.4B and 5.6 of the *Corporations Act 2001*, then by extension it is not inconsistent with the corresponding provisions in Parts 5.4 and 5.6 of the pre-23 July 1993 *Corporations Law* as applied by s.1408, such that no relevant inconsistency between the *Bell Act* and s.1408 arises.

123. BGNV advances a further contention; that s.5G(8) of the *Corporations Act 2001* is ineffective to avoid invalidity between the *Bell Act* and s.1408 because s.1408 is not contained "in Chapter 5 of the *Corporations Act*"[98]. As dealt with in detail elsewhere, where it operates, s.5G(8) disapplies "the provisions of Chapter 5 of this Act".

124. The short answer is that the reference to "Chapter 5" in s.5G(8) includes Parts 5.4 and 5.6 of the pre-23 June 1993 *Corporations Law*, as effectively incorporated into the *Corporations Act 2001*. The provisions are properly and obviously to be read as being part of that Chapter and Act by reason of s.1408. If, contrary to common sense, they are properly to be understood to be *Corporations Law* provisions, a similar result is achieved by the operation of s.1405 of the *Corporations Act 2001*. The reasons for this are similar to those in relation to the operation of s.25(1) of the *Bell Act*.

125. There is a longer answer. By reason of s.1408(1) of the *Corporations Act 2001*, that Act "has the same effect" as it would have if s.1383(2) of the (old) *Corporations Law*, "had been part of" the *Corporations Act 2001*, and those transitional provisions "produced the same results or effects (to the greatest extent possible)" for the purposes of the *Corporations Act 2001* as they produced for the purposes of the (old) *Corporations Law*. Sections 1382(2) and (7)(f) produced the following results or effects for the purposes of the (old) *Corporations Law*. Parts 5.4 to 5.6 of the *Corporations Law*, as in force immediately before 23 June 1993, continued to apply for the purposes of the winding up of a company ordered to be wound up under the

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[97] See BGNV's ASOC at [72] (SCB at 46–47); BGNV's Submissions at [89].
[98] BGNV's Submissions at [125].

Corporations Law prior to 23 June 1993. That "old winding up law" applied as if certain sections of the *1992 Reform Act*, that made changes to Parts 5.4 to 5.6 and inserted Part 5.7B into the *Corporations Law*, had not been enacted.

126. If ss.1383(2) and (7)(f) "had been part of" the *Corporations Act 2001* and produced the same results or effects (to the greatest extent possible) for the purposes of the *Corporations Act 2001* as they produced for the purposes of the (old) *Corporations Law*, several consequences follow. *First*, Parts 5.4 to 5.6 of the *Corporations Law*, as in force immediately before 23 June 1993, would "continue to apply" for the purposes of the winding up of a pre-1993 WA Bell Company, but by reason of the force of the *Corporations Act 2001*. *Second*, those Parts would be treated as being part of the *Corporations Act* — this is a consequence of the statutory directive to produce the same results or effects (to the greatest extent possible) to the previous application of the law, under the previous application of the law. Under the previous application of the law, Parts 5.4 to 5.6, the "old winding up" provisions, would have been incorporated in and read with the remainder of the *Corporations Law* that otherwise applied, together with the other parts of the *Corporations Law*, so as to be read as one statute.

127. The objects of Pt.10.1 of the *Corporations Act* are similar to the above directive, and a directive is also given that in resolving any ambiguity as to the meaning of any of the other provisions of Part 10.1 "an interpretation that is consistent with the object of this Part is to be preferred to an interpretation that is not consistent with that object"[99].

128. If BGNV's construction were correct, references to Chapter 5 (or in fact, any reference to a section, part, division or chapter) in the *Corporations Act 2001* would also not accommodate reference to the corresponding provisions of the *Corporations Law* taken to be included in the *Corporations Act 2001* by reason of ss.1401(2)[100]. So, it would create the precise circumstance that was intended to be avoided.

129. Regard should also be had to the purposes of Part 1.1A of the *Corporations Act 2001* — to avoid inconsistency and facilitate the exercise of State legislative power that could have been exercised prior to the enactment of the *Corporations Act 2001*. There is no sensible purpose that can be attributed to Parliament that has the effect that States can rely on s.5G(8) in relation to post-23 June 1993 windings up but not provide for the invocation of that provision in respect of pre-23 June 1993 companies.

130. For these reasons, and consistent with interpretative principles referred to earlier, s.5G(8) extends to Parts 5.4 to 5.6 of the pre-1993 *Corporations Law* as if incorporated into Chapter 5 of the Act.

131. Alternatively, if that is not correct, and Parts 5.4 to 5.6 of the pre 23 June 1993 *Corporations Law* are not to be treated as being part of *Corporations Act 2001*, in particular Chapter 5, s.1405(1) provides a similar outcome. That section is expressed in similar terms to s.11(5) of the *Corporations (Ancillary Provisions) Act 2001* (WA) referred to above in relation to the operation of s.25(1) of the *Bell Act*. In other words, it operates such that that references in the *Corporations Act* to, relevantly, a group of provisions of the *Corporations Act*, is taken in relation to events, circumstance or

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[99] *Corporations Act 2001* (Cth) s.1370(2).

[100] See, for example, s.5A(2) of the *Corporations Act 2001* (Cth) in relation to the Crown being bound by Chapter 5 of that Act.

things that happened before the commencement of the *Corporations Act 2001* on 15 July 2001 to include a reference to the corresponding provisions of the *Corporations Law*.

132. BGNV accepts that the provisions of Part 5.4 and 5.6 of the *Corporations Law* in force prior to 23 June 1993 are substantially the same as the provisions in Part 5.4B and 5.6 of the *Corporations Act 2001*[101]. Consequently, at least to the extent of that similarity, Chapter 5 of the *Corporations Law* corresponds with Chapter 5 of the *Corporations Act 2001* for the purpose of s.1405[102].

133. Each of the following are events circumstances or things that happened or arose before 15 July 2001: the winding up of the WA Bell Companies ordered to be wound up before 23 June 1993; all liabilities of those WA Bell Companies incurred prior to 15 July 2001 and all transactions and agreements of those WA Bell Companies which were effected or entered into by the company or its liquidator, or related to the period, prior to 15 July 2001 (including things done in respect of those transactions, whenever those things may have occurred).

134. A reference in s.5G(8) of the *Corporations Act 2001* to Chapter 5 of the *Corporations Act* is thus taken, in relation to those events, to include a reference to the corresponding provisions of Chapter 5 of the *Corporations Law*.

135. The effect of this is that, subject to its other terms being met, which is addressed in detail below, s.5G(8) displaces Chapter 5 of the applied pre-23 June 1993 *Corporations Law* to the extent it would be inconsistent with the operation of the Corporations displacement provisions of the *Bell Act*.

SECTIONS 5F AND 5G OF THE *CORPORATIONS ACT 2001*

136. Section 51 of the *Bell Act* invokes s.5F of the *Corporations Act 2001* (Cth) and s.52 of the *Bell Act* invokes s.5G of the *Corporations Act 2001*. BGNV contends that ss.5F and 5G, as invoked, do not operate so as to 'save' the *Bell Act* or provisions of it that are inconsistent with provisions of the *Corporations Act 2001*[103].

137. The scope and operation of ss.5F and 5G are to be understood having regard to their purposes. Plainly enough, Part 1.1A is an integral basis upon which the States referred power, empowering the Commonwealth Parliament to enact the *Corporations Act 2001*, and its operation central to States remaining referring States.

138. It is apparent from the text and context of Part 1.1A that its underlying purposes included preserving a referring State's ability to withdraw specified matters from the operation of Commonwealth Corporations legislation, including the *Corporations Act 2001*, and to legislate in a manner which may otherwise be inconsistent with such Commonwealth Corporations legislation[104], without withdrawing completely as a referring State.

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[101] See BGNV's ASOC at [72] (SCB at 46).
[102] See *Corporations Act 2001* (Cth) ss.1371(2), (3).
[103] See BGNV's Submissions at [91]–[125].
[104] The point is expressed a little differently by Barrett J in *HIH Casualty & General Insurance Ltd v Building Insurers' Guarantee Corporation* [2003] NSWSC 1083; (2003) 188 FLR 153 at 182 [72] (*'HIH'*).

139. *First*, s.5E(1) of the *Corporations Act* provides that the Corporations legislation is not intended to exclude or limit the concurrent operation of State and Territory laws. So the *Corporations Act* does not cover a field[105]. *Second*, s.5F facilitates a State or Territory excluding certain matters from the operation of the Commonwealth Corporations legislation (in whole or in part). No inconsistency arises because the Commonwealth legislation simply does not apply to the excluded matter. *Third*, s.5G provides an alternative mechanism to s.5F which operates (relevantly here) on State "post-commencement provisions". Section 5G provides for a number of particular consequences in the interaction of these State post-commencement provisions with particular provisions of and things provided for in the Commonwealth Corporations legislation. As with s.5F, the essential means of s.5G is to state that Commonwealth legislation, that might otherwise apply to the same thing as the State post-commencement provision, does not. Section 5I is in effect a mirror of s.5F. It empowers the Commonwealth to modify by regulation the operation of the Commonwealth Corporations legislation to exclude itself from matters dealt with by specified State or Territory laws.

140. As will be noted below, Part 1.1A of the *Corporations Act 2001* is to be read with s.8 of the *Corporations (Ancillary Provisions) Act 2001* (WA). The operation of this provision requires an understanding of what came before it.

Prior to Part 1.1A of the *Corporations Act 2001*

141. The *Corporations Act 2001* was preceded by the national scheme by which the States and the Northern Territory adopted, as a law of each State and the Northern Territory, the model *Corporations Law*[106].

142. Section 5 of the *Corporations ([State or Territory]) Act 1990* of each State and Territory dealt with future amendment to the adopted *Corporations Law* by States[107]. Section 6 provided that State laws inconsistent with, but which preceded, the *Corporations Law*, continued to apply.

143. Other provisions of the *Corporations ([State or Territory]) Act 1990* dealt with different issues of State legislative power; in particular ss.7, 12, 13, 15 and 16. None seek to limit the surrogate *Corporations Law* of each State and Territory to the territory of the State or Territory.

144. Another feature of the *Corporations Law* scheme was that such laws operated to the extent of the legislative power of each State and Territory. The existence of the mechanism in s.5 for a particular State to change the *Corporations Law* of that State illustrates that conflicts could have arisen, and such real conflicts were recognised and

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[105] See, eg, *Director of Public Prosecutions (Vic) v County Court (Vic)* [2010] VSC 157; (2010) 239 FLR 139 at 151–152 [50]–[51] (J Forrest J); *Bow Ye Investments Pty Ltd v Director of Public Prosecutions (Vic)* [2009] VSCA 149; (2009) 229 FLR 102 at 116 [71] (Warren CJ, Buchanan JA and Vickery AJA agreeing); *IG Index Plc v New South Wales* [2006] VSC 108; (2006) 198 FLR 132 at 142–143 [39] (Bongiorno J); *Loo v Director of Public Prosecutions (Vic)* [2005] VSCA 161; (2005) 12 VR 665 at 679 [25] (Winneke P, Charles JA agreeing); *HIH Casualty & General Insurance Ltd v Building Insurers' Guarantee Corporation* [2003] NSWSC 1083; (2003) 188 FLR 153 at 190 [78] (Barrett J).

[106] Along with *Corporations Regulations*, the *ASC Law* and *ASC Regulations*; see definition of "applicable provision" in s.3 of the *Corporations (Western Australia) Act 1990* (WA).

[107] *Loo v Director of Public Prosecutions (Vic)* [2005] VSCA 161; (2005) 12 VR 665 at 669 [5] (Winneke P).

accommodated by s.5(2) and s.6. If the New South Wales Parliament amended the *Corporations Law* (NSW) to have had an effect (say) in Western Australia, there was no limit on the power of the Western Australian Parliament to legislate to 'deal with' such NSW legislation. If this gave rise to a real conflict between the *Corporations Law* (WA) and the *Corporations Law* (NSW) then this conflict would be resolved in accordance with law[108].

145. A State law invoking s.5 of the *Corporations ([State or Territory]) Act 1990* was not limited by that section, or anything else, to amendment having effect only within the territory of a particular State or Territory. Nor was the maintenance of the operation of pre-existing provisions under s.6 so limited. The limitation was on legislative power not territory.

146. In this matter the plaintiffs contend that the States, in referring power to enable the Commonwealth to enact the *Corporations Act 2001*, including s.5F, fundamentally altered the regime that had previously existed.

147. Section 8 of the *Corporations (Ancillary Provisions) Act 2001* (WA) was enacted to complement the *Corporations Act 2001* and is part of the overall legislative package. All referring States have similar provisions[109]. By reason of this provision and s.5F(4) of the *Corporations Act 2001*, any Western Australian laws existing at the commencement of the *Corporations Act 2001*, that were inconsistent with the new *Corporations Act 2001* (or any "Corporations legislation" in the meaning in s.5F) were valid, even if they had not complied with s.5 of the *Corporations (Western Australia) Act 1990* (WA).

Section 5F of the *Corporations Act 2001*

148. The plaintiffs' contentions in this matter are that, notwithstanding the extra-territorial scope of s.5 of the *Corporations ([State or Territory]) Act 1990* of each State and s.8 of the *Corporations (Ancillary Provisions) Act 2001*, each referring State requested that the Commonwealth enact legislation that fundamentally altered the nature of State laws that then existed, and precluded referring States from legislating extra-territorially.

149. BGNV relies on the reasoning of Barrett J in *HIH*[110].

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[108] As has been recognised on many occasions, such conflict resolving laws in Australia — dealing with conflicting State statutes — are protean or at least undeveloped. See, for instance, *Sweedman v Transport Accident Commission* [2006] HCA 8; (2006) 226 CLR 362 at 402 [31], 406 [48] (Gleeson CJ, Gummow, Kirby and Hayne JJ). See also Stephen Gageler SC, 'Private intra-national law: Choice or conflict, common law or constitution?' (2003) 23 *Australian Bar Review* 184 and Graeme Hill, 'Resolving a True Conflict between State Laws: A Minimalist Approach' (2005) 29(1) *Melbourne University Law Review* 39. These matters are discussed in Mark Leeming, *Resolving Conflicts of Laws* (Federation Press, 2011) at Chapter 6. United States literature, involving (*inter alia*) "governmental interest analysis" is considerable. Much of this was first synthesised by Professor Currie, and much of this is in the various chapters of Brainerd Currie (ed), *Selected Essays on the Conflict of Laws* (Duke University Press, 1963).

[109] *Corporations (Ancillary Provisions) Act 2001* (NSW) s.8; *Corporations (Ancillary Provisions) Act 2001* (Vic) s.8; *Corporations (Ancillary Provisions) Act 2001* (Qld) s.9; *Corporations (Ancillary Provisions) Act 2001* (SA) s.8; *Corporations (Ancillary Provisions) Act 2001* (Tas) s.8.

[110] *HIH* [2003] NSWSC 1083; (2003) 188 FLR 153 at 193 [88]. See BGNV's Submissions at [94]–[98].

150. Barrett J's reasoning should be rejected for the following reasons. The words "in the State or Territory" in s.5F(2) are to be understood having regard to the inevitable fact that a State will not declare a matter to be an excluded matter, and thereby 'disapply' the Commonwealth legislation, unless the State fills the gap. Invariably the State Act that declares the matter to be an excluded matter in relation to one or other of s.5F(1)(a)–(d) also positively fills the gap that this declaration leaves. This is so in respect of all of the scenarios set out in s.5F(1)(a)–(d). The *Bell Act* is an example of this. This informs the meaning of the words "in the State or Territory" in s.5F(2).

151. The words "in the State or Territory" in s.5F(2) refer to the State or Territory where the matter is or the States and Territories where the matter is. This properly emphasises the importance of the word "the" in "in the State or Territory". The singular "State or Territory" includes the plural[111].

152. The declaration of an excluded matter by "a law of a State or Territory" (call it State 1) disengages the Corporations legislation from the States and Territories to which the law of State 1, in respect of the matter, applies. Assume this. A law of Western Australia declares Corporation X, that operates in (say) Western Australia and New South Wales, an excluded matter and the same law of Western Australia then legislates in respect of Corporation X. Section 5F(2) does not confer power on the Western Australian Parliament to legislate in respect of Corporation X. It withdraws the operation of Commonwealth law. Commonwealth law is then withdrawn "in relation to the matter" in the States and Territories to which the matter relates. The Western Australian law then operates in such States and Territories. If the New South Wales Parliament then wishes to legislate in respect of this matter, the Commonwealth Corporations legislation does not apply to it in New South Wales and any conflict between any New South Wales and Western Australian law in respect of the matter would be resolved by the rules or interpretative techniques for resolving such conflicts alluded to above. The (extra-territorial) operation of the Western Australian law in respect of Corporation X in New South Wales has the effect of withdrawing or disengaging the Corporations legislation in respect of Corporation X (the "matter") in New South Wales.

153. Such an understanding is consistent with the breadth of the defined term "matter" in s.5F(6), none of the meanings of which suggest or are logically consistent with, any geographical limitation. On this understanding, Part 1.1A simply preserves, as it was intended, the regime for State and Territory opt out of Corporations legislation that existed prior to the *Corporations Act 2001*. This understanding is also enhanced by the existence of s.5F(3). This understanding also provides a certain and clear meaning to s.5G(11).

154. This understanding also overcomes the principal and obvious difficulty with the reasoning and conclusion of Barrett J in *HIH*. If correct, Barrett J's reasoning leaves no real scope for s.5F to operate.

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[111] *Acts Interpretation Act 1901* (Cth) s.23.

Section 5G of the *Corporations Act 2001*

155. If s.5F(2) does not provide a complete answer to the alleged inconsistency with the Corporations legislation, s.5G does[112].

Section 5G(11)

156. By reason of s.5G(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 the provision of the Corporations legislation and an inconsistent post-commencement provision.

157. The reference in s.5G(3)(b) to a provision of "a law of the State or Territory" is a reference to a provision of the law of the State or Territory that enacted the law. The term "in a State or Territory" means any State or Territory in which the law operates. For the reasons explained above this need not be State or Territory that enacted the law.

158. The provision is not territorially limited to that legislating State or Territory. Rather it disapplies Corporations legislation in any State or Territory (or all) to the extent necessary to ensure that no inconsistency arises between the Corporations legislation and (here) the post-commencement law of the State or Territory.

159. By reason of s.5G(11), all of the displacement provisions of the *Bell Act* operate unaffected by the Corporations legislation.

Section 5G(8)

160. BGNV's essential contention concerning s.5G(8) is that it does not dis-apply Chapter 5 of the *Corporations Act 2001* because s.5G(8) only dis-applies the *Corporations Act 2001* if the State law is one that that effects a winding up or administration[113], and the *Bell Act* does neither[114]. This contention proceeds on an erroneous construction of the provision.

161. The construction of the plaintiffs emphasises the word "the" in s.5G(8) — to contend that Chapter 5 provisions do not apply to "a" winding up only to the extent to which "the" winding up is carried out in accordance with a provision of law of a State or Territory[115]. So, a State law can only displace Chapter 5 to the extent that the State replaces the Commonwealth's regime with an identical regime. This is illustrated by BGNV's contention that a State could not displace the winding up provisions of Chapter 5 by providing for a receivership under a State Act[116].

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[112] Section 52(1) of the *Bell Act* limits the effect of the invocation by that section of s.5G of the *Corporations Act 2001*, by providing that the section "has effect if, and to the extent that, an excluded Corporations legislation provision has any application, as a law of the Commonwealth, in relation to a WA Bell Company". In s.50 "excluded Corporations legislation provision" is defined to mean "any provision of the Corporations legislation that does not apply in the State, as a law of the Commonwealth, in relation to the WA Bell Companies because of section 51".

[113] BGNV's Submissions at [110]–[111].

[114] BGNV's Submissions at [108], [115]–[123].

[115] BGNV's Submissions at [109]–[110].

[116] BGNV's Submissions at [110].

162. Such a construction denies s.5G(8) of any sensible operation. The section operates 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.

The *Bell Act* process is a "winding up" for the purpose of s.5G(8)

163. The *Bell Act*, and more particularly its displacement provisions, provide for a winding up of the WA Bell Companies.

164. In denying this, the plaintiffs rely upon McPherson SPJ's statement in *Crust 'n' Crumb*[117]. However, the core of what MacPherson SPJ referred to is entirely apposite: "winding up is a process that consists of collecting the assets, realising and reducing them to money, dealing with proofs of creditors by admitting them or rejecting them and distributing the net proceeds after providing for costs and expenses, to the persons entitled"[118].

165. All those features are present in the form of external administration carried out under the *Bell Act*.

BGNV's asserted 'necessity' of judicial supervision of windings up

166. It is erroneous to contend that a process that consists of getting in assets, realising and reducing them to money, admitting or rejecting claims of creditors and distributing the net proceeds after providing for costs and expenses, to the persons entitled, does not attract the description of winding up because it is not subject to judicial supervision[119]. Voluntary winding up from the first did not involve court supervision[120]. Further, countless corporations, in particular statutory corporations, have been 'wound up' without court 'supervision'[121]. In the United Kingdom, dissolution by statute without court supervision has been common[122]. Contrary to BGNV's submissions, the history of windings up includes administrative windings up without curial direction[123].

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[117] BGNV's Submissions at [112]–[114].

[118] *Re Crust 'n' Crumb Bakers (Wholesale) Pty Ltd* [1991] QSC 185; [1992] 2 Qd R 76 at 78.

[119] BGNV's Submissions at [116].

[120] V Markham Lester, *Victorian Insolvency: Bankruptcy, Imprisonment for Debt, and Company Winding-up in Nineteenth-Century England* (Clarendon Press, 1995) at 226.

[121] For example, States have legislated to dissolve companies previously incorporated under companies legislation. In Western Australia, this includes companies dissolved by the *City Club Act 1965* (WA), *Collie Club Act 1953* (WA), *Fremantle Buffalo Club (Incorporated) Act 1964* (WA), *Goldfields Tattersalls Club (Inc.) Act 1986* (WA), *Kalgoorlie Country Club (Inc) Act 1982* (WA), *Perth and Tattersall's Bowling and Recreation Club (Inc.) Act 1979* (WA), *West Australian Club Act 1948* (WA) and *The Westralian Buffalo Club Act 1949* (WA). None were conducted via judicial supervision.

[122] For example, the East India Company was dissolved by the *East India Stock Dividend Redemption Act 1873* (UK). See also the *Madras Railway Annuities Act 1908* (UK); *Bombay Baroda and Central India Railway Act 1942* (UK); the *Ceylon Railway Company's Dissolution Act 1862* (UK).

[123] This is discussed below in respect of the collapse of the Albert Life Assurance Company. See also *R v Davison* [1954] HCA 46; (1954) 90 CLR 353 at 384 (Kitto J), 390 (Taylor J); *Gould v Brown*[1998] HCA 6; (1998) 193 CLR 346 at 404–405 [68]. As Professor Lester has explained (and as dealt with in more detail below) at the foundation of companies legislation the UK Parliament earnestly considered vesting the whole of the jurisdiction for the winding-up of insolvent companies to the existing bankruptcy commissioners, with neither the Bankruptcy Court of Chancery having any role. This policy was not adopted but not because of a notion that inherent in corporate winding up was curial supervision — see V Markham Lester, *Victorian Insolvency: Bankruptcy, Imprisonment for Debt, and Company Winding-up in Nineteenth-Century England* (Clarendon Press, 1995) at 223–224.

Winding up is and has always been a statutory process[124]. There is not common law company law or winding up[125]. The process does not inhere to judicial control.

The asserted 'necessity' of *pari passu* distribution in windings up

167. *Pari passu* distribution is not inherent to a winding up as the plaintiffs contend[126].

168. As Gummow J observed in *Sons of Gwalia Ltd*[127]:

> There are no "general principles of company law" applicable in a winding up and to which there must be reconciled those provisions of the [*Corporations Act 2001*] and its predecessors (beginning with the *Companies Act 1862* (UK)) which stipulate a particular system of proof of debts and the ranking of debts and the placement of "shareholder claims" in that system.

169. The *pari passu* principle is not only not immutable; but rare[128]. Statutory priorities can be and have been changed according to legislative policy over time[129].

BGNV's asserted 'necessity' of a singular class of creditors in windings up

170. It appears that BGNV contends that conducting the administration for the benefit of persons other than the creditors means that the administration is not a winding up. In particular, BGNV contends[130] that the *Bell Act* "provides for payments to be made to persons who would not be entitled to receive such a payment in a winding up". This derives from the definition of "creditor" in s.3 of the *Bell Act* to include a beneficiary of any trust, something which is said to "turn... established principle on its head"[131]. There is no inherent or mandatory definition of "creditor" in a winding up regime. Assume that an amendment to s.556(1) of the *Corporations Act 2001* provided that, in a winding up, proceeds were to be paid to the spouse of an employee rather than to the creditor employee, if the creditor employee had failed to pay child support. The spouse is not a creditor. As a further example, in the *Albert Life Assurance Arbitration Act 1871*[132] a creditor included the "assigns of a creditor"[133].

BGNV's asserted 'necessity' of distribution of the company's assets in windings up

171. This is the contention that because under most companies regimes the company being wound up is not divested of assets until final distribution, the process of the *Bell Act* is

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[124] See, eg, Review Committee, Parliament of the United Kingdom, *Report of the Review Committee on Insolvency Law and Practice* (1982) at 24 [74]; Thomson Reuters, *McPherson's Law of Company Liquidation* (at January 2016) at [1.30], [1.40].
[125] *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1; (2007) 231 CLR 160 at 186 [36] (Gummow J).
[126] BGNV's Submissions at [74], [118]–[119].
[127] *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1; (2007) 231 CLR 160 at 186 [36] (Gummow J).
[128] Review Committee, Parliament of the United Kingdom, *Report of the Review Committee on Insolvency Law and Practice* (1982) at 61 [223].
[129] See, eg, changes made by the *Corporate Law Reform Act 1992* (Cth) to s.556 of the then-applicable *Corporations Law*.
[130] BGNV's Submissions at [122].
[131] BGNV's Submissions at [122].
[132] 34 Vict., c.xxxi.
[133] Section 2 (definition of "creditor").

not a winding up because the assets to be distributed are vested in the Authority[134]. This is a distinction without a difference.

BGNV's asserted 'necessity' of singularity of purpose in legislation providing for windings up

172. There seems to be put a contention that fatal to the characterisation of the *Bell Act* process as a winding up is that certain of objects of the Act do not relate to winding up[135]. The *Corporations Act 2001* does not deal only with winding up.

BGNV's asserted 'necessity' of non-application to deregistered companies

173. It is contended that, because the *Bell Act* regime deals with deregistered companies, its processes cannot be a winding up regime[136]. What the *Bell Act* does in respect of deregistered companies is very limited. The *Bell Act* does not take any property of deregistered companies[137]. Only if a deregistered company is reinstated will the property revested in the company as a consequence of its reinstatement (and which is taken to then be received by the company) transfer to or vest in the Authority at the time at which it is received[138]. None of that is contrary to the notion of a winding up. A winding up of Company A may impact upon Company B, which interacts with Company A in some way. This does not alter the character of the winding up of Company A. The *Bell Act*'s limited effect on a deregistered company is different from the legislation considered in *DPP v Loo*[139]. The question there was whether s.5G(8) was invoked where the State law may also have impacted on a company not being wound up or subject to the regimes in s.5G(8).

The *Bell Act* process is an "external administration" for the purpose of s.5G(8)

174. If the *Bell Act* does not effect a winding up, it effects an "external administration", or an "other external administration". BGNV submits that "other external administration" should be read solely as a reference to, and confined in its meaning by, Part 5.3A of the *Corporations Act 2001*[140].

175. This limited approach to defining "other external administration" should be rejected. The *Corporations Act 2001* does not limit "external administration" to particular parts of Chapter 5. The meaning of "other external administration" goes beyond the forms of external administration provided for in Chapter 5 of the *Corporations Act 2001*. *First*, in its ordinary and natural meaning, "other external administration" is not limited to the forms in Chapter 5. It relates to administration by an external agency not in accordance with the constitution of the company. In effect, it refers to administration other than by the directors. Chapter 5 is but one example of such external

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[134] BGNV's Submissions at [122], [123].
[135] BGNV's Submissions at [123].
[136] BGNV's Submissions at [124].
[137] Section 22(4)(b) of the *Bell Act*.
[138] Section 22(3) of the *Bell Act* read with the definition of "reinstated WA Bell Company" in s.3 of the *Bell Act*.
[139] [2002] VSC 231; (2002) 130 A Crim R 452 at 467 [64] (Ashley J).
[140] BGNV's Submissions at [108].

administration. Another example, outside of Chapter 5 of the *Corporations Act 2001*, is provided for by the *Payment Systems and Netting Act 1998* (Cth)[141].

176. *Second*, even if "external administration" is limited to a method provided for in Chapter 5 of the *Corporations Act 2001*, for the adjective "other" to have any work to do, it likely refers to external administrations beyond Chapter 5.

177. *Third*, it is difficult to discern that the purpose of s.5G(8) is to limit the legislative power of the States and Territories to only establish forms of external administration provided for by the Commonwealth Parliament in Chapter 5 of the *Corporations Act 2001*. Such an interpretation prevents a State or Territory from implementing (say) a form of official management, which was provided for under Part 5.3 of the *Corporations Law*, or from enacting *sui generis* external administration schemes — for example, the *James Hardie Former Subsidiaries (Winding Up and Administration) Act 2005* (NSW).

178. The *Bell Act* creates a form of "other external administration" if not a winding up.

Section 5G(4)

179. Sections 5G(4) and (5) also operate to facilitate the valid operation of a number of provisions of the *Bell Act*.

180. The operation of s.5G(4) is explained by Barrett J in *HIH*[142]. BGNV contend that for s.5G(4) to operate it is necessary for the defendant to identify every specific provision of the Corporations legislation that prohibits the doing of an act or imposes liability for doing the act[143]. Section 5G(4) operates differently to this. The section is invoked by State law in respect of provisions of State law that "specifically authorises or requires the doing" of acts. They are valid, and any provision of Corporations legislation that might be contended to be inconsistent does not prohibit the act or impose a liability for it.

181. BGNV[144] in effect contends that s.5G(4) of the *Corporations Act 2001* does not operate in relation to provisions of the *Bell Act* which effect an outcome, because this is not to authorise or require the performance of an act. The example given is the transfer and vesting of property in the Authority under s.22(1) of the *Bell Act*. This is too narrow a reading of the words "authorises or requires the doing of" an act. These are plainly words of breadth. Section 22(1) of the *Bell Act* is apposite. By it things are "transferred to and vested in" the Authority. That is the doing of an act. Numerous provisions are protected by the operation of s.5G(4)[145].

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[141] *Payment Systems and Netting Act 1998* (Cth) s.5. See also Explanatory Memorandum, *Financial System Legislation Amendment (Resilience and Collateral Protection) Bill 2016* (Cth) at [1.28]–[1.30].
[142] [2003] NSWSC 1083; (2003) 188 FLR 153 at 195 [95]–[96].
[143] BGNV's Submissions at [101], [103].
[144] BGNV's Submissions at [102]–[103].
[145] *Bell Act*, ss.22(1)-(3), 23–31, 33–34, 36–38, 39(1), 39(2), 39(4)–(6), 40–46, 48, 55, 56(3).

Section 5G(5)

182. There are numerous provisions of the *Bell Act* that, in effect, provide that each WA Bell Company is subject to the control and direction of a person (the Authority[146]) and authorise the Authority to give instructions to the directors or other officers (including the liquidator[147]) of each WA Bell Company. For instance, see ss.27, 28, 29, and 33. By reason of the operation of s.5G(5), the Authority can control and direction the WA Bell Companies notwithstanding anything contained in the Corporations legislation.

OTHER CLAIMS OF *BELL ACT* INCONSISTENCY WITH THE CORPORATIONS LEGISLATION — NON-DISPLACEMENT PROVISIONS

183. This genus of argument emerges out of ss.5F and 5G of the *Corporations Act 2001*. The State contends above that s.5F operates in respect of the whole of the *Bell Act* to avoid all inconsistency between the whole of the *Bell Act* and the Corporations legislation. Then it is contended that if s.5F(2) does not provide a complete answer to the alleged inconsistency with the Corporations legislation, s.5G operates (as a result of its invocation in s.52 of the *Bell Act*), declaring Parts 3, 4 and 5 and ss.55 and 56(3) of the Act to be Corporations legislation displacement provisions in relation to the Corporations legislation.

184. So, if the invocation of s.5F fails but s.5G operates as the State contends, there remains the issue of inconsistency between provisions of the *Bell Act* that have not been declared to be Corporations legislation displacement provisions and the Corporations legislation.

185. The plaintiffs contend that various provisions of the *Bell Act* that are not Corporations displacement provisions are inconsistent with various provisions of the Corporations legislation.

186. Sections 9 and 10 of the *Bell Act* are alleged by BGNV to be directly inconsistent with ss.474(1), 477 and 478(1)(a) of the *Corporations Act 2001*[148]. The answer to this is that ss.5G (4), (5), (8) and (11) displace ss.471A, 474(1), 477 and 478(1)(a) *re* ss.22, 27,28 and 29 of the *Bell Act*. As such the sections have no remaining operation that affects, and could thereby be inconsistent with, ss.9 and 10 of the *Bell Act*.

187. BGNV contends that s.18 of the *Bell Act* is inconsistent with ss.555 and 556 of the *Corporations Act 2001*. There is no real inconsistency between these provisions. The fund subject to the *Bell Act* is over $1.7 billion[149]. Having regard to their functions[150] and the time limits in the Act[151], the Authority's expenses and Administrator's remuneration cannot exhaust the fund.

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[146] The Authority is established as a body corporate and has, both within and outside the State, the legal capacity of an individual — see *Bell Act* ss.7(1), (2) and (4).
[147] *Corporations Act 2001* (Cth) s. 9 (definition of "officer" of a corporation).
[148] BGNV's Submissions at [69]. See also Special Case at [60] (SCB at 39).
[149] The bank accounts holding the trust property immediately before the transfer day held $1,038,359,017.21 and the bank accounts holding the uncontested amount immediately before the transfer day held $689,300,429.72 — see Amended Special Case at [33], [40] and Attachment F (SCB at 172, 176–178, 210–211). Adding together the various sums arrives at the stated amounts.
[150] See *Bell Act*, s.9.
[151] See *Bell Act*, Part 4.

188. BGNV contends that ss.54, 56(1) and (2), 56(4), 58, 68(2)(b)(ii), 72 and 73 of the *Bell Act* are inconsistent with ss.468(1), (3) and (4) of the *Corporations Act 2001*. This contention is premised on s.468(1) having the effect that the disposition effected by s.22 of the *Bell Act* is void. Section 468(1) of the *Corporations Act 2001* does not have this effect because of the operation of ss.5G(8) and (11). It is also alleged by BGNV that ss.54(2), 56(2), 58(1), 69(2)(b)(ii), 72(2)(a)–(b) and 73 of the *Bell Act* are inconsistent with ss.474, 477(2)(a) and 478 of the *Corporations Act 2001*. Again, this is really a contention concerning s.22 of the *Bell Act*. The answer to it this is that ss.5G (4), (5), (8) and (11) displace ss.474(1), 477 and 478(1)(a) *re* s.22 of the *Bell Act*.

189. This contention, as understood, is that s.73(1) of the *Bell Act* is inconsistent with s.471B of the *Corporations Act*[152]. There is no inconsistency. Section 471B of the *Corporations Act* does not "cover the field". Both provisions, which provide for leave, operate together.

OTHER CLAIMS OF *BELL ACT* INCONSISTENCY CONTENDED NOT TO BE SAVED BY SECTION 5G(8)

190. There is a further scenario in this. It is to be understood as follows. The State's invocation of s.5F fails and the State's contention as to the operation of ss.5G(4), 5G(5) and 5G(11) is rejected. This leaves s.5G(8), which could operate. In this scenario, there is the issue of inconsistency between provisions of the *Bell Act* that are declared to be Corporations legislation displacement provisions, but are alleged to be inconsistent with provisions of the *Corporations Act 2001* other than Chapter 5. Section 5G(8) only exempts Chapter 5 of the *Corporations Act 2001* from operation.

191. BGNV contends that s.33(7) of the *Bell Act* is inconsistent with ss.530B, 531 and 542(2) of the *Corporations Act 2001* and reg.5.6.02 of the *Corporations Regulations 2001* (Cth)[153]. Section 33(7) of the *Bell Act* requires a liquidator of a WA Bell Company to hand over the books to the Authority. It is a displacement provision and ss.530B, 531 and 542(2) of the *Corporations Act 2001* are all contained in Chapter 5. So they are all displaced by the operation of s.5G(8) of the *Corporations Act 2001*. Because of this, it is unnecessary to go into the detail of what ss.530B, 531 and 542(2) do, except to explain what reg.5.6.02 does. Regulation 5.6.02 requires a liquidator to ensure that the books kept under s.531 of the *Corporations Act 2001* are available at his or her office for inspection. Thus, the operation of reg.5.6.02 is premised on the continuing existence of the obligation to keep the books and entitlement to inspect. However, by reason of the operation of s.5G(8) of the *Corporations Act 2001*, s.531 ceases to operate, in turn facilitating the operation of sections of the *Bell Act*, including ss.28 and 29 (that prevent a liquidator performing a function or power as liquidator without the Authority's written approval) and 33(7). On this understanding, reg.5.6.02 has no independent operation capable of giving rise to any inconsistency with s.33(7) of the *Bell Act*.

192. BGNV contends that s.55 of the *Bell Act* is invalid for inconsistency with s.601AH of the *Corporations Act 2001*[154]. While s.55 is a displacement provision, s.601AH is not

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[152] See BGNV's ASOC at [71] (SCB at 46). This claim does not appear to be referred to in BGNV's Submissions.
[153] See BGNV's ASOC at [66] (SCB at 43); BGNV's Submissions at [86.2].
[154] BGNV's Submissions at [83].

in Chapter 5 of the *Corporations Act 2001*. Section 55 of the *Bell Act* also, in BGNV's submission, prevents ASIC from applying to the Court for the reinstatement of the company[155] and thereby prevents the Court from making an order that ASIC reinstate the registration of such a company. By s.601AH of the *Corporations Act 2001* a person aggrieved by the deregistration of a company may apply to the Court to reinstate a company. Section 51(3)(c) of the *Bell Act* removes from the excluded matter registration of a WA Bell Company to be reinstated and s.601AH of the *Corporations Act*. So, *prima facie*, s.601AH continues to operate. But, because s.55 of the *Bell Act* is also a displacement provision for the purposes of s.5G, s.601AH continues to operate in respect of WA Bell Companies but not to the extent it would be inconsistent with s.55 of the *Bell Act*. In effect, this means that the Authority is the only entity that can take a step for achieving the reinstatement of the registration of a deregistered company listed in Schedule 1 under s.601AH of the *Corporations Act 2001*.

193. If the State's arguments on s.5F, s.5G(4), s.5G(5) and 5G(11) fail, then it accepts that s.55 of the *Bell Act* cannot be saved by s.5G(8), as it is outside Chapter 5.

194. In this event, s.55 is invalid. It could be severed from the *Bell Act*.

195. BGNV contends that ss.22, 25, 26 and 30 of the *Bell Act* are inconsistent with s.601CL(15)(c) of the *Corporations Act 2001*[156]. No inconsistency arises. Section 25(1) of the *Bell Act* does not prevent BGNV lodging a proof of debt with the Authority and ss.42 and 44 allow for BGNV to be paid a dividend with respect of that proof. Under the *Bell Act*, Mr Trevor can recover and realise the property of BGNV in this jurisdiction and thereafter perform his duties according to law.

196. Other than as addressed above, the State concedes that to the extent the alleged inconsistency between the provisions of the *Bell Act* and the corporations legislation cannot be avoided by ss.5F and 5G of the *Corporations Act*, those provisions are inconsistent.

INCONSISTENCY OF PROVISIONS OF THE *BELL ACT* WITH SECTION 39(2) OF THE *JUDICIARY ACT 1903* (CTH)

The *Bell Act* ss.25(5), 27 and 29 contention

197. Section 25(5) of the *Bell Act* is not a direction to any Court as to the manner or outcome of the exercise of jurisdiction[157] or a withdrawal of jurisdiction. It is in the nature of numerous uncontroversial legislative restrictions on the bringing of claims. The most obvious analogy is the restriction on creditors bringing or maintaining an action against a company once a winding up order has been made[158].

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[155] It is disputed that the restriction on an aggrieved person applying to a Court is relevant to ASIC given that ASIC is the body that has the power to reinstate the registration of a company: *Corporations Act,* s.601AH.
[156] See BGNV's ASOC at [75] (SCB at 47–48); BGNV's Submissions at [87].
[157] See *Chu Kheng Lim v The Minister for Immigration, Local Government and Ethnic Affairs* [1992] HCA 64; (1992) 176 CLR 1 at 37 (Brennan, Deane and Dawson JJ).
[158] See s.471B of the *Corporations Act 2001* (Cth). See also the discussion in *Re Gordon Grant and Grant Pty Ltd* [1983] 2 Qd R 314 at 316–317.

198. Winding up is not an exclusive judicial function, though winding up orders have long fallen to courts[159]. Dr Cooke[160] details such matters as does Professor Lester[161]. Professor Lester notes that prior to the enactment of the *Joint Stock Companies Winding-up Act 1848* (UK) thought was given to vesting the whole of the jurisdiction for the winding-up of insolvent companies in the existing bankruptcy commissioners, with neither the Bankruptcy Court nor Chancery having any role[162]. As recorded by Professor Lester, this proposal was rejected because of the possibility that matters might arise in the course of winding up that relied upon the equitable jurisdiction, which made efficient an ongoing role for Chancery[163].

199. That there is nothing inherent in the nature of a winding up that renders it exclusively judicial is exemplified by the 1870s experience with the Albert Life Assurance Company. In 1869, the Albert Life Assurance Company collapsed. In response, *The Albert Life Assurance Company Arbitration Act 1871*[164] and *The Albert Life Assurance Company Arbitration Act 1874 Act*[165] were passed, which established an administrative winding up. This circumstance evidences that winding up has never been an exclusively judicial function. The *Bell Act* employs a similar non-judicial process for the finalisation of the winding up and division of assets of companies. Another example of a legislative provision that is not a direction to a Court as to the manner or outcome of the exercise of its jurisdiction is the privative clause. Relevant also is the *BLF Case*[166]. The *BLF Case* highlights the critical operation of s.25(5). The section does not remove jurisdiction, federal or otherwise, from the Supreme Court. State laws that do remove jurisdiction are invalid by reason of inconsistency with s.39(2)[167].

200. The basal proposition in all of this is as expressed by Gleeson CJ, Gaudron and Gummow JJ in *Edensor*[168]. The necessary distinction is between depriving or withdrawing or limiting the exercise jurisdiction and (say), "prohibiting persons within [a] description ... from resorting to the jurisdiction of the Court and not a section depriving the Supreme Court of jurisdiction"[169].

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[159] *R v Davison* [1954] HCA 46; (1954) 90 CLR 353 at 368 (Dixon CJ and McTiernan J), *Gould v Brown* [1998] HCA 6; (1998) 193 CLR 346 at 404 [68] (Gaudron J).

[160] Colin Cooke, *Corporation, Trust and Company: An Essay in Legal History* (Manchester University Press, 1950).

[161] See V Markham Lester, *Victorian Insolvency: Bankruptcy, Imprisonment for Debt, and Company Winding-up in Nineteenth-Century England* (Clarendon Press, 1995) in particular at Chapter 6.

[162] V Markham Lester, *Victorian Insolvency: Bankruptcy, Imprisonment for Debt, and Company Winding-up in Nineteenth-Century England* (Clarendon Press, 1995) at 223.

[163] V Markham Lester, *Victorian Insolvency: Bankruptcy, Imprisonment for Debt, and Company Winding-up in Nineteenth-Century England* (Clarendon Press, 1995) at 223–224.

[164] 34 & 35 Vict., c.xxxi.

[165] 37 & 38 Vict., c.lviii.

[166] *Australian Building Construction Employees' & Builders Labourers' Federation v Commonwealth* [1986] HCA 47; (1986) 161 CLR 88 ('*BLF Case*'). The impugned legislation in that case is similar to Schedule 6A of *The Albert Life Assurance Company Arbitration Act 1871*, in that it also contains a recitation, by which the Parliament made certain findings. The recital is set out at 92–93 of the reported decision: "WHEREAS the Parliament considers that it is desirable, in the interest of preserving the system of conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of anyone State, to cancel the registration of The Australian Building Construction Employees' and Builders Labourers' Federation under the Conciliation and Arbitration Act 1904".

[167] *Commonwealth v Rhind* [1966] HCA 83; (1966) 119 CLR 584 at 606.

[168] *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* [2001] HCA 1; (2001) 204 CLR 559 at 588 [59].

[169] *Commonwealth v Rhind* [1966] HCA 83; (1966) 119 CLR 584 at 606 (Menzies J).

201. The former is not inconsistent with s.39(2) of the *Judiciary Act*. Sections 25(5), 27 and 29 of the *Bell Act* are of this genus.

The *Bell Act* s.73 contention

202. A provision of State law that limits the bringing of actions in respect of class of matters X, some of which may attract federal jurisdiction, but which recognises that the Supreme Court, in exercise of federal jurisdiction, can grant leave to bring such an action does not withdraw federal jurisdiction or deprive a State Court of it. The imposition of a leave requirement is commonplace for Courts, both in the exercise of State and federal jurisdiction[170]. The imposition of a leave requirement does not direct a Court in the exercise of its power. Section 73 of the *Bell Act* does not withdraw jurisdiction simply because the Supreme Court may decline to grant leave. This contention should be rejected.

The *Bell Act* ss.22 and 26 contentions

203. The plaintiffs' arguments concerning ss.22 and 26 of the *Bell Act* are put in the context of inconsistency with s.39(2) of the *Judiciary Act*, and more broadly Chapter III of the Commonwealth *Constitution*. The response is the same. That ss.22 and 26 may have the effect or consequence that the plaintiffs will receive less money than they would have liked or, but for ss.22 and 26, have obtained from actions already on foot in the Supreme Court does not destroy or render ineffective the exercise of judicial power in federal jurisdiction by the Supreme Court[171].

204. Sections 22 and 26 of the *Bell Act* alter substantive rights. By altering substantive rights, the Act is not inconsistent with a provision of Commonwealth law (s.39(2)) that confers jurisdiction on a State court to deal with the substantively different matter.

PROVISIONS OF THE *BELL ACT* INFRINGE CHAPTER III OF THE *CONSTITUTION*

205. There are three contentions put by BGNV to the effect that the *Bell Act* infringes Chapter III of the Commonwealth *Constitution*.

206. The first contention concerns ss.22 and 26 of the *Bell Act*. It is, in effect, a different way of stating the contention that ss.22 and 26 of the *Bell Act* render COR 146 of 2014 "inutile" or deny the action of its "legal basis", thereby "destroying" its character as a matter. So, in addition to these effects being inconsistent with s.39(2) of the *Judiciary Act* they are also contended to be contrary to Chapter III of the Commonwealth *Constitution*.

207. The same responses apply as put above. The contention fails by reason of the line of authority (now "well settled") most recently articulated in *Duncan*[172].

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[170] See, eg, s.35(2) of the *Judiciary Act 1903* (Cth); s.101(2) of the *Supreme Court Act 1970* (NSW); s.60(1)(e)–(f) of the *Supreme Court Act 1935* (WA).

[171] *R v Humby; Ex parte Rooney* [1973] HCA 63; (1973) 129 CLR 231 at 250. See also *HA Bachrach Pty Ltd v The State of Queensland* [1998] HCA 54; (1998) 195 CLR 547; *BLF Case* [1986] HCA 47; (1986) 161 CLR 88 at 96–97 (Gibbs CJ, Mason, Brennan, Deane and Dawson JJ), *Duncan v Independent Commission Against Corruption* [2015] HCA 32; (2015) 324 ALR 1 at 8 [26] (French CJ, Kiefel, Bell and Keane JJ) ('*Duncan*').

[172] [2015] HCA 32; (2015) 324 ALR 1 at 8 [26] (French CJ, Kiefel, Bell and Keane JJ) ('*APLA*').

208. The articulation of this first contention by BGNV relies seemingly solely upon observations of McHugh J in *APLA Limited v Legal Services Commissioner (NSW)*[173], all of which are shorn from their context. Plainly McHugh J was not there seeking to over-rule *R v Humby; Ex parte Rooney*[174] nor *Bachrach*[175]. If his Honour's sentence is to be understood literally (as BGNV contend), then it would follow that s.39(2) of the *Judiciary Act* would be invalid because it recognises that federal jurisdiction is invested in State courts "within the limits of their several jurisdictions", and this can change. To do so is contrary to a number of decisions which recognise that the Commonwealth takes a State court as it finds them and that States can change the limits of their jurisdiction[176].

209. The next part sentence in McHugh J's judgment in *APLA* invoked by BGNV is that a State Parliament "... simply has no power to legislate in respect of or in relation to "matters" that arise in federal courts or concern the exercise of federal jurisdiction"[177]. Again, if sought to be understood literally, such a proposition is plainly wrong.

210. Next, BGNV rely upon McHugh J's statement that implications derived from Chapter III of the Commonwealth *Constitution*, "provide a shield against any legislative forays that would harm or impair the nature, quality and effects of federal jurisdiction and the exercise of federal judicial power conferred or invested by the Constitution or laws of the Parliament of the Commonwealth"[178]. It rather depends on what his Honour meant by "harm or impair" and "nature, quality and effects of". Again, if to be understood literally, such observation is contrary to (*inter alia*) *R v Humby; Ex parte Rooney*[179], *Bachrach*[180] and *Duncan*[181].

211. The second contention is that provisions of the *Bell Act*, including s.73 of the *Bell Act*, direct the exercise of judicial power by the Supreme Court exercising federal jurisdiction, in various and variously articulated ways. This contention should be rejected. State Parliaments routinely legislate in a manner that affects pending proceedings being considered in federal jurisdiction. *Duncan v Independent Commission Against Corruption*[182] is the most recent obvious example[183]. Contrary to BGNV's contention[184], such legislation is valid even if it benefits one party to the litigation[185]. What Chapter III of the Commonwealth *Constitution* precludes is a State law that seeks to direct the manner in which a court, State or otherwise, deals with a

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[173] [2005] HCA 44; (2005) 224 CLR 322.
[174] [1973] HCA 63; (1973) 129 CLR 231.
[175] *H A Bachrach Pty Ltd v Queensland* [1998] HCA 54; (1998) 195 CLR 547.
[176] See, for example, *Commonwealth v District Court of the Metropolitan District* [1954] HCA 13; (1954) 90 CLR 13 at 22 (Dixon CJ, Kitto and Taylor JJ); *Leeth v Commonwealth* [1992] HCA 29; (1992) 174 CLR 455 at 468–469 (Mason CJ, Dawson and McHugh JJ), 498 (Gaudron J); *APLA* [2005] HCA 44; (2005) 224 CLR 322 at 406–407 [232] (Gummow J), 433 [325] (Kirby J); *Le Mesurier v Connor* [1929] HCA 41; (1929) 42 CLR 481 at 496 (Knox CJ, Rich and Dixon JJ); *Commonwealth v Dalton* [1924] HCA 3; (1924) 33 CLR 452 at 456 (Isaacs and Rich JJ).
[177] *APLA* [2005] HCA 44; (2005) 224 CLR 322 at 367 [82]. See BGNV's Submissions at [140].
[178] *APLA* [2005] HCA 44; (2005) 224 CLR 322 at 363 [73]. See BGNV's Submissions at [140].
[179] [1973] HCA 63; (1973) 129 CLR 231 at 250 (Mason J).
[180] *H A Bachrach Pty Ltd v Queensland* [1998] HCA 54; (1998) 195 CLR 547.
[181] *Duncan* [2015] HCA 32; (2015) 324 ALR 1 at 8 [26] (French CJ, Kiefel, Bell and Keane JJ).
[182] *Duncan* [2015] HCA 32; (2015) 324 ALR 1.
[183] *Duncan* [2015] HCA 32; (2015) 324 ALR 1 at 9 [30]–[31] (French CJ, Kiefel, Bell and Keane JJ).
[184] BGNV's Submissions at [143].
[185] See *BLF Case* [1986] HCA 47; (1986) 161 CLR 88 at 96–97 (Gibbs CJ, Mason, Brennan, Deane and Dawson JJ). *Duncan* [2015] HCA 32; (2015) 324 ALR 1 is the most recent example of this.

substantive matter before it. Nothing in the *Bell Act* does this. Nothing in the *Bell Act* directs the Supreme Court to do or not do anything.[186]

212. The third contention is that the *Bell Act* has extinguished the subject matter of COR 146 of 2014, which is before the Supreme Court of Western Australia and being considered by the Court in exercise of federal jurisdiction and has thereby denied the proceeding of the status of a matter. It is contended that this is contrary to ss.75 and 76 of the *Constitution*[187]. The *Bell Act* has not extinguished the subject matter of COR 146 or 208 of 2014. Even if the *Bell Act* has extinguished the subject matter of COR 146 or 208 of 2014, there is nothing in this that deprives an action before a Court the status of "matter". *Duncan*[188] is a complete answer to this proposition, as is the *BLF Case*[189].

PART VII: LENGTH OF ORAL ARGUMENT

213. It is estimated that the oral argument for the State of Western Australia will take one day.

Dated: 25 March 2016

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[186] See also *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* [1992] HCA 64; (1992) 176 CLR 1 at 36–37 (Brennan, Deane and Dawson JJ), cited with approval by Gummow, Hayne and Bell JJ in *Australian Education Union v General Manager of Fair Work Australia* [2012] HCA 19; (2012) 246 CLR 117 at 150 [78]. See also *Australian Education Union v General Manager of Fair Work Australia* [2012] HCA 19; (2012) 246 CLR 117 at 141 [50] (French CJ, Crennan and Kiefel JJ); *Duncan* [2015] HCA 32; (2015) 324 ALR 1 at 8 [24] (French CJ, Kiefel, Bell and Keane JJ).

[187] BGNV's Submissions at [137]–[145]; WAG's Submissions at [128]–[129].

[188] *Duncan* [2015] HCA 32; (2015) 324 ALR 1 at 8 [24] (French CJ, Kiefel, Bell and Keane JJ).

[189] *BLF Case* [1986] HCA 47; (1986) 161 CLR 88 at 96–97 (Gibbs CJ, Mason, Brennan, Deane and Dawson JJ).