

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

THE STATE OF WESTERN AUSTRALIA
Defendant

IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. P4 of 2016

BETWEEN: **MARANOVA TRANSPORT PTY LTD (IN LIQ) ACN 009 668 393**
First Plaintiff

ANTONY LESLIE JOHN WOODINGS
Second Plaintiff

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

STATE OF WESTERN AUSTRALIA
First Defendant

**THE BELL GROUP LTD (IN LIQ) ACN 008 666 993
AND THE OTHER COMPANIES NAMED IN
SCHEDULE A TO THE WRIT OF SUMMONS**
Second Defendant

IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. P63 of 2015

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

THE STATE OF WESTERN AUSTRALIA
Defendant

**ANNOTATED WRITTEN SUBMISSIONS OF THE DEFENDANT IN REPLY
TO THE COMMONWEALTH ATTORNEY GENERAL'S SUBMISSIONS**

Date of Document: 1 April 2016
Filed on behalf of the State of Western Australia by:

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PART I: SUITABILITY FOR PUBLICATION

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

PART II: REPLY SUBMISSIONS

2. The State responds to three contentions put by the Commonwealth Attorney General: the alleged inconsistencies between the *Bell Act* and the Commonwealth taxation legislation; the construction of s.5F of the *Corporations Act 2001* (Cth) and the contentions on ss.25(5) and 73 of the *Bell Act*.

INCONSISTENCY OF PROVISIONS OF THE *BELL ACT* WITH THE COMMONWEALTH TAX LEGISLATION

3. The Commonwealth adopts and proposes to present the submissions of the Federal Commissioner of Taxation¹. The Commissioner, in turn, generally supports and supplements submissions made by the BGNV plaintiffs in S248 of 2015.
4. Only additional arguments are addressed.

Section 215 of the *ITAA 1936*

5. The Commissioner contends ss.22, 29, 45 and 54(1) and (2) of the *Bell Act* are inconsistent with s.215 of the *Income Tax Assessment Act 1936* (Cth) because they prevent the liquidator of the WA Bell Companies from discharging his obligation to "set aside", and his liability to pay, the amount provided for in s.215(3)(b) of the *ITAA 1936* (now s.260-45 in Schedule 1 to the *Taxation Administration Act 1953* (Cth))².
6. The Commissioner refers to ss.29 and 54(1) and (2) of the *Bell Act*³, in addition to ss.22 and 45 referred to by the BGNV plaintiffs. The response is the same. There is no inconsistency. *First*, the Authority has the same assets available for distribution to the creditors of the WA Bell Companies as did the liquidator. So, the Commissioner is in exactly the same position in respect of the *Bell Act* as it would be under the legislation that would otherwise be applicable⁴. *Second*, the liquidator has no liability to pay the amount provided for in s.215(3)(b) so long as a process exists by which distributions can be made to the Commissioner in respect of liability for tax to which s.215(2) of the *ITAA 1936* relates⁵.
7. The Commissioner further contends its entitlement to have the tax debts of the WA Bell Companies paid in the "proportionate" amount required to be set aside under s.215(3)(b) of the *ITAA 1936* is affected by ss.41, 42 and 43(1) and (6) of the *Bell Act*⁶. Any entitlement of the Commissioner to receive an amount from the liquidator is not determined by s.215. It is determined, and always has been, by the provisions in companies legislation.

¹ Commonwealth's Submissions at [2].

² Commissioner of Taxation's Submissions at [20], [26]–[28].

³ Commissioner of Taxation's Submissions at [26(a)].

⁴ State's Submissions in S248 of 2015 at [30].

⁵ State's Submissions in S248 of 2015 at [32].

⁶ Commissioner of Taxation's Submissions at [26(c)].

Section 254 of the *ITAA 1936*

8. The Commissioner contends that ss.27 to 29 of the *Bell Act* are inconsistent with s.254(1)(a) of the *ITAA 1936* because they prevent the liquidator of a WA Bell Company from being "answerable as taxpayer"⁷.
9. It is unclear what the Commissioner contends is required of the liquidator to be "answerable". The setting aside obligation has been met and the *Bell Act* does not contemplate the making of any further income, profits or gains giving rise to a further obligation under ss.254(1)(a) and (b) of the *ITAA 1936*. The Commissioner need simply lodge a proof in terms of Part 4 of the *Bell Act*.
10. The Commissioner contends that ss.22, 29, 45 and 54(1) and (2) of the *Bell Act* are inconsistent with the liquidator's retention obligation under s.254(1)(d) of the *ITAA 1936*. The State's response is the same as that in relation to s.215 of the *ITAA 1936*⁸. The Authority has the same assets available for distribution to the creditors of the WA Bell Companies as did the liquidator and has a fund which exceeds the retained amount.
11. The Commissioner contends that its entitlement to have tax paid to it pursuant to s.254(1)(a) and by reason of ss.556(1)(a) and (dd) of the *Corporations Act* is affected by ss.41, 42 and 43(1) and (6) of the *Bell Act*⁹. The entitlement of the Commissioner to receive from a company in liquidation is determined by companies legislation, so no issue of inconsistency with s.254 of the *ITAA 1936* arises.
12. To the extent the Commissioner's contention relies on ss.556(1)(a) and (dd) of the *Corporations Act* — those provisions have been excluded or displaced by ss.5F and 5G of the *Corporations Act* and ss.51 and 52 of the *Bell Act*.

Section 177 of the *ITAA 1936*

13. The Commissioner contends that ss.41(2), 42(2) and parts of s.43 of the *Bell Act* are inconsistent with s.177 of the *ITAA 1936* (now item 2 of s.350-10(1) in Schedule 1 to the *TAA 1953*)¹⁰.
14. The amount to be paid to the Commissioner in respect of a tax liability of a company being wound up is not determined by s.177 of the *ITAA 1936*. The State has suggested a reading down that recognises that sums, which are the subjects of notices of assessment to which s.177 applies, are liabilities under the *Bell Act*¹¹.

⁷ Commissioner of Taxation's Submissions at [33(a)].

⁸ See [5] above and the State's Submissions in S248 of 2015 at [34]–[35].

⁹ Commissioner of Taxation's Submissions at [33(d)].

¹⁰ Commissioner of Taxation's Submissions at [41].

¹¹ See also [16] below.

Sections 208 and 209 of the *ITAA 1936*

15. It may be¹² that the Commissioner alleges that ss.37(1), 43(8) and 44(5) of the *Bell Act* are inconsistent with ss.208 and 209 of the *ITAA 1936* (now s.255-5 in Schedule 1 to the *TAA 1953*).
16. If so, the contention as to s.37(1) of the *Bell Act* is resolved by the State's acceptance that provisions of the *Bell Act* are to be read down such that if a notice of assessment to which s.177 of the *ITAA 1936* applies is 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 IV of the *TAA* on a review or appeal relating to the assessment, the amount and all particulars of the assessment are correct¹³.
17. In respect of any inconsistency with ss.43(8) and 44(5) of the *Bell Act*; the release, discharge and extinguishment of liabilities of the WA Bell Companies provided for is not inconsistent with any rights of the Commissioner because that process is in substance the same as under the *Corporations Act*; and the Commissioner has no right pursuant to ss.208 or 209 of the *ITAA 1936* to receive anything in a winding up.

SECTION 5F OF THE *CORPORATIONS ACT*

18. It is unclear whether the Commonwealth puts any contention as to the meaning and operation of s.5F of the *Corporations Act*¹⁴. It is not clear whether the term "jurisdiction" is meant to refer to "geographical jurisdiction" or the "jurisdiction to legislate". If the Commonwealth is putting that which is derived from Barrett J's judgment in the *HIH*¹⁵ matter, this is addressed in the primary submissions.
19. That the Commonwealth contends this, having regard to its power under s.5F(3) of the *Corporations Act* to override a State's declaration of an excluded matter, invites reference to actual invocations of s.5F that have not been the subject of any consequent exercise of power by the Commonwealth pursuant to s.5F(3). Section 5F was invoked in s.4B(4) of the *Grain Marketing Act 1991* (NSW). The "principal object" of the Act was to increase returns to NSW producers by "having a single, more powerful, entity marketing their product both in domestic and international markets"¹⁶. Section 41(1) provided that "[t]he Board may act as agent for any person for the purpose of marketing (a) any of the commodity which that person is entitled to sell... whether or not it was produced within New South Wales, and may do all acts, matters and things necessary or expedient to carry out that purpose". Section 43(1)(a) empowered the Board to "make such arrangements as it considers necessary with regard to sales of the commodity or any other product with which the Board is associated for export or for consignment to other countries or other parts of Australia". Section 43(9) provided that the Board "may exercise any of its functions

¹² Sections 37(1), 43(8) and 44(5) of the *Bell Act* are not identified as being inconsistent with ss.208 and 209 of the *ITAA 1936* in the table at [20] of the Commissioner of Taxation's Submissions. However, those provisions are dealt with in connection with the Commissioner's support, in part, of BGNV's Submissions at [58]-[60], which relate to ss.208 and 209 of the *ITAA 1936*.

¹³ State's Submissions in S248 of 2015 at [66]-[67], [79].

¹⁴ Commonwealth's Submissions at [13].

¹⁵ *HIH Casualty and General Insurance Ltd v Building Insurers' Guarantee Corporation* [2003] NSWSC 1083; (2003) 202 ALR 610.

¹⁶ NSW Government Review Group, *Review of the NSW Grain Marketing Act 1991 Final Report* (1999) at viii [20].

under this Act, whether or not the function is exercised in, or the thing in respect of which the function is exercised is in or of or produced in, New South Wales".

20. The *Co-operatives Act 1997* (SA)¹⁷ (in s.9(1) invoked 5F of the *Corporations Act*) and in s.40(1) provided that a "co-operative has, both within and outside the State, the legal capacity of a natural person"; in s.40(2) provided that a co-operative had, "both within and outside the State", numerous specific powers. Part 11 Div.1 (restrictions on share and voting interests) was stated by s.283 to apply (a) "to all natural persons, whether resident in South Australia or in Australia or not and whether Australian citizens or not, and to all bodies corporate or unincorporated, whether incorporated or carrying on business in the State or in Australia or not" and (b) "extends to acts done or omitted to be done outside the State, whether in Australia or not". Section 361 provided that the Governor may "by proclamation, declare a law of a State other than South Australia to be a co-operatives law for the purposes of this Part if satisfied that the law (a) substantially corresponds to the provisions of this Act; and (b) contains provisions that are referred to in this Part as provisions of a co-operatives law that correspond to specified provisions of this Act". Part 14 contained provisions regulating "foreign co-operatives", including providing for registration of a foreign co-operative (s.364). Further, the prescribed provisions of the Act and regulations "apply, with all necessary modifications and any prescribed modifications, to a foreign co-operative which is registered under this Part as if the foreign co-operative were a co-operative" (s.369).
21. The *Central Coast Water Corporation Act 2006* (NSW), in s.11(1) invokes s.5F, and by 28(1) confers all the powers of a natural person on the Corporation, and provides that they may be exercised "within or outside the State" (s.28(3)) and "outside Australia" (s.28(4)).
22. The *Public Trustee Act 1978* (Qld), by s.8(9) invokes s.5F, and by s.8(7) states that the public trustee "may exercise its powers inside and outside Queensland", and under s.8(8), the powers may be exercised "outside Australia". Further, s.28(1) empowers the Minister to direct the public trustee to purchase, accept, hold or take "any moveable or immoveable property within or outside Queensland, which is wholly or partly used or held, or which it is proposed shall be wholly or partly used or held, by the Government of the State for governmental, administrative or departmental purposes" to be held on trust for the State. Section 55(3) permits the public trustee to appoint a person to act as agent or attorney "in relation to an estate in any place outside the State". Section 81(3) extends the powers of the public trustee to "property or any rights of a property nature of the incapacitated person outside the State", including the power to "receive and give a valid discharge for any legacy or other interest in an estate in which the incapacitated person is interested in any place outside the State".
23. These are examples only.

¹⁷ Since repealed by the *Co-operatives National Law (South Australia) Act 2013* (SA).

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

24. The Commonwealth contends that ss.25(5) and 73 of the *Bell Act* are inconsistent with s.39(2) of the *Judiciary Act 1903* (Cth) for two reasons. *First*, that both provisions denude the Court's authority, in exercise of its federal jurisdiction, to decide proceedings relating to liabilities under s.25(5)¹⁸. *Secondly*, s.73(1) establishes a "general rule" that the Court will not exercise its jurisdiction in matters caught by s.73(1)¹⁹. These provisions are said to be inconsistent either by reason of s.109 of the *Constitution* or because they would not be picked up by s.79 of the *Judiciary Act*²⁰.
25. Section 39(2) invests jurisdiction. To be inconsistent with such investiture a law must withdraw or remove jurisdiction or preclude a court from exercising the invested jurisdiction. Neither s.25(5) nor s.73 of the *Bell Act* is a withdrawal, removal or preclusion of exercise of jurisdiction. Commonly, laws limit (say) the types of proceedings that may be brought within jurisdictions of courts or limit, by characteristic, classes of people who might bring proceedings. Vexatious litigants are an example of the latter. Sections 25(5) and 73 of the *Bell Act* are examples of the former. As explained in the State's primary submissions²¹, ss.25(5) and 73 are no different to uncontroversial legislative restrictions on the bringing of claims.
26. A law that would be inconsistent with s.39(2) of the *Judiciary Act* would be one that (say) provided, "the Supreme Court shall not have jurisdiction to hear and determine matters arising under Act X". Neither s.25(5) nor s.73 of the *Bell Act* is a law of this type.
27. The discrimen which the Commonwealth urges in its submissions (at [17]) — identifying (valid) State laws that, although imposing "limits" (the word in s.39(2)) on the jurisdictions of State courts, have no more than an "incidental effect on federal jurisdiction" by (relying upon the statement of Barwick CJ in *Rhind*²²) "shrinking it pro tanto" — is illusive.
28. Even on this analysis, so long as State courts' federal jurisdiction is not targeted by State legislation, any law that affects federal jurisdiction exercisable by the court is (it would have been thought) incidental. The description of ss.25(5) and 73 of the *Bell Act* "shrinking pro tanto" the federal jurisdiction of the Supreme Court is entirely apt.
29. The above analysis is equally applicable to the Commonwealth's contention that ss.25(5) and 73 of the *Bell Act* could not be picked up by s.79 of the *Judiciary Act*. For the same reasons, neither s.39(2) of the *Judiciary Act* nor the *Constitution* provide otherwise to ss.25(5) and 73 of the *Bell Act* and thereby prevent them being picked by s.79 of the *Judiciary Act*.

¹⁸ Commonwealth's Submissions at [15(a)].

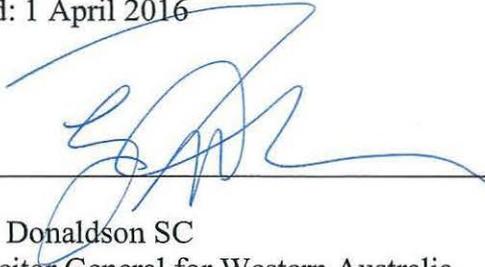
¹⁹ Commonwealth's Submissions at [15(b)].

²⁰ Commonwealth's Submissions at [16].

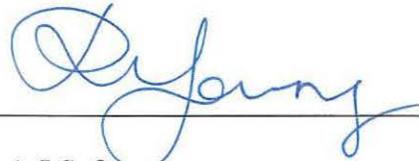
²¹ State's Submissions in S248 of 2015 at [197].

²² *Commonwealth v Rhind* [1966] HCA 83; (1966) 119 CLR 584.

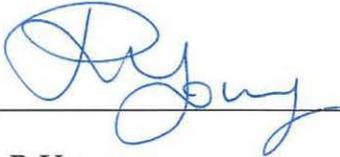
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