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

and

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

and

THE STATE OF WESTERN AUSTRALIA
Defendant

PLAINTIFFS' ANNOTATED SUBMISSIONS

Filed on behalf of the Plaintiff by
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I. CERTIFICATION

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

II. ISSUES

2. The following issues arise:

2.1. is the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Act 2015* (WA) (the **Bell Act**), or any of its provisions, inconsistent with any provision of the *Income Tax Assessment Act 1936* (Cth) (the **1936 Act**), the *Income Tax Assessment Act 1997* (Cth) (the **1997 Act**) or the *Taxation Administration Act 1953* (Cth) (**TAA**) and so invalid to the extent of the inconsistency by reason of s.109 of the Constitution (**Issue 1**);

2.2. do the plaintiffs have standing to raise **Issue 1** and is there a justiciable controversy insofar as the plaintiffs rely on former s.215 of the 1936 Act to establish the invalidity of Parts 3 and 4 of the Bell Act (**Issue 2**);

2.3. is the Bell Act, or any of its provisions, inconsistent with any provision of the *Corporations Act 2001* (Cth) and so invalid to the extent of the inconsistency by reason of s.109 of the Constitution (**Issue 3**);

2.4. do ss.5F, 5G(4), 5G(8) or 5G(11) of the Corporations Act operate to avoid any inconsistency that would otherwise arise between the Bell Act and the Corporations Act (**Issue 4**);

2.5. is the Bell Act, or any of its provisions, inconsistent with s.39(2) of the *Judiciary Act 1903* (Cth) and so invalid to the extent of the inconsistency by reason of s.109 of the Constitution (**Issue 5**);

2.6. is the Bell Act, or any of its provisions, invalid on the ground that it or they infringe Chapter III of the Constitution (**Issue 6**); and

2.7. if any provision of the Bell Act is invalid, can it be severed (**Issue 7**).

III. SECTION 78B NOTICES

3. The plaintiffs have given notice to the Attorneys-General in compliance with s.78B of the Judiciary Act.

IV. JUDGMENTS BELOW

4. This proceeding is brought in the Court's original jurisdiction pursuant to s.30(a) of the Judiciary Act.

V. FACTS

5. The relevant facts are agreed and set out in the amended Special Case (**ASC**).

VI. ARGUMENT

The context in which Issues 1, 3 and 4 arise

6. The transitional provisions of Part 10.1 of the Corporations Act have important consequences for the resolution of **Issues 1**, **3** and **4**. It is therefore important to understand how those provisions operate, particularly in relation to the right of a creditor to lodge a proof of debt in the winding up of a WA Bell Company. In this context it is necessary to distinguish between two groups of WA Bell Companies. The first comprises those companies that were ordered to be wound up before 23 June 1993. The second comprises those companies that were ordered to be wound up after that date. The relevance of the date of 23 June 1993 is that this was the date upon

which the relevant provisions of the *Corporate Law Reform Act 1992* (Cth) (the **Reform Act**) came into force. The significance of the Reform Act is explained below.

7. The Corporations Law commenced on 1 January 1991. The Corporations Law was set out in s.82 of the *Corporations Act 1989* (Cth) (the **1989 Act**). Section 7 of the *Corporations (Western Australia) Act 1990* (WA) (the **1990 Act**) then applied the Corporations Law set out in s.82 of the 1989 Act as a law of Western Australia.[1] In this way the Corporations Law was adopted as a State law of the State of Western Australia.

8. With effect from 15 July 2001 the Commonwealth repealed the 1989 Act by the *Corporations (Repeals, Consequentials and Transitionals) Act 2001* (Cth) (s.3 read with Schedule 1, Part 1, item 2). At the same time, s.7 of the 1990 Act was amended by s.30(2) of the *Corporations (Ancillary Provisions) Act 2001* (WA) (the **Ancillary Provisions Act**) so that on and from 15 July 2001 s.7 of the 1990 Act applied the Corporations Law set out in s.82 of the 1989 Act, as in force immediately before 15 July 2001, as a law of Western Australia.

9. While s.7 of the 1990 Act continued to apply the Corporations Law as in force immediately before 15 July 2001 as a law of Western Australia, the Ancillary Provisions Act has the effect that both the 1990 Act and the Corporations Law have no continued operation of their own force in Western Australia on and from 15 July 2001, except as provided by ss.6(1) and 9 of the Ancillary Provisions Act.[2] Neither of these exceptions apply. It follows, as a result of s.6(2) of the Ancillary Provisions Act, that the Corporations Law has no operation in Western Australia of its own force on and from 15 July 2001.

10. The Corporations Act commenced on 15 July 2001. Typically new legislation includes transitional provisions having the effect that things done and proceedings commenced before the date of commencement of the new Act continue to be governed by the old law. The Corporations Act took a different approach.[3] Rather than seeking to preserve the provisions of the Corporations Law with respect to matters that occurred and proceedings that commenced before 15 July 2001, the transitional provisions of the Act generally have the effect of substituting new corresponding rights and liabilities and deeming new corresponding proceedings to have been commenced; that is, the general approach adopted in Part 10.1 of the Corporations Act is that the new law replaces the old law as from its commencement.[4]

11. Two provisions of the Corporations Act (ss.1401 and 1408) are central to the operation of this approach.

12. Section 1408(1) provides that the Corporations Act has the same effect, after 15 July 2001, as it would have if the transitional provisions of the Corporations Law specified in s.1408(6) had been part of the Corporations Act. One of the specified transitional provisions is Chapter 11 of the Corporations Law (other than s.1416). Chapter 11 of the Corporations Law contained s.1383. Section 1383(2) provided:

> *If, before [23 June 1993] the Court ordered the winding up of a company [Parts 5.4, 5.5 and 5.6 of the Corporations Law as in force before 23 June 1993] continues to apply for the purposes of the winding up.*

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1 *R v Hughes* (2000) 202 CLR 535 at [6] (Gleeson CJ, Gaurdon, McHugh, Gummow, Hayne and Callinan JJ) and *MacLeod v Australian Securities and Investments Commission* (2002) 211 CLR 287 (***MacLeod***) at [1] (Gleeson CJ, Gaurdon, McHugh, Gummow, Hayne and Callinan JJ).

2 Section 6(2) of the Ancillary Provisions Act.

3 *Brown v DML Resources (No 3)* (2001) 164 FLR 337 at [100] (Austin J).

4 *Shum Yip Properties v Chatswood Investment & Development* (2002) 166 FLR 451 13 at [9] (Austin J) and *James v Andrews* [2001] NSWSC 716 at [19] (Acting Master Berecry).

13. The effect of s.1408 is to cause s.1383 of the Corporations Law to have, in the context of the Corporations Act itself, the force and effect it had while the Corporations Law was in force, such force and effect being the same as if created by the Corporations Act. That is, the provisions of Part 5.4 to 5.6 of the Corporations Law are applied by force of s.1408 of the Corporations Act picking up s.1383 of the Corporations Law such that the results produced by the application of that section are produced by operation of the Corporations Act, rather than the Corporations Law.[5]

14. Section 1401(1) provides:

This section applies in relation to a right [6] or liability[7] (the pre-commencement right or liability), whether civil or criminal, that:

(a) was acquired, accrued or incurred under a provision of the [Corporations Law of a State or Territory] that was no longer in force immediately before [15 July 2001]; and

(b) was in existence immediately before [15 July 2001].

However, this section does not apply to a right or liability under an order made by a court before [15 July 2001].

15. The operation of ss.1401 and 1408 can be illustrated by considering the position of a creditor of a WA Bell Company that was ordered to be wound up before 23 June 1993. BGNV is such a creditor: it is a creditor of TBGL (which was ordered to be wound up on 24 July 1991) and BGF (which was ordered to be wound up on 3 March 1993).[8]

16. Prior to 23 June 1993 a creditor of TBGL or BGF had a right to lodge a proof of debt in their windings up under s.553 of the Corporations Law. Under the pre-23 June 1993 version of s.553 claims encompassed by s.82(2) of the *Bankruptcy Act 1966* (Cth) (demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust) were not provable in a winding up.[9] With effect from 23 June 1993 s.92 of the Reform Act repealed s.553 of the Corporations Law and replaced it with a new s.553, the terms of which were identical to those which now appear in s.553 of the Corporations Act.[10]

17. The amendments introduced by the Reform Act fundamentally altered the pre-23 June 1993 position. In particular, the Reform Act severed the connection between the statutory identification of debts and claims admissible to proof in a winding up and the classes of debts admissible to proof in bankruptcy. In particular, the former rules, which excluded some claims for unliquidated damages from proof in a winding up, were removed.[11]

18. The changes introduced by the Reform Act were not retrospective. Thus s.185 of the Reform Act introduced s.1383 of the Corporations Law, the terms of which are set out in paragraph 12 above. As a result, the old, pre-23 June 1993, version of s.553 of the Corporations Law continued to apply to the winding up of a company wound up before 23 June 1993. It follows that in the period 23 June 1993 to 14 July 2001 the right of a creditor such as BGNV to lodge a proof in a company wound up before 23 June 1993

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5 *Shaw v Goodsmith Industries Pty Ltd* (2002) 41 ACSR 556 at [8] (Barrett J), *Re Emilco Pty Ltd (in liq)* (2002) 43 ACSR 536 at [9]-[11] (Barrett J) and *Re The Bell Group Ltd (in liq); ex parte Mr Woodings* (2015) 293 FLR 215 at [15]-[19] (Pritchard J).

6 "Right" includes an interest or status: see s.1371(1).

7 "Liability" includes a duty or obligation: see s.1371(1).

8 ASC [20] (Special Case Book (**SCB**) p.169 and Annexure "A" to the ASC, (SCB p.198 (BGF) and p.200 (TBGL).

9 *Sons of Gwalia Ltd v Margaretic* (2007) 231 CLR 160 (***Sons of Gwalia)*** at [159] (Hayne J).

10 *Sons of Gwalia* at [161] and [167] (Hayne J).

11 *Sons of Gwalia* at [160]-[161] (Hayne J).

(e.g. TBGL and BGF) was found in the pre-23 June 1993 version of s.553 of the Corporations Law. The position then changed on and from 15 July 2001 as a result of the operation of s.1401 of the Corporations Act.

19. Two requirements must be met before s.1401 applies:[12] (a) the pre-commencement right must have been acquired or accrued under a provision of the Corporations Law that was no longer in force immediately before 15 July 2001; and (b) the right must have been in existence immediately before 15 July 2001. Both of these requirements are satisfied in relation to the right of a creditor to lodge a proof in the winding up of a company ordered to be wound up before 23 June 1993:

10 19.1. the right to prove was acquired or accrued under s.553 of the Corporations Law as in force immediately before 23 June 1993. Section 553 (in that form) was not in force immediately before 15 July 2001 because it had been repealed on and from 23 June 1993 by s.92 of the Reform Act; and

19.2. the right to prove was in existence immediately before 15 July 2001 because it was preserved by s.1383 of the Corporations Law in the period from 23 June 1993 to 14 July 2001.

20. Section 1401 thus applies. This has four consequences. First, by reason of s.1401(2)(a) and (b), the Corporations Act is taken to include the provision of the Corporations Law under which the pre-commencement right was acquired (namely, the pre-23 June 1993
20 version of s.553 and any other provisions of the Corporations Law that applied in relation to the pre-commencement right) with such modifications, if any, as are necessary. That is, the text of the former s.553 of the Corporations Law is included as a provision of the Corporations Act. Secondly, on 15 July 2001, the person entitled to lodge a proof under s.553 of the Corporations Law acquired a substituted right equivalent to his pre-commencement right under the provision taken to be included in the Corporations Act by s.1401(2)(a) as if that provision applied to the conduct or circumstances that gave rise to the pre-commencement right.[13] The first and second consequences were described by Gummow, Hayne and Crennan JJ in the following terms in *Forge v Australian Securities and Investments Commission* (2006) 228 CLR
30 45 at [114]:

ASIC rightly submitted that the effect of s 1401 of the Corporations Act 2001 (Cth) was, by sub-s (1), to look at, rather than to pick up, the rights and liabilities, inchoate and contingent, as they existed on 14 July 2001, and to label them "pre-commencement rights or liabilities". By sub-s (2), s 1401 then incorporated into the new Corporations Act 2001 (Cth), for the limited purposes of sub-s (3), the text of the provisions of the State law which had given rise to the pre-existing rights and liabilities (in this case ss 1317EA and 232 or 243ZE as the case required). Sub-section (3) then created, under the provisions thus incorporated into the new Corporations Act 2001 (Cth), new and substituted rights and liabilities equivalent to the old "as if that provision applied to the
40 *conduct or circumstances that gave rise to the pre-commencement right or liability". Section 1401(3) thus provided for present and future consequences as to past acts.*

21. Thirdly, the person's pre-commencement right was cancelled on 15 July 2001 and ceased to be a right under a law of the State.[14] That is, the right was extinguished and ceased to be a right under s.553 of the Corporations Law. The relevant source of the

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[12] For simplicity the analysis that follows is limited to the acquisition or accruing of rights and ignores the incurring of a liability.

[13] Section 1401(3).

[14] Section 7(2) of the Ancillary Provisions Act.

right was, instead, s.1401 of the Corporations Act.[15] Fourthly, on and from 15 July 2001 the person could institute a procedure, proceeding or remedy in respect of the substituted right under the provision taken to be included in the Corporations Act by s.1401(2) as if those provisions applied to the conduct or circumstances that gave rise to the pre-commencement right or liability.[16] One such "procedure" is lodging a proof in the winding up.

22. Against this background it is then necessary to consider s.25(1) of the Bell Act. That section provides that if, immediately before the transfer day (27 November 2015), a liability of a WA Bell Company was admissible to proof against the company in the winding up of the company under Part 5.6 of the Corporations Act, then that liability may be proved with the Authority in accordance with Part 4, Division 2 of the Bell Act. Section 25(1) does not provide, as it could have, that if a person was a creditor of a WA Bell Company immediately before the transfer day then that person could lodge a proof with the Authority. Nor does it provide that if a WA Bell Company had a liability to a person immediately prior to the transfer day that person could lodge a proof with the Authority. Rather, under s.25(1) it is only if the relevant liability was admissible to proof under Part 5.6 of the Corporations Act that the liability can be proved with the Authority. It follows that if the liability was not admissible to proof under that Part, it cannot be proved with the Authority.

23. What then was the position on 26 November 2015, the date fixed by s.25(1) of the Bell Act, of a creditor (such as BGNV) of a company (such as TBGL and BGF) ordered to be wound up before 23 June 1993? For the reasons explained above, that person had a right to lodge a proof of debt in the winding up under s.1401 of the Corporations Act applying the text of the pre-23 June 1993 version of s.553 of the Corporations Law as a provision of the Corporations Act. Section 1401 is in Part 10.1 of the Corporations Act. It follows that the person did not have a right to lodge a proof of debt under Part 5.6 of the Corporations Act.

24. The same conclusion (the right to prove is not a right under Part 5.6 of the Corporations Act) can be reached via the application of s.1408 of the Corporations Act. As already noted, s.1408 of the Corporations Act deems s.1383 of the Corporations Law to be part of the Corporations Act. Thus when s.1383 provides that the pre-23 June 1993 version of Part 5.6 of the Corporations Law (which includes the pre-23 June 1993 version of s.553) continues to apply for the purposes of the winding up of a company ordered to be wound up before 23 June 1993, those preserved provisions apply as deemed provisions of the Corporations Act. They do not apply as provisions of the Corporations Law. This is because the Corporations Law ceased to operate in Western Australia of its own force on 15 July 2001. The provisions could therefore only operate as deemed provisions of the Corporations Act as a result of being picked up by s.1383, itself a deemed provision of the Corporations Act. It thus follows that any right of BGNV to lodge a proof of debt on 26 November 2015 in the winding up of a company ordered to be wound up before 23 June 1993 also arises under s.1408 of the Corporations Act.

25. This conclusion is reinforced by s.1408(5). It relevantly provides:

Nothing in [s.1408(1)] ... is taken to produce a result that a right ... exists under a transitional provision as it has effect because of [s.1408(1)] ... that relates solely to events, circumstances or things that occurred before [15 July 2001].

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[15] *Director of Public Prosecutions (WA) v Mansfield* (2008) 35 WAR 431 at [36] and [40] (Martin CJ) and [103]-[104] (McLure JA with whom Buss JA agreed).

[16] Section 1401(4).

Note: Instead, an equivalent right ... will be created by section ... 1401. (Emphasis added)

26. Section 1383 of the Corporations Law is a transitional provision that has effect because of s.1408(1). The effect of s.1408(5) is that nothing in s.1408(1) produces a result that a right exists under s.1383 that relates solely to events, circumstances or things that occurred before 15 July 2001. The winding up of a company before 23 June 1993 relates solely to events, circumstances or things that occurred before 15 July 2001. Thus nothing in s.1408(1) produces a result that a right exists under s.1383 of the Corporations Law that relates solely to the winding up of a company before 15 July 2001. In other words, the right to prove in the winding up of such a company exists under s.1408, in combination with s.1401 of the Corporations Act, not under the Corporations Law. If s.1408(1), in its application of s.1383, was read to give a person a right to lodge a proof under Part 5.6 of the Corporations Law in the winding up of a company ordered to be wound up before 23 June 1993, s.1408(5) would be infringed. As the note to that section makes clear, the relevant right does not arise under s.1383 picking up Part 5.6 of the Corporations Law. Instead, the relevant right is created by s.1401 of the Corporations Act.

27. It follows from the above that as a result of s.25(1) of the Bell Act no creditor of a company ordered to be wound up before 23 June 1993 is entitled to lodge a proof with the Authority. This conclusion has significant implications for the resolution of **Issue 1**: the inability of the Commonwealth to lodge a proof with the Authority in respect of tax-related liabilities owing by those companies is one instance of the way in which the Bell Act alters, impairs and detracts from rights created by Commonwealth law. It also has significant implications for the resolution of **Issue 3**: the inability of, for example, BGNV to lodge a proof with the Authority in respect of the liabilities owing to it by TBGL and BGF is one instance of the way in which the Bell Act is inconsistent with the Corporations Act. Finally, it has significant implications for the resolution of **Issue 4**, in particular the application of s.5G(8): legislation that prevents a creditor of a company from lodging a proof in respect of the liability owing by that company to the creditor cannot be described as providing for the "winding up" of that company, an essential element to the operation of s.5G(8).

28. The defendant disputes the conclusion that no creditor of a company ordered to be wound up before 23 June 1993 is entitled to lodge a proof with the Authority. In its defence to WA Glendinning's action in P63 of 2015 (but, significantly, not in its defence to BGNV) the State seeks to avoid this conclusion by invoking s.11(5) of the Ancillary Provisions Act. Apparently, the State contends that the reference in s.25(1) of the Bell Act to Part 5.6 of the Corporations Act is to be read as a reference to Part 5.6 of the Corporations Law. It must follow from this that the State contends that the right of a creditor of a company ordered to be wound up before 23 June 1993 to lodge a proof of debt in that winding up is a right given under Part 5.6 of the Corporations Law and, therefore, s.25(1) of the Bell Act gives them a right to lodge a proof with the Authority. The State's argument is wrong.

29. For the reasons explained above, immediately before the transfer day the right of a person to prove in the winding up of a company ordered to be wound up before 23 June 1993 was a right given to them under ss.1401 and 1408 of Part 10.1 of the Corporations Act. It was not a right given to them under Part 5.6 of the Corporations Act. *A fortiori*, it was not a right given to them under Part 5.6 of the Corporations Law. Any right that a person had to lodge a proof of debt under Part 5.6 of the Corporations Law was extinguished by s.7(2) of the Ancillary Provisions Act. In addition, under s.6 of that Act, the Corporations Law no longer operated of its own force in Western Australia on and from 15 July 2001.

30. Even if we assume, for the purposes of argument, that the above analysis is wrong and ss.1401 or 1408 do not govern the position, the position will then be governed by s.7(1) of the Ancillary Provisions Act. Section 7(1) provides:[17]

To the extent that [the 1990 Act or Corporations Law] ceases to operate of its own force because of section 6, the effect is that which would have resulted had this Act [the 1990 Act and the Corporations Law] been Commonwealth Acts in relation to which the Acts Interpretation Act 1901 of the Commonwealth as in force on 1 November 2000 applied.

31. Section 8(c) of the Acts Interpretation Act as in force on 1 November 2000 provided that where an Act repeals, in whole or part, a former Act then, unless the contrary intention appears, the repeal does not affect any right, privilege, obligation or liability acquired, accrued or incurred under any Act so repealed.

32. On 14 July 2001 a creditor of a company ordered to be wound up before 23 June 1993 had a right to lodge a proof in that company under Part 5.6 of the Corporations Law. For the purpose of the present analysis it is assumed, contrary to the plaintiffs' case, that their argument concerning the application of s.1401 of the Corporations Act is wrong. On this assumption, on and from 15 July 2001 the right to lodge a proof continued under s.7(1) of the Ancillary Provisions Act. The right, however, did not continue to exist under Part 5.6 of the Corporations Law (the conclusion required for the operation of the State's s.11(5) defence). Rather, the right was preserved by s.7(1) of the Ancillary Provisions Act and s.8(c) of the Acts Interpretation Act by the fiction (created by s.7(1)) of treating the Corporations Law as if it was a Commonwealth Act governed by s.8(c) of the Acts Interpretation Act.

33. On either view, therefore, a creditor's right to lodge a proof on 26 November 2015 was not a right given under Part 5.6 of the Corporations Act or Part 5.6 of the Corporations Law. It was a right given under Part 10.1 of the Corporations Act by s.1401, read with s.1408, incorporating the text of the pre-23 June 1993 version of s.553 of the Corporations Law as a provision of the Corporations Act. If that is wrong, it was a right given under s.7(1) of the Ancillary Provisions Act. It follows that the State's s.11(5) defence must fail.

34. There is another fatal flaw in the State's argument. Section 11(5) only operates to read a reference in the Bell Act to a provision of the Corporations Act as a reference to the corresponding provision of the Corporations Law *"in relation to events, circumstances or things that happened or arose at a time before [15 July 2001]"*. In other words, s.11(5) is directed to historical events, circumstances or things that happened before 15 July 2001. It is thus inapplicable to s.25(1) of the Bell Act which is addressed to events occurring after 15 July 2001, namely the right of a person to lodge a proof in a winding up as at 26 November 2015.

Issue 1: tax legislation inconsistency

Relevant principles

35. The Constitution gives paramountcy to the laws of the Commonwealth Parliament. That paramountcy is achieved, in the case of a conflict between Commonwealth and State law, in the manner set out in s.109 of the Constitution.[18]

36. Inconsistency may manifest itself in a variety of ways. In *Victoria v The Commonwealth ("The Kakariki")* (1937) 58 CLR 618 at 630 Dixon J stated two

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[17] Section 7(2) of the Ancillary Provisions Act operates despite s.7(1). That is, if, as is concluded above, s.7(2) applies, it follows that s.7(1) does not.

[18] *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 (***Jemena***) at [36] (the whole Court).

principles respecting s.109, the first of which is often associated with the description "direct inconsistency", and the second with the expressions "covering the field" or "indirect inconsistency".[19] The expression "cover the field" in this context means "cover the subject matter".[20]

37. While it has been said that there is a need for caution in speaking of different species or classes of "inconsistency", lest such classification obscures the task at hand, namely construing the laws in question,[21] and the metaphor of covering the field has been criticised,[22] the utility of accepted tests of inconsistency, based on recognising different aspects of inconsistency for the purposes of s.109, is well established. So too is it accepted that in any one case more than one test may be applied in order to establish inconsistency for the purposes of s.109.[23] Nevertheless, the different approaches to inconsistency that have been articulated in this Court are interrelated and directed to the same end. They are tests for discerning whether a "real conflict", that is a conflict that is significant and not trivial, exists between a Commonwealth law and a State law.[24] Such a conflict may arise either from the laws' legal operation or from their practical effect.[25]

38. There is also utility in distinguishing between different kinds of "direct inconsistency". Direct inconsistency can arise where one law commands or permits what the other forbids or where one law compels disobedience to the other law.[26] So too if one law takes away a right which the other confers[27] (for example, where a Commonwealth law grants a right and a State law prohibits the exercise of that right),[28] where a State law interferes with a positive authority conferred by a Commonwealth law,[29] or where a State law interferes with a right, power or privilege conferred by a Commonwealth law.[30] Direct inconsistency can also arise where there is a direct conflict or collision between a Commonwealth law and a State law, each of which creates rights and duties or imposes obligations by stating a rule or norm of conduct and a sanction for a breach of that rule or norm.[31] This will be the case, for example, if a State law imposes an obligation greater than that for which the federal law has provided[32] or if a provision of the State law qualifies or negates the essential legislative scheme or effect of the federal law.[33] Another example of direct inconsistency is where powers conferred by Commonwealth legislation are dealt with by State legislation in a manner which

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19 *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 (***Telstra***) at [28] (the whole Court). *Dickson v The Queen* (2010) 241 CLR 491 (***Dickson***) at [13]-[14] (the whole Court) and *Jemena* at [39] (the whole Court).

20 *Jemena* at [40] (the whole Court).

21 *Momcilovic v The Queen* (2011) 245 CLR 1 (***Momcilovic***) at [245] (Gummow J) and [318] and [339] (Hayne J).

22 *Jemena* [40] (the whole Court) and *Momcilovic* at [263]-[264] (Gummow J).

23 *Jemena* [42] (the whole Court) and *Momcilovic* at [630] (Crennan and Kiefel JJ).

24 *Jemena* [41]-[42] (the whole Court) and *Momcilovic* at [630] (Crennan and Kiefel JJ).

25 *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 (***APLA***) at [202]-[206] (Gummow J).

26 *University of Wollongong v Metwally* (1984) 158 CLR 447 at 455-456 (Gibbs CJ), *Momcilovic* at [631] (Crennan and Kiefel JJ) and *Maloney v The Queen* (2013) 252 CLR 168 at [10] (French CJ).

27 *Dao v Australian Postal Commission* (1987) 162 CLR 317 (***Dao***) at 335 (Mason CJ, Wilson, Deane, Dawson and Toohey JJ).

28 *Western Australia v Ward* (2002) 213 CLR 1 at [667]-[668] (Callinan J).

29 *Dao* at 335 (Mason CJ, Wilson, Deane, Dawson and Toohey JJ).

30 *Telstra* at [32] (the whole Court).

31 *Momcilovic* at [632] (Crennan and Kiefel JJ).

32 *Telstra* at [27] (the whole Court), *Blackley v Devondale Cream (Vic) Pty Ltd* (1968) 117 CLR 253 at 258-259 (Barwick CJ); see also at 270 per Taylor J and 272 per Menzies J; *Australian Broadcasting Commission v Industrial Court (SA)* (1977) 138 CLR 399 at 406 (Stephen J); *Dao* at 335, 338-339 (Mason CJ, Wilson, Deane, Dawson and Toohey J); and *Dickson* at [22] (the whole Court).

33 *Australian Mutual Provident Society v Goulden* (1986) 160 CLR 330 at 339-340 (the whole Court) and *Dickson* at [16] (the whole Court).

impairs or inhibits their exercise.[34] There may be inconsistency even though it is possible to obey both the Commonwealth law and the State law.[35]

39. One law is inconsistent with another where they are in conflict and cannot be reconciled one with the other.[36] Laws cannot be reconciled if to give effect to one would alter, impair or detract from the other.[37] In considering s.109 inconsistency the fundamental question is thus whether the operation of the State law is such as to alter, impair or detract from that of the federal law.[38] In particular, does the State law alter, impair or detract from a federal right, duty, privilege, power or immunity? The crucial notions of "altering", "impairing" or "detracting from" the operation of a law of the Commonwealth have in common the idea that a State law conflicts with a Commonwealth law if the State law undermines the Commonwealth law. The question of inconsistency between a Commonwealth law and a State law involves a comparison between the two laws[39] and depends on the text and operation of the respective laws.[40] The starting point in all cases is an analysis of the laws in question and of their true construction.[41]

Relevant provisions of the taxation legislation

40. The Commissioner is charged with the general administration of the taxation laws under s.8 of the 1936 Act, s.1-7 of the 1997 Act and s.3A of the TAA. The Commissioner has a duty under s.166 of the 1936 Act to make an assessment of the amount of the taxable income of any taxpayer and of the tax payable thereon.[42] Similarly, the Commissioner has a duty to pursue recovery of tax-related liabilities owing to the Commonwealth, unless it is not economical or an appropriate use of resources to do so.[43]

41. Prior to their windings up (and, in the case of TBGL, shortly after its winding up) the Commissioner issued income tax assessments, or amended income tax assessments, under ss.166 and 170 of the 1936 Act to Albany Broadcasters, Bell Bros, Bell Bros Holdings, BGF, Industrial Securities, Maradolf, Maranoa Transport, TBGL, Wanstead, WAON and Wigmores for income tax years ended prior to the respective company's date of winding up.[44] Each of these companies is, with the exception of Maradolf and Maranoa Transport, a WA Bell Company. Those assessments are the subject of proofs of debt lodged by the Commissioner in the winding up of those companies.[45]

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[34] *Australian Broadcasting Commission v. Industrial Court (S.A.)* (1977) 138 CLR 399 at 406 per Stephen J, cited with approval by Mason CJ, Wilson, Deane, Dawson and Toohey JJ in *Dao* at 338.
[35] *Telstra* at [27] (the whole Court) and *Momcilovic* at [241] (Gummow J) and [637] (Crennan and Kiefel JJ).
[36] *University of Wollongong v Metwally* (1984) 158 CLR 447 at 463 (Mason J).
[37] *Momcilovic* at [317] (Hayne J dissenting in the result).
[38] *Victoria v The Commonwealth* (1937) 58 CLR 618 at 630 (Dixon J), *Dickson* at [13]-[14] (the whole Court), *Telstra* at [28] (the whole Court), *Jemena* at [39] (the whole Court) and *Momcilovic* at [340] (Hayne J).
[39] *Jemena* at [37] (the whole Court).
[40] *Jemena* at [45] (the whole Court).
[41] *Momcilovic* at [242] (Gummow J) and [323] (Hayne J).
[42] ASC [61] (SCB p.183) and *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 (***Richard Walter***) at 181-182 (Mason CJ), *Denlay v Federal Commissioner of Taxation* (2011) 193 FCR 412 at [81] (Keane CJ, Dowsett and Reeves JJ) and *Federal Commissioner of Taxation v Dalco* (1990) 168 CLR 614 at 618 (Brennan J) and 629 (Toohey J). Mason CJ and Dawson J agreed with both Brennan and Toohey JJ.
[43] Part 4-15 of Schedule 1 to the TAA read with s.47 of the *Financial Management and Accountability Act 1997* (Cth) and s.11 of the *Public Governance, Performance and Accountability Rule 2014* (Cth). See also *Piccinin v Deputy Commissioner of Taxation* [2002] FCAFC 282 at [29] (Black CJ, Wilcox and Moore JJ).
[44] ASC [71] (SCB p.185) and Annexure 11 to the ASC (SCB, pp.352-410).
[45] ASC [21] (SCB pp.169-170) and [71], [71B] and [71D] (SCB pp.185-187) and Annexure 12 to the ASC (SCB pp.411-472).

42. In August 2015 the Commissioner issued income tax assessments under ss.167, 168 or 169 of the 1936 Act to each of TBGL, Bell Bros, Bell Bros Holdings, Industrial Securities, Wanstead, WAON and Wigmores in respect of the year of income ending 30 June 2014 and an income tax assessment under s.254 of the 1936 Act to Mr Woodings, in his capacity as liquidator of TBGL, in respect of the year of income ending 30 June 2014.[46] Shortly prior to the issue of the assessments, TBGL had formed an income tax consolidated group with effect from 1 July 2002.[47]

43. Upon the formation of the tax consolidated group TBGL and its wholly owned subsidiary members (Albany Broadcasters, Ambassador Nominees, Belcap Enterprises, BEM, BGF, BPG, Dolfinne, GWT, Harlesden Finance, Maradolf, Maranoa Transport, TBGL Enterprises and W&J Investments) operated as a single entity for income tax purposes with effect from 1 July 2002.[48] The key consequences of forming the tax consolidated group are: (a) TBGL, as head company of the consolidated group, lodges a single consolidated group income tax return for the income years in which the group chooses to consolidate and all future years during which the group is in existence,[49] (b) TBGL, as head company, is liable to pay any group income tax liabilities (although subsidiary members may become liable if TBGL defaults),[50] (c) tax losses are effectively pooled at the level of the head company of the tax consolidated group. As a result, carried forward tax losses of group members can be utilised by TBGL,[51] (d) assets and liabilities of subsidiary members are treated as assets and liabilities of TBGL for the purposes of calculating TBGL's taxable income or loss[52] and (e) intra-group transactions, assets and liabilities are ignored so that effectively only transactions with parties outside the tax consolidated group are recognised for income tax purposes.[53]

44. Each of TBGL, Bell Bros, Bell Bros Holdings, Dolfinne Securities, Industrial Securities, Neoma Investments, Wanstead, Wanstead Securities, WAON, Wigmores and Mr Woodings as liquidator of TBGL have lodged objections to the August 2015 assessments with the Commissioner.[54] One of the grounds of objection to TBGL's assessment is that TBGL had available tax losses in excess of the assessable income derived by TBGL.[55] If the objections are not allowed, each of the companies and Mr Woodings have the right to pursue a review or appeal under Pt IVC of the TAA.[56]

45. Payment for the notice of assessment issued to Mr Woodings was due on 21 November 2014.[57] Payment for the notices of assessment issued to each of TBGL, Bell Bros, Bell Bros Holdings, Dolfinne Securities, Industrial Securities, Neoma Investments, Wanstead, Wanstead Securities, WAON and Wigmores was due on 1 December 2014.[58] In July 2015, pursuant to s.255-10 of the TAA, the Commissioner deferred to the earlier of 31 December 2015 and the day immediately before the transfer day (i.e. 26 November 2015) the due payment of any income tax payable by TBGL, Dolfinne Securities, Industrial Securities, Neoma Investments and Wanstead Securities on the

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46 ASC [73] (SCB p.188) and Annexure 12 to the ASC (SCB, pp.473-506).
47 ASC [72] (SCB p.188).
48 Sections 700-1 and 701-1 of the 1997 Act.
49 Section 701-1 of the 1997 Act and Explanatory Memorandum to the *New Business Tax System (Consolidation) Bill (No 1) 2002* [2.6] and [2.17].
50 See Division 721 of the 1997 Act.
51 See Division 707 of the 1997 Act.
52 Section 701-1 of the 1997 Act and Explanatory Memorandum to the *New Business Tax System (Consolidation) Bill (No 1) 2002* [2.6], [2.20] and [2.26].
53 Section 701-1 and Explanatory Memorandum to the *New Business Tax System (Consolidation) Bill (No 1) 2002* [2.6] and [2.18].
54 ASC [80] (SCB p.190).
55 ASC [80] (SCB p.190).
56 ASC [80] (SCB p.190).
57 ASC [74.1] (SCB p.188).
58 ASC [74.2] (SCB p.189).

assessments issued to them in August 2015.[59] No deferment of the date for payment was given to Bell Bros, Bell Bros Holdings or Wanstead. On 26 November 2015 the Commissioner demanded that TBGL and Mr Woodings as liquidator of TBGL pay to the Commissioner that day the amount the subject of the assessments that had been issued to them.[60] (As explained above, TBGL, as head company of the tax consolidated group, was liable for any group income tax liabilities). Neither TBGL, nor Mr Woodings, has paid the amounts demanded by the Commissioner.[61]

46. The Commissioner's service of the pre and post-liquidation assessments had six relevant consequences. First, tax became due and payable *"by force of"*[62] the 1936 Act or the 1997 Act on the date specified in the notice of assessment or fixed by reference to the date of service of the notice.[63] Secondly, the Commissioner's assessment of liability is conclusive, except upon the processes of review and appeal under Part IVC of the TAA.[64] The conclusive nature of the assessment is an integral part of the tax collection system[65] and reflects a long-standing legislative policy to protect the interests of the revenue.[66] Thirdly, the liability of the companies and Mr Woodings to pay tax under the post-liquidation assessments to which they have objected is not suspended pending the outcome of those objections or a review or appeal under Pt IVC of the TAA.[67] Fourthly, the tax assessed is a debt owing to the Commonwealth payable to the Commissioner who can sue for and recover any unpaid tax in a Court of competent jurisdiction.[68] Those debts are a tax-related liability[69] of the companies and Mr Woodings created by force of the provisions of the relevant tax legislation.[70] They thus have their origin in federal law: the source of the debt is located in the statutory consequences given to an assessment, formerly by ss.208 and 209 of the 1936 Act, now by s.255-05 in Schedule 1 to the TAA.[71] As a result, the debts have a *"special character"*.[72] Fifthly, if any due and payable tax remains unpaid, the taxpayer is liable to pay the general interest charge (formerly additional tax).[73] Sixthly, Mr Woodings became subject to the obligations contained in s.254 of the 1936 Act [74] and former s.215 of the 1936 Act (alternatively, in the case of Albany Broadcasters, s.260-45 of Sch 1 to the TAA).[75]

47. The suite of Commonwealth tax legislation, of which the 1936 Act, the 1997 Act and the TAA forms part, contains an exclusive and comprehensive regime for the collection

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59 ASC [75.2] (SCB p.189).
60 ASC [79] (SCB p.190).
61 ASC [79] (SCB p.190).
62 *Batagol v Federal Commissioner of Taxation* (1963) 109 CLR 243 at 251-252 (Kitto J) cited by Brennan J in *Richard Walter* at 191.
63 ASC [62] (SCB p.183). See also *Richard Walter* at 192 and 195-196 (Brennan J).
64 ASC [66] (SCB p.184).
65 *Richard Walter* at 226 (Toohey J).
66 *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd* (2008) 237 CLR 473 (***Broadbeach***) at [44] (Gummow A-CJ, Heydon, Crennan and Kiefel JJ).
67 ASC [63] and [64] (SCB pp.183-184).
68 ASC [65], [77] and [78] (SCB pp.184, 189).
69 The phrase "tax-related liability" means a pecuniary liability to the Commonwealth "arising directly" under a statute of which the Commissioner has the general administration (s.2(1) of the *TAA* and s.5-1 in Schedule 1 of the TAA, s.250-10(2), item 70 of Sch 1 of the TAA and s.995-1 of the 1997 Act). The consequence is that liabilities for income tax, additional tax and GIC are within the scope of these provisions.
70 *Broadbeach* at [51] (Gummow A-CJ, Heydon, Crennan and Kiefel JJ) and *Bruton Holdings Pty Ltd (in liq) v Federal Commissioner of Taxation* (2009) 239 CLR 346 (***Bruton***) at [12] (the whole Court).
71 *Broadbeach* at [55] and [57] (Gummow A-CJ, Heydon, Crennan and Kiefel JJ) and *Bruton* at [12] (the whole Court).
72 *Broadbeach* at [56] (Gummow A-CJ, Heydon, Crennan and Kiefel JJ).
73 ASC [67]-[70] (SCB pp.184-185).
74 ASC [82] (SCB p.191). Section 254 applies to a trustee. A "trustee" is defined in s.6(1) of the 1936 Act to include a liquidator.
75 ASC [81] (SCB pp.190-191).

and recovery of Commonwealth tax-related liabilities. The general scheme of the 1936 Act is to define the obligations and liabilities of taxpayers in respect of income tax and additional tax in comprehensive terms which apply generally throughout the Commonwealth and which, subject to presently irrelevant exceptions, apply to all taxpayers regardless of the State in which they live or in which income is derived or proceedings for recovery are brought.[76] The paramount purpose of the 1936 Act is to ascertain the liability of taxpayers to tax and the Act, with that object in view, sets up a legislative regime whereby the Commissioner assesses a taxpayer to tax, the taxpayer being liable to pay the amount stated in the notice of assessment, subject to a review or an appeal under Pt IVC of the TAA.[77]

48. As a result, the provisions of the 1936 Act providing for the collection and recovery of tax (of which the provisions noted in paragraph 46 are essential elements) are a "coherent scheme"[78] which covers the field.[79] It has been found that this legislative scheme leaves no room for the application of (a) State limitation laws,[80] (b) State laws which diminish or curtail discretions conferred on the Commissioner under the 1936 Act,[81] or (c) State confidentiality laws when information is sought by the Commissioner under the 1936 Act.[82]

Relevant provisions of the Bell Act and the application of s.109 to this case

49. The Bell Act alters, impairs and detracts from the exclusive, comprehensive and specific legislative regime established by Commonwealth law for the collection and recovery of Commonwealth tax-related liabilities in four main respects. In doing so it undermines the scheme of the 1936 Act in its application to liquidators of insolvent companies.

50. First, the Bell Act undermines the operation of s.254 of the 1936 Act. Under s.254(1)(a) Mr Woodings is made answerable as taxpayer for the doing of all things that are required to be done by virtue of the 1936 Act in respect of the income, or any profits or gains of a capital nature, derived by him as liquidator or derived by the company of which he is liquidator and for the payment of tax thereon. Section 254(1)(d) *authorises* and *requires* Mr Woodings to retain from time to time out of any money that comes to him as liquidator so much as is sufficient to pay tax which is or will become due in respect of any income, profit or gains derived by him as liquidator or derived by the company of which he is liquidator. That retention obligation crystallised once the Commissioner issued the assessments.[83] Under s.254(1)(e) Mr Woodings is made personally liable for the tax payable in respect of the income, profits or gains to the extent of any amount that he has retained or should have retained under s.254(1)(d).

51. The Bell Act alters, impairs and detracts from the authorisation conferred, and the obligation imposed, on Mr Woodings by s.254(1)(d). Section 22 of the Bell Act, which transfers to and vests in the Authority the money held by each WA Bell Company and the money held by Mr Woodings on behalf of or on trust for a WA Bell Company and others (Maranoa Transport and BGUK), prevents Mr Woodings from enjoying and exercising the authority conferred on him by s.254(1)(d) to set aside and retain any

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[76] *Deputy Commissioner of Taxation v Moorebank Pty Ltd* (1988) 165 CLR 55 (***Moorebank***) at 64 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).
[77] *Richard Walter* at 187 (Mason CJ).
[78] *Moorebank* at 67.
[79] *Moorebank* at 65-66.
[80] *Moorebank* at 67.
[81] *Deputy Commissioner of Taxation v Zarzycki* (1990) 96 ALR 146 at 149-151.
[82] *Deputy Commissioner of Taxation v Law Institute of Victoria Ltd* (2010) 27 VR 51 at [4] (Mandie JA).
[83] *Commissioner of Taxation v Australian Building Systems Pty Ltd (in liq)* (2015) 326 ALR 590 at [1], [26] and [43] (French CJ and Kiefel J) and [58] (Gageler J).

money which may come to him in his capacity as liquidator. Section 22 also prevents Mr Woodings from complying with the retention obligation imposed on him by s.254(1)(d).

52. In addition, the Bell Act prevents Mr Woodings from complying with his obligations under ss.254(1)(a) and 254(1)(b). Mr Woodings, in his capacity as liquidator, is an "officer" of the company within the meaning of s.9 of the Corporations Act. By force of s.28 of the Bell Act Mr Woodings no longer has control of the property and affairs of the WA Bell Companies. Section 29 also prevents him from performing or exercising (or purporting to perform or exercise) a function or power as an officer of the company without the Authority's written approval. As a result, Mr Woodings can no longer do the things that he is required to do under the 1936 Act (as required by s.254(1)(a)). Nor can he make the returns that s.254(1)(b) requires him to make.

53. The restraints imposed on Mr Woodings which prevent him from complying with his obligations under s.254, in particular his retention obligation under s.254(1)(d), in turn prevent Mr Woodings from meeting the liability for tax imposed on him under s.254(1)(e). In this way, the Bell Act undermines the object of s.254. Section 254 is addressed to avoiding a risk to the revenue: without s.254(1)(d) the Commissioner would be at risk of being left with a claim against a liquidator who has paid away funds from which his own liability to tax might be met, in circumstances where the liquidator and the company of which he is liquidator is not worth powder and shot. The object of s.254(1)(d) is to obviate that risk.[84] Thus the retention obligation serves to ensure that there is sufficient money in the hands of the liquidator to pay his or her liability for the tax which is assessed as owing. The Bell Act prevents the object of s.254 being met. Before the Bell Act money was held by Mr Woodings from which his, and the companies' liability to tax could be met. After the Bell Act there is no available money to meet those liabilities. It has all been transferred to the Authority.

54. There is another aspect in which the Bell Act interferes with and undermines the operation of s.254. Section 45(1) of the Bell Act discharges a liquidator of a WA Bell Company, on dissolution of that company under s.30, from *"all liability"* arising out of or relating to anything done or not done[85] by them in performing their duties, including complying with obligations arising under the Bell Act. One such liability discharged by s.45(1) is Mr Wooding's personal liability for tax under s.254(1)(e). Another is his liability under s.254(1)(a).

55. Secondly, the Bell Act undermines the operation of former s.215 of the 1936 Act. Under former s.215(1)(a) a liquidator of a company which is being wound up must, within 14 days after becoming liquidator, give notice of his appointment to the Commissioner. Mr Woodings complied with this obligation.[86] The Commissioner was then obliged, as soon as reasonably practicable thereafter, to notify the liquidator of the amount which appeared to the Commissioner to be sufficient to provide for any tax which then is or will thereafter become payable by the company (former s.215(2)). There is no prescribed form of notice under former s.215(2). The Commissioner gave the liquidators the required notice by the Commissioner lodging proofs of debt in the windings up, which proofs were based on the pre-liquidation assessments. The lodgment of a proof of debt is sufficient notice for the purpose of former s.215: *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd* (1940) 63 CLR 278 at 311 (Dixon J) and *Pace v Antleres Pty Ltd* (1998) 80 FCR 485 at 504 (Lindgren J). Notice was also provided by the Commissioner's service of the post-liquidation

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[84] *Commissioner of Taxation v Australian Building Systems Pty Ltd (in liq)* [(2015) 326 ALR 590 at [130]-[131] (Keane J, dissenting in the result).

[85] In s.45(1) a reference to something being done includes a failure to do something: s.45(2).

[86] ASC [71C] (SCB p.186).

assessments and the Commissioner's demand for payment of the outstanding tax made on 26 November 2015. Two further obligations are then imposed on the liquidator by former s.215(3). First, the liquidator must not part with any of the assets of the company until he has been so notified (former s.215(3)(a)). Secondly, he must set aside, out of the assets available for payment of ordinary debts of the company, assets to the value of an amount that bears to the value of the assets available for payment of ordinary debts of the company the same proportion as the amount notified by the Commissioner under former s.215(2) bears to the sum of the amounts referred to in former s.215(3)(b)(i), (ii) and (iii). In effect, the liquidator is obliged to set aside the proportion of those available assets that would be applied in accordance with s.555 of the Corporations Act to meet the notified amount of tax-related liabilities.[87] The liquidator is then, by former s.215(3)(c), to the extent of the value of the assets that he is so required to set aside, made liable, as liquidator, to pay the tax. If the liquidator refuses or fails to comply with any provision of former s.215 or refuses or fails as liquidator duly to pay the tax for which he is liable under former s.215(3), the liquidator is, to the extent of the value of the assets that he is required to set aside, made personally liable to pay the tax and is guilty of an offence (former s.215(4)). Because the obligation to set aside is for a specific purpose (the payment of tax that is or may be payable) "set aside" in this context means "set aside and retain" until the relevant purpose has been fulfilled. That is, Mr Wooding's "set aside" obligation is a continuous, ongoing, obligation.

56. The words of former s.215(3) are to be given their ordinary meaning: the liquidator is obliged to set aside out of the assets available for the payment of tax, assets to the requisite value.[88] Before the Bell Act such assets were available from which the liquidator could set aside funds. After the Bell Act those assets were no longer available for this purpose. The Bell Act thus alters, impairs and detracts from the operation of former s.215 for the same reasons explained above in relation to s.254. Section 22 of the Bell Act prevents Mr Woodings from complying with his (continuous) obligation to set aside the assets which former s.215(3)(b) requires him to set aside. Section 45 of the Bell Act extinguishes the liability created by former s.215(4). Alternatively, if the Commissioner's proofs of debt, post-liquidation assessments and demand for payment do not constitute notice for the purposes of former s.215(2), such that the "set aside" obligation in former s.215(3)(b) is not engaged, the Bell Act alters, impairs and detracts from the operation of former s.215(3)(a) which requires Mr Woodings not to "part with" any, that is retain[89] all, of the assets of the company until he has received the s.215(2) notice. Section 22 has the practical and legal effect that Mr Woodings has parted with the assets of the company: before the Bell Act Mr Woodings held the assets; after the Bell Act he no longer retained them.

57. In short, in relation to both s.254 and former s.215, the Bell Act undermines the scheme of the 1936 Act applying to liquidators of insolvent companies by altering, impairing and detracting from the obligations imposed by the 1936 Act which require the liquidator to set aside and preserve assets to meet the taxation liabilities of the company in liquidation.

58. Thirdly, the Bell Act alters, impairs or detracts from the Commonwealth's rights in respect of the tax-related liabilities owing to it by Mr Woodings and the WA Bell

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[87] *Bruton* at [16] (the whole Court), a case on the analogous s.260-45 of Schedule 1 to the TAA.

[88] *Bank of New South Wales v The Commissioner of Taxation* (1979) 145 CLR 438 at 452 (Gibbs J, with whom Barwick CJ, Stephens, Mason, Aickin and Wilson JJ agreed).

[89] *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd* (1940) 63 CLR 278 (***EO Farley***) at 311 (Dixon J).

Companies, which liabilities are created by force of Commonwealth law. It does so in a number of respects.

59. As already noted, a consequence of the service of the pre and post-liquidation assessments is that tax became due and payable by force of the 1936 Act or the 1997 Act as a debt owing to the Commonwealth and payable to the Commissioner who can sue for and recover any unpaid tax in a Court of competent jurisdiction. Prior to the introduction of the Bell Act the Commissioner could take steps to recover the debt. He could, for example, in respect of the debts owing by the WA Bell Companies to the Commonwealth, lodge a proof of debt in the windings up of those companies. He could, in respect of Mr Wooding's personal liability under former s.215 and s.254, commence proceedings against Mr Woodings in a Court of competent jurisdiction to recover the tax owing.

60. After the Bell Act, however, the Commissioner can do neither of those things. The Commissioner's right, conferred by a Commonwealth law, to pursue proceedings against Mr Woodings in a Court of competent jurisdiction has been taken away by ss.25(5)(c) and (d) of the Bell Act which prohibits any action, claim or proceeding of any nature arising out of, or relating to, a liability of a WA Bell Company being made against the company or its liquidator. It has also been rendered nugatory by the operation of s.45 for the reasons explained above. Similarly, the Commissioner's ability to enforce tax debts created by force of Commonwealth law by pursuing the post-liquidation assessments served on TBGL, Bell Bros Holdings and Wigmores and the proofs of debt based on the pre-liquidation assessments served on Albany Broadcasters, Bell Bros Holdings, BGF and Wigmores has been taken away by the combined operation of ss.22, 25(1) and 25(5)(c). As a result of s.25(1), the Commonwealth cannot prove with the Authority in respect of the liabilities owed to the Commonwealth by those WA Bell Companies ordered to be wound up before 23 June 1993 (see paragraphs 6 to 34 above). Even if it could, s.25(5) prevents the Commonwealth from lodging any proof of debt in the winding up of a WA Bell Company. In any event, as a practical matter, the Bell Act renders inutile such a proof of debt or pursuit of the tax liability created by the post-liquidation assessments given that, by reason of s.22, there are no longer any funds in the windings up with which to pay creditors and by reason of s.29 the liquidator cannot exercise any of his powers in the winding up.

61. The Bell Act takes away or interferes with rights conferred on the Commonwealth by federal law in other respects. As noted, the Commissioner's assessment of a tax payer's liability is conclusive, except upon the processes of review and appeal under Part IVC of the TAA. The conclusive evidence provisions of item 2 of s.350-10(1) of Schedule 1 to the TAA (formerly s.177 of the 1936 Act) bind a liquidator and preclude him from rejecting a proof of debt supported by a notice of assessment.[90] As a result, the assessment establishes that the Commonwealth is a creditor of the relevant WA Bell Company for the amount stated in the assessment whether or not the proof has been admitted in the winding up. As a creditor, the Commonwealth, has a statutory right to prove in the winding up. It also has a statutory right, subject to specified exceptions, to *pari passu* treatment with other ordinary unsecured creditors. Similarly, the Commonwealth, like all other creditors has a right to the benefit of the liquidator's administration of the company's estate.[91] This is to be contrasted with the position of the Commonwealth under the Bell Act. One of the roles of the Authority is to determine the liabilities of each WA Bell Company (ss.35(a) and 37(1)). In doing so,

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[90] *Commonwealth of Australia v Duncan* [1981] VR 879 at 882-883 (Lush J) and *Re Master Painters Association of Victoria Ltd* (2004) 211 ALR 316 at [17] (Mandie J).

[91] See paragraph 106 below.

the Authority has an absolute discretion (s.37(3)), including an absolute discretion as to the quantification of any liability (ss.39(6)). In addition, nothing in the recommendation of the Authority or the determination of the Governor creates any right in, or for the benefit of a creditor of a WA Bell Company or any other person (ss.39(8) and s.43(6)). It follows that a creditor vis-à-vis the Authority has no right equivalent to the right of a creditor in a winding up to the due administration of the estate. Thus the Authority is free to ignore the conclusive evidence provisions and determine the liabilities of those companies to the Commonwealth, in its unfettered discretion, in a manner which is inconsistent with the conclusive evidence provisions. The position is the same under ss.41(2) and 42(2) of the Bell Act in relation to any determination made by the Governor. The Governor may, for example, determine that nothing is to be paid to the Commonwealth (s.43(8)) despite the effect of the conclusive evidence provisions. In this way, the Bell Act undermines an integral part of the tax collection system.

62. Finally, under the Bell Act the Governor may, at any time dissolve a WA Bell Company by proclamation (s.30). On dissolution, the WA Bell Company ceases to exist (s.30(2)). The dissolution of a WA Bell Company extinguishes the liabilities of that company to the Commonwealth created by force of Commonwealth law. Those liabilities may also be extinguished under the Bell Act in a number of other situations. The Governor may, for example, determine that an amount be paid to the Commonwealth under s.42(2). Equally, the Governor may determine that nothing is to be paid to the Commonwealth. In the latter situation every liability of every WA Bell Company to the Commonwealth is discharged and extinguished by force of s.43(8). In the former situation, no such payment may be made unless the Commonwealth first executes a deed of release in a form approved by the Minister providing for the release or discharge of any person from any liability that the Minister considers appropriate (s.44(3)). This could include requiring the Commonwealth to discharge each WA Bell Company and Mr Woodings from their tax-related liabilities owing to the Commonwealth. If such a deed is not executed within the time specified by s.44(5) every liability of every WA Bell Company to the Commonwealth is by force of the Act discharged and extinguished (ss.44(5)(a) and 44(7)(a)). In this way, the Bell Act alters, impairs and detracts from the Commonwealth's existing rights under federal law.

63. Fourthly, the Bell Act takes away rights conferred on TBGL by the 1997 Act. Upon formation of the TBGL consolidated group, the available carry forward tax losses of each subsidiary group member as at 1 July 2002 were transferred to TBGL as head company.[92] On transfer, TBGL as head company is treated for income years ending after the transfer as if it made the relevant tax losses so that TBGL can utilise the loss for those income years to the extent permitted by the 1997 Act.[93] The Bell Act prevents TBGL from utilising available carry forward tax losses in the manner permitted by the 1997 Act. TBGL's statutory right to utilise those losses is "property" within the meaning of s.3 of the Bell Act (being *"any right, interest or claim"*).[94] By force of s.22 that property has been transferred to the Authority. It is therefore no longer available to be utilised by TBGL. In this way, the Bell Act alters, impairs and detracts from a right conferred on TBGL by force of Commonwealth law.

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92 Section 707-100 of the 1997 Act.
93 Section 707-105(1) of the 1997 Act.
94 Cf. s.22(6) of the Bell Act which treats a (statutory) right to make a taxation objection or a right or capacity to seek the review of, or to appeal against a decision of the Commissioner in relation to a taxation objection, as "property".

Conclusion

64. The legal and practical effect of the Bell Act is to render nugatory the Commonwealth's tax debts and thereby render nugatory rights conferred on the Commonwealth by Commonwealth law. Those tax debts and the rights conferred on the Commonwealth in respect of them have their origin in federal law. The Commonwealth's *"legal rights which are the immediate product of federal statute"* are *"protected by s.109 of the Constitution"*.[95] It is not within the competence of State legislation to impair the recovery or enforcement of debts owing to the Commonwealth in respect of taxes levied by it. The Bell Act operates to deny or qualify rights, duties, powers and privileges conferred by federal law on the Commissioner. As a result there is direct collision between the Bell Act and the provisions of the 1936 Act, the 1997 Act and the TAA. There is also indirect inconsistency. The suite of tax legislation is, in the words of Dixon J in *The Kakariki*, at 630, *"intended as a complete statement of the law governing"* the collection and recovery of tax-related liabilities owing to the Commonwealth. For the Bell Act to *"regulate or apply to the same matter or relation is ... a detraction from the full operation of the Commonwealth law"* and so is inconsistent with it.

Issue 2: Standing and justiciable controversy

65. The plaintiffs will address this issue in reply after the defendant has identified the basis of its challenge to the plaintiffs' standing.

Issue 3: Corporations Act inconsistency

66. The defendant contends that the Bell Act is not inconsistent with the provisions of the Corporations Act pleaded in paragraphs 60 to 75 of the statement of claim. It is difficult to reconcile this contention with the defendant's invocation of ss.5F and 5G of the Corporations Act. If there was no relevant inconsistency between the Bell Act and the Corporations Act, there would be no need to rely on ss.5F or 5G.

67. The Bell Act alters, impairs and detracts from the statutory regime for the disposition of assets of insolvent companies provided for in Chapter 5 of the Corporations Act in a number of respects. It disrupts, for example, the scheme for the orderly payment of debts and claims in accordance with, amongst other things, ss.555 and 556 of the Corporations Act. In short, the Commonwealth and State Acts have contradictory provisions governing the same topics, making it impossible for both laws to be obeyed.

Mr Wooding's duties and powers as liquidator

68. Sections 474(1) and 478(1)(a) of the Corporations Act oblige Mr Woodings, as the liquidator of each WA Bell Company, to take into his custody or control all of the property to which the company is or appears to be entitled and cause that property to be applied in discharging the company's liabilities. Section 477 of the Corporations Act gives the liquidator various powers including, amongst other things, to carry on the business of the company so far as is necessary for the beneficial disposal or winding up of that business (s.477(1)(a)), to dispose of all or any part of the property of the company (s.477(2)(c)) and do all such other things as are necessary for winding up the affairs of the company and distributing its property (s.477(2)(m)). The office of liquidator is a statutory office and the liquidator's powers derive *solely* from the relevant statute pursuant to which the liquidator was appointed.[96]

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[95] *The Commonwealth v Cigamatic Pty Ltd (in liq)* (1962) 108 CLR 372 at 378 (Dixon CJ) cited by Gummow J in *Momcilovic* at [239].

[96] *Butterell v Dock Smith Pty Ltd* (1997) 41 NSWLR 129 at 137-138 (McLelland CJ in Eq) and *Re Dallhold Investments Pty Ltd* (1994) 53 FCR 339 at 342 (Sackville J).

69. Sections 9, 10, 22, 27 and 28 of the Bell Act (which transfers the property of the WA Bell Companies to the Authority, makes the Authority the administrator of each WA Bell Company and gives it power to control and manage the company's property and affairs) prevent Mr Woodings from discharging his obligations under ss.474(1) and 478(1)(a) and prevent Mr Woodings from exercising his powers as liquidator under s.477 of the Corporations Act. As Mr Woodings no longer has custody or control of the companies' property he cannot cause that property to be applied in discharging the companies' liabilities. Mr Woodings has thus been deprived of assets which would otherwise have been available to meet the debts of the company. The Bell Act thus prevents the liquidator from performing a central part of his function under the Corporations Act. In addition, Mr Woodings is no longer able to exercise any of the powers conferred on him by s.477 of the Corporations Act because s.29 of the Bell Act imposes a restraint on the exercise of those powers (prohibiting their exercise without the Authority's written approval, unless the exercise of the power is also the exercise of a power or duty under the Act) and s.58(1), amongst others, makes it a criminal offence for Mr Woodings to exercise those powers. In addition, Part 6 of the Bell Act purports to dis-apply s.477 of the Corporations Act. While Mr Woodings remains (in name) liquidator, the Bell Act strips him of all of his powers as liquidator.

The right to prove

70. Under ss.553(1), 553D and 553E of the Corporations Act all debts payable by and all claims against a WA Bell Company ordered to be wound up after 23 June 1993, being debts or claims meeting the requirements of s.553(1), are admissible to proof against the company. Section 25(5) of the Bell Act prevents a person from proving those debts or claims in the windings up of those companies.

71. Section 555 of the Corporations Act only permits debts and claims in relation to a WA Bell Company to be proved on a individual company by company basis. In contrast, ss. 39(1) and 42(3)(a) of the Bell Act permits "pooled" payments to be made to a person in respect of the aggregate of all liabilities of all WA Bell Companies to that person as a creditor. This undermines an essential characteristic of the regime established by Chapter 5 of the Corporations Act, namely that a liquidator must discharge out of the assets in his hands only those claims which are legally enforceable against the company. That is, he can only make a payment to a creditor of that company. The Bell Act, in contrast, allows, in substance, the property of company A to be paid to a creditor of company B who is not a creditor of company A.

72. Under the Corporations Act, the amount of a debt or claim admissible to proof is to be computed for the purposes of the winding up as at the "relevant date" (s.554(1)), debts and claims of uncertain value are estimated by the liquidator or determined by the Court, with an aggrieved person having a right of appeal from any decision (ss.554A and 1321) and foreign currency debts or claims are converted into Australian currency in accordance with ss.554C(2) or 554C(3). In contrast, under the Bell Act, the Authority has an absolute discretion in determining the liabilities of each WA Bell Company and the quantification of those liabilities (ss.35, 37(1), 37(3) and 39(6)(a)) and an aggrieved person has no rights of appeal (s.74).

Adjudication of proof of debt and the right to equal treatment

73. Mr Woodings, as liquidator of a WA Bell Company, is an officer of the Court. As Marks J observed in *Re Timberland Ltd* [1980] VR 669 at 671 the *"winding up is by the court which for the purposes the liquidator is"*. In adjudicating proofs of debt the liquidator is an independent and impartial decision maker who must act according to law. In particular, in determining whether to admit or reject a proof of debt, a liquidator acts in a quasi-judicial capacity according to standards no less than the standards of a

court or judge.[97] The conduct of the liquidator is subject to the supervision and oversight of the Court. A person aggrieved by a liquidator's decision has a right to appeal and have the matter determined by the Court *de novo*. This is to be contrasted with what occurs under the Bell Act. There is no independent decision-maker. Proofs are lodged on the Authority (s.34) and it is the Administrator who determines what recommendations he will make to the Minister about the satisfaction of that proof (ss.39(1) and 40(2)). The Administrator is appointed by the State (s.8(4)), a party with a material financial interest in the outcome of the process, and the Administrator's remuneration is determined by the Minister (s.8(6)). The Administrator does not have to act according to law. Rather, he has an absolute discretion in making his recommendation (ss.39(6) and 40(6)). The Minister is free to ignore that recommendation. Similarly, the Governor, on the advice of the Minister, is free, in his or her absolute discretion, to make whatever determination he or she wants (ss.41 and 42). In making their decisions there is no obligation on the Authority, Minister or Governor to afford the parties natural justice (s.74(3)). The rules of evidence do not apply (s.75(b)). There is no obligation to give reasons (ss.39(5) and 40(8)). There are no rights of appeal or review other than for jurisdictional error (s.74). In the absence of a duty to give reasons the ability to review for jurisdictional error is not meaningful: it makes the relevant decision effectively unexaminable and results in inscrutable decision making.[98] And those who have lodged a proof have no rights (ss.39(8), 40(9) and 43(6)). Thus a person with a valid claim may receive nothing (s.43(1) and (8)). The roles of the Authority, Minister and Governor are about as far removed from the quasi-judicial role of the liquidator as can be imagined.

Equal treatment and the order of priorities

74. A fundamental principle of the winding up of a company under the Corporations Act is that the winding up involves a procedure for the equal and rateable distribution of the assets of the company amongst its creditors. The *pari passu* principle, as applied to the payment of the admitted or proved debts of the company, lies at the heart of the winding up process.[99] It ensures, subject to some well recognised statutory exceptions, that creditors are treated equally, one or more creditors are not discriminated against and one or more creditors do not profit at the expense of other creditors.

75. Thus, under s.555 of the Corporations Act, except as otherwise provided by that Act, all debts and claims proved in a winding up rank equally and, if the property of the company is insufficient to meet them in full, they must be paid proportionately. The Bell Act contradicts and undermines this fundamental principle. Thus the Authority has an absolute discretion in determining the liabilities of each WA Bell Company (s.37(3)), in quantifying any liability, in recommending the amount to be paid to a person and as to the priority to be given to that payment (s.39(6)). Similarly, the Governor has an absolute discretion as to the amount, if any, to be paid to a person (ss.41(2), 42(2) and 43(1)). A person is not entitled to have a payment made to them unless they give to the Authority a deed in a form approved by the Minister that provides for the release or discharge of any person from any liability that the Minister considers appropriate (s.44(3)). Finally, a creditor of a WA Bell Company has no right to a payment (ss.39(8) and 43(6)) and may receive no payment (s.43(8)).

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[97] *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 (***Tanning Research***) at 338-339 (Brennan and Dawson JJ, with whom Toohey J generally agreed).

[98] *Wainohu v New South Wales* (2011) 243 CLR 181 at [69] (French CJ and Kiefel J) and [109] (Gummow, Hayne, Crennan and Bell JJ).

[99] See, for example, *In re Oak Pits Colliery Company* (1882) 21 Ch D 322 at 329 per Lindley LJ, *In re International Pulp and Paper Co* (1876) 3 Ch D 594 at 598 per Jessel MR and *Ince Hall Rolling Mills Co Ltd v Douglas Forge Co* (1882) 8 QBD 179 at 184 (Watkin Williams J).

76. Subject to Division 6 of Part 5.6 of the Corporations Act, in the winding up of a WA Bell Company, the debts and claims specified in s.556 of the Corporations Act must be paid in priority to all other unsecured debts and claims. The first tier of priority under s.556(a) is expenses (except deferred expenses) properly incurred by the liquidator of the company in preserving, realising or getting in property of the company, or in carrying on the company's business. In addition, under s.559 of the Corporations Act, the debts of a class referred to in each of the paragraphs of s.556 rank equally between themselves and must be paid in full, unless the property of the company is insufficient to meet them, in which case they must be paid proportionately. Under the Bell Act, however the expenses of the Authority and the remuneration of the Administrator, amongst other things, must be paid out of the Fund before all other payments (s.18(2)). And the Authority has an absolute discretion as to the priority to give to a payment recommended to be paid (s.39(6)(c)) and the quantification of the amount, if any, of the liabilities incurred by a liquidator of a WA Bell Company in preserving, realising or getting in property of the company or in carrying on the company's business (ss.25(2), 25(3) and 39(6)).

77. Sections 555 and 556 of the Corporations Act create rights in the creditors of a company in liquidation who are entitled to have their debts and claims paid in accordance with the priorities provided for in s.556.[100] Those rights are adversely affected by the Bell Act.

Disposition of property after the winding up

78. Section 468(1) of the Corporations Act makes void any disposition of property of a WA Bell Company, other than an exempt disposition, made after the commencement of the winding up of that company, unless the Court otherwise orders. A "disposition" of property in this context means a transfer of property, more particularly the transfer of property in which the company has a beneficial interest.[101] Section 22 of the Bell Act transfers to and vests in the Authority at the beginning of the transfer day all property vested in or held on behalf of or on trust for a WA Bell Company. The disposition of property effected by s.22 of the Act is not an exempt disposition and the Court has not otherwise ordered.[102] Thus s.468(1) renders the disposition of property effected by s.22 of the Bell Act void. Void for these purposes means void, not voidable, and void for all purposes related to or incidental to the administration of the winding up of the company concerned.[103]

79. Because the transfer of property of a WA Bell Company to the Authority is void (such that the Authority has no title to retain the property), each of the WA Bell Companies has a right to recover an amount equal to the value of the transferred property pursuant to a common law action for money had and received.[104] However, ss.54(2), 56(2), 56(3) and 58(1) of the Bell Act make it an offence, punishable by a fine or term of imprisonment, or both, for a WA Bell Company, or their liquidator, to do so. For example, an action for money had and received to obtain restitution of property transferred to the Authority contrary to ss.468(1) and 468(3) of the Corporations Act

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[100] *Loo v Director of Public Prosecutions (Vic)* (2005) 12 VR 665 at [40] (Winneke P, with whom Charles JA agreed).

[101] *Re Loteka Pty Ltd (in liq)* [1990] 1 Qd R 322 at 325-326 (McPherson J), *In re Margart Pty Ltd* (1984) 9 ACLR 269 at 272 (Helsham CJ in Eq) and *Wily v Commonwealth* (1996) 66 FCR 206 at 210-211 (Sheppard J) and 211-212, 220 and 223 (Lindgren J).

[102] ASC [84] (SCB p.191).

[103] *National Acceptance Corporation v Benson* (1988) 12 NSWLR 213 at 215 (Kirby J) and 221 and 229 (Priestley JA with whom Clarke JA agreed).

[104] *Re Fresjac Pty Ltd (in liq); Campbell v Michael Mount PPB* (1995) 65 SASR 334 at 339 and 341 (Doyle CJ with whom Matheson J agreed), *Shirlaw v Lewis* (1993) 10 ACSR 288 at 295 (Hodgson J) and *Federal Commissioner of Taxation v Jaques* (1956) 95 CLR 223 at 229 (Dixon CJ, Fullagar, Kitto and Taylor JJ).

would have the effect of defeating, avoiding, preventing or impeding the operation of the Act or the achievement of its objects, contrary to s.54(2), and would be an act in relation to property transferred to the Authority by s.22 for the purpose of directly or indirectly defeating the effectiveness of the transfer, contrary to s.56(2).

80. In addition, s.72(2)(b) of the Act makes the State of Western Australia, the Authority and the Administrator not liable to any action, liability or demand arising from the transfer of property to, and the vesting of property in the Authority by s.22. Section 73 of the Act also prevents a person, on and from the transfer day, beginning proceedings in a court with respect to property that was, immediately before that day, property of a WA Bell Company, except with the leave of the Supreme Court of Western Australia. The Act thus operates to prevent a WA Bell Company or its liquidator from enjoying the protection afforded to a company in liquidation by s.468 of the Corporations Act.

Attachment of property

81. Section 468(4) of the Corporations Act makes void any attachment put in force against the property of a WA Bell Company after the commencement of the winding up by the Court. "Attachment" in s.468 does not have a restricted meaning; in particular, it is not limited to a curial attachment.[105] Section 22 of the Bell Act, either alone or in combination with s.23(2) (which imposes upon the recipient of a notice from the Administrator an obligation to do all things necessary to deliver to the Authority property of a WA Bell Company specified in the notice) and ss.56 and 58 (the offence provisions noted above) effect such an attachment. Those sections impose an obligation to transfer to the Authority the property of a WA Bell Company, render it unlawful for the company or its liquidator not to do so and invalidates any attempt to avoid this obligation. As a matter of general understanding, these are indicia of an attachment.[106]

Dissolution of companies and reinstatement of deregistered companies

82. Under s.601AD(1) of the Corporations Act a company only ceases to exist on deregistration. However, under s.30(2) of the Bell Act, a WA Bell Company ceases to exist upon the Governor dissolving the company by proclamation under s.30(1). Thus the Bell Act provides for a company that is incorporated throughout Australia[107] to be dissolved by State executive action in circumstances where the company could not be dissolved under the Corporations Act.

83. Under s.601AH of the Corporations Act a person aggrieved by the deregistration of a company can apply to the Court to reinstate the company. However, s.55 of the Bell Act (which makes it an offence for a person other than the Authority to take any step for achieving the reinstatement of the registration under Part 5A.1 of the Corporations Act of a deregistered company listed in Schedule 1 of the Bell Act without the written approval of the Authority) prevents ASIC or a person aggrieved by the deregistration of a deregistered WA Bell Company from applying to the Court for reinstatement of the company and thereby prevents the Court from making an order that ASIC reinstate the registration of such a company.

Release of Mr Woodings and Mr Wooding's remuneration

84. Under s.481(3) of the Corporations Act a liquidator is not discharged from liability upon dissolution of the company. The liquidator is only discharged from liability by an order of the Court if the requirements of s.480 (and, if applicable, s.481) are satisfied. However, under s.45 of the Bell Act a liquidator of a WA Bell Company is, on the

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[105] *Bruton* at [32].
[106] *Bruton* at [28]-[29].
[107] ASC [17.2] (SCB p.168).

dissolution of the company, discharged from all liability arising out of or relating to anything done or not done by them in performing their duties.

85. Mr Woodings, as liquidator of a WA Bell Company is entitled to receive remuneration in accordance with the requirements of ss.473(2) and 473(3) of the Corporations Act. However, ss.25(2), 25(3), 37(3), 41(2) and 42(2) of the Bell Act permit a payment of remuneration to be made to a liquidator of a WA Bell Company other than in accordance with the requirements of ss.473(2) and 473(3) of the Corporations Act.

Books and records

86. Under s.33(7) of the Bell Act, Mr Woodings, as liquidator of a WA Bell Company must, within one month after the transfer day, give to, or as directed by the Authority all books of the WA Bell Company and of the liquidator that are relevant to the affairs of the company as at immediately before the transfer day. However, under:

86.1. s.530B(1) of the Corporations Act no person, including the Authority, is entitled, as against the liquidator of a company, to retain possession of the books of the company except in the circumstances specified in s.530B, none of which apply;

86.2. s.531 of the Corporations Act a liquidator or provisional liquidator must keep proper books dealing with the matters specified in that section, which books may be inspected by a creditor or contributory, unless the Court otherwise orders. Regulation 5.6.02 of the Corporations Regulations requires the liquidator or provisional liquidator to ensure that the books are available at his office for inspection. Under the Bell Act creditors and contributories have no rights of inspection. In addition, under s.29(1) of the Bell Act Mr Woodings has no power, without first obtaining the written consent of the Authority, to: (a) keep the books required or (b) ensure that they are available at his office for inspection; and

86.3. s.542(2) of the Corporations Act the liquidator must retain all books of the company and of the liquidator that are relevant to the affairs of the company at or subsequent to the commencement of the winding up of the company for a period of 5 years from the date of deregistration of the company. Mr Woodings cannot comply with this obligation because, s.33(7) of the Bell Act required him to give the books to the Authority. In addition, Mr Woodings could only retain the books, as required by s.542(2) of the Corporations Act, if he exercised a power or function as liquidator. Section 29(1) of the Bell Act prohibits him from doing so.

BGNV's ancillary winding up

87. Under s.601CL(15)(c) of the Corporations Act Mr Trevor, as liquidator of BGNV, is obliged to recover and realise the property of BGNV in Australia. BGNV's property in Australia includes its contractual rights under PTICA to share in the pooled proceeds of any s.564 order and its admitted proofs of debt in the windings up of TBGL and BGF. The Bell Act prevents Mr Trevor from discharging his duty under s.601CL(15)(c) to recover and realise BGNV's property in Australia. In the case of BGNV's contractual rights under PTICA the Act does so by making PTICA void under s.26(1)(i). As a result, BGNV is no longer entitled to 37.5% of the "Distribution Fund" as defined in PTICA.[108] In the case of BGNV's admitted proofs of debt in the windings up of TBGL and BGF, the Bell Act does so by force of ss.22 and 25(5) (which deprive BGNV of the ability to be paid a dividend on its proofs of debt in the windings up of TBGL and

[108] ASC [27] (SCB p.171).

BGF) and by force of s.25(1) which denies to BGNV the ability to lodge a proof with the Authority (for the reasons explained in paragraphs 22 to 34 above).

The Authority's "administration" of the WA Bell Companies

88. Under s.27(1) of the Bell Act the Authority is made the "administrator" of each WA Bell Company. While a WA Bell Company is under the administration of the Authority, the Authority has control of the company's property and affairs, may manage that property and affairs, including disposing of any of that property and may perform any function and exercise any power that the company or any of its officers could perform or exercise if the company were not under the administration of the Authority (s.28). In purporting to exercise its functions and powers under ss.9 and 10 of the Bell Act and in purporting to act as administrator of a WA Bell Company under ss.27 and 28, the Authority is performing or exercising or purporting to perform or exercise a function or power as an "officer" of the company (as defined in the Corporations Act) contrary to ss.471A(1) and 471A(2B) of the Corporations Act. The Authority has therefore committed and is continuing to commit a strict liability offence under the Corporations Act.

The WA Bell Companies ordered to be wound up before 23 June 1993

89. As has been explained, for those companies ordered to be wound up before 23 June 1993 the provisions of the Corporations Law corresponding with the provisions of the Corporations Act discussed above are applied as provisions of the Corporations Act by force of s.1408. Those provisions are inconsistent with the provisions of the Bell Act discussed above for the same reasons. As a result, the Bell Act is inconsistent with s.1408 of the Corporations Act.

Conclusion

90. The Bell Act cannot operate concurrently with the winding up provisions in Chapter 5 of the Corporations Act. Nor, in relation to those companies wound up before 23 June 1993 can it operate concurrently with s.1408 of the Corporations Act. The State appears to accept that there is no scope for the concurrent operation of the provisions given that it has sought to invoke s.5G of the Corporations Act. By reason of s.5G(2), s.5G does not apply to a provision of a law of a State that is capable of concurrent operation with the Corporations Act.

Issue 4: the operation of ss.5F and 5G of the Corporations Act

91. The defendant's invocation of ss.5F and 5G, even if successful, is no answer to the plaintiffs' ground of challenge based on the tax legislation inconsistency. Nor is it an answer to the plaintiffs' Judiciary Act inconsistency or Ch III invalidity arguments. At best, it can only be an answer to the ground of challenge based on inconsistency with the Corporations Act.

The geographical operation of the Corporations Act throughout Australia

92. Each provision of the Corporations Act applies in the whole of Australia.[109] On and from 15 July 2001, when the Corporations Act came into force, each of the WA Bell Companies became registered under the Corporations Act. Although registered in Western Australia, each company became incorporated throughout Australia[110] and had *"one indivisible existence as a body corporate throughout "this jurisdiction" without reference to any political or geographical subdivision of it"*.[111]

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[109] Corporations Act, ss.5(2) and 5(3).
[110] ASC [17.2] (SCB p.168).
[111] *HIH* at [90] (Barrett J).

Section 5F

93. Section 51(1) of the Bell Act invokes s.5F of the Corporations Act. The plaintiffs accept that the requirements of s.5F have been satisfied and that s.5F therefore applies. The plaintiffs and the defendant, however, join issue as to the consequences which flow from this. In particular, they differ as to the meaning of s.5F(2)(d) which provides that the provisions of the Corporations Act (other than s.5F and otherwise than to the specified extent) *"do not apply in the State ... in relation to the matter"*.

94. The effect of s.5F(2) is to modify the territorial operation of the Corporations Act. As Barrett J explained in *HIH v Building Insurers* (2003) 202 ALR 610 (***HIH***) at [88]:

> *The effect of ... s.5F(2) ... is to single out a particular "matter", being the "matter" identified by the state or territory enactment, and to cause the territorial operation of the Corporations Act to be modified and restricted so that such application as it would otherwise have had "in" the relevant state or territory "to" (or "in relation to") the particular "matter" is negated. As a corollary, such application as the Corporations Act has to or in relation to the particular matter that cannot be classified as application "in" the state or territory is not negated.*

95. The notion of a provision of the Corporations Act having application "in" a particular State is, as Barrett J explained in *HIH* at [89], meaningful in relation to those provisions dealing with matters having clear territorial attributes. An example of such a provision is a provision requiring a person carrying on business in a particular jurisdiction to hold a licence: in these circumstances s.5F could be used to permit a person to carry on business in that jurisdiction without a licence.[112] But the geographical application of other Corporations Act provisions "in" a State makes no sense in relation to activities which are not capable of having a territorial quality linked to a State. This is the case with provisions such as ss.555 and 556 directing the manner of application of the property of a company in the course of insolvent winding up and the order in which debts and claims are to be paid in such a winding up (*HIH* at [90]). This is particularly so given that the winding up operates throughout Australia. As a result, such application as the Corporations Act has to or in relation to a matter that cannot be classified as having an application "in" a State cannot be negated by s.5F(2) (*HIH* at [88]).

96. It follows that if provisions of the Corporations Act apply other than in a territorially defined or territorially ascertainable way, s.5F(2) has no application (*HIH* at [92]). Put another way, s.5F(2) can do no more than to cause a Corporations Act provision not to apply "in" a particular State "to" (or "in relation to") a particular matter. If the relevant provisions of the Corporations Act which are purportedly excluded or displaced do not have any distinct and separate territorial operation then s.5F has no role to play (*HIH* at [108]). The reasons for this are explained at [91]-[92] of Barrett J's judgment in *HIH*. Although the passage is a lengthy one it is necessary to set it out in full as it is directly applicable to the present case:

> *[91] The directions in ss.555, 556 and 562A of the Corporations Act as to the application of assets and payment of claims in the winding up of a company that that Act itself causes to be incorporated "in this jurisdiction" and therefore to be a body corporate cannot be regarded as applying "in" any particular state or territory "to" (or "in relation to") the "matter" of such application and payment. The directions apply "in" the whole of the area to which the Commonwealth Act's territorial operation extends. And they do*

[112] An example of this is provided by *Queensland Power Trading Corporation v Australian Securities and Investments Commission* (2005) 24 ACLC 120. See at [24]-[25].

so in a way that is geographically indiscriminate, so that, unless there is some clear provision to the contrary, a particular thing that must be done in obedience to them cannot be regarded as something to be done "in" one particular state or territory rather than any other and an act of statutory compliance or implementation does not in any sense belong to one state or territory rather than any other. The fact that a particular liquidator has his office in Sydney or Hobart, or that the bulk of the work in relation to a particular winding up is done in Adelaide or Perth does not mean that compliance with and implementation of ss.555, 556 and 562A take on some character identifiable with the particular state. Wherever relevant acts may be performed, effectuation of s.555, s.556 or s.562A occurs under and by virtue of the Corporations Act as it applies throughout the whole of its territorial reach.

[92] Sections 5F(2) and 5F(4) can therefore produce no meaningful result so far as operation of state and territory cut-through provisions in relation to due administration of ss.555, 556 and 562A of the Corporations Act is concerned. Even if s.5F(2) or (4) purported or appeared to produce the result that ss.555, 556 or 562A did not apply "in" a particular state or territory "to" (or "in relation to") some "matter" identified in the cut-through provision, the section would in reality lead nowhere because application and administration of ss.555, 556 and 562A are not things in relation to which any Corporations Act provision applies in a territorially defined or territorially ascertainable way.

97. Although these comments were directed to the operation of ss.555, 556 and 562A of the Corporations Act they apply equally to all the provisions discussed above in relation to **Issue 3** which do not have any distinct and separate territorial operation. For example, s.1408, the transitional provision which applies the provisions of Parts 5.4, 5.5 and 5.6 of the Corporations Law as provisions of the Corporations Act in relation to those companies ordered to be wound up before 23 June 1993, has no such territorial operation. It follows that s.5F cannot operate to give the Bell Act precedence over the winding up provisions of the Corporations Act or avoid the direct inconsistency between the two Acts.

98. In any event, even if s.5F had the effect of dis-applying the Corporations Act "in" Western Australia, this does not avoid inconsistency for the purposes of s.109 elsewhere in Australia. As already noted, each provision of the Corporations Act operates throughout Australia as do the relevant windings up. It follows, that even if s.5F operates to dis-apply the Corporations Act in Western Australia the Act will continue to operate in every other State and Territory. Section 5F cannot avoid the inconsistency between the Bell Act (which, by reason of s.6, operates extraterritorially) and the Corporations Act in those States and Territories. It follows that in every other place in Australia the windings up of the WA Bell Companies are continuing and Mr Woodings, as liquidator, has the powers given to him by the Corporations Act. Let us then assume that Mr Woodings, as liquidator, commences an action in, say, Victoria or New South Wales, to have the transfer of property of the WA Bell Companies effected by s.22 of the Bell Act set aside on the ground that s.468 of the Corporations Act rendered the transfer void. (The $1.7 billion held by Mr Woodings was held in accounts either maintained in NSW or governed by Victorian law).[113] The Corporations Act is, by force of covering clause 5 of the Constitution, binding on the courts in Victoria and NSW. Western Australian legislation invoking s.5F cannot avoid this result. At best, it can only dis-apply the Corporations Act in Western Australia, not

[113] ASC [32]-[35] and [39]-[40] (SCB pp.172-174 and pp.176-178).

Victoria or NSW. Accordingly, in those States there remains an inconsistency between the Corporations Act and the Bell Act. Section 109 of the Constitution will thus operate to invalidate the Bell Act to the extent of the inconsistency.

Section 5G

99. Section 52(2) of the Bell Act invokes s.5G of the Corporations Act. The plaintiffs accept that the requirements of s.5G(3) have been satisfied and that s.5G therefore applies. The plaintiffs and the defendant, however, join issue as to the consequences which flow from this. Three relevant consequences, those provided by ss.5G(4), 5G(8) and 5G(11), need to be considered.

The s.5G(4) consequence

100. Section 5G(4) relevantly provides that a provision of the Corporations Act does not prohibit the doing of an "act" or impose a liability (whether civil or criminal) for doing an "act" if a provision of a law of a State (the Bell Act) specifically authorises or requires the doing of the "act". Section 5G(4) only applies if a State law specifically authorises or requires the doing of an "act". The section then operates to accommodate the specific authority or requirement of the State law to the extent of removal of any prohibition or liability that would otherwise apply or arise under the Corporations Act.[114] In other words, s.5G(4) displaces the prohibition or liability that would arise from the Corporations Act to such an extent as to enable the authority conferred by State law to be exercised or the requirement imposed by State law to be met.

101. In order for s.5G(4) to apply, the defendant must point to:

101.1. a provision of the Corporations Act which prohibits the doing of an act or imposes a liability for doing an act; and

101.2. a provision of the Bell Act which specifically authorises or requires the doing of that act.

102. This test breaks down when applied to a provision such as s.22 of the Bell Act. That section transfers to and vests in the Authority the property of the WA Bell Companies. It does so by force of the section. Statutory vesting of this kind does not involve the doing of any "act". Rather, it involves the transmission of ownership in the sense described by Starke J in *Wolfson v Registrar-General (NSW)* (1934) 51 CLR 300 at 311-312:

> *Transmission in its strictest sense is the devolution of property upon some person by operation of law, unconnected with any direct act of the party to whom the property is transmitted – as, by death, bankruptcy, insolvency or marriage ... .*

103. Other examples can be given. For example, s.25(1) of the Bell Act specifically authorises a person to lodge a proof with the Authority in certain situations. Thus the second limb of the test for the application of s.5G(4) is satisfied. The first limb of that test, however, requires the defendant to identify a provision of the Corporations Act which prohibits the doing of that act. There is no such provision: no section of the Corporations Act prohibits a person lodging a proof with the Authority or imposes a liability on them for doing so. There is therefore no room for s.5G(4) to apply. Similarly, s.25(5) of the Bell Act prohibits a creditor of a WA Bell Company from lodging a proof of debt in the winding up of that company under the Corporations Act. Neither limb of the test is satisfied. The first limb has not been met because no prohibition or liability is imposed by a provision of the Corporations Act; the relevant prohibition is imposed by the Bell Act. The second limb is also not satisfied: s.25(5)

[114] *HIH* at [95]-[96] (Barrett J).

does not specifically authorise or require the doing of an act. Rather, it prohibits a person from doing specified acts.

104. If the defendant wishes to rely upon s.5G(4) then it must identify each provision of the Corporations Act which it says prohibits the doing of an act or imposes a liability for doing that act and then identify each provision of the Bell Act which specifically authorises or requires the doing of the act. To date it has not done so.

The s.5G(8) consequence

105. Section 5G(8) provides:

The provisions of Chapter 5 of this Act do not apply to a scheme of arrangement, receivership, winding up or other external administration of a company to the extent to which the scheme, receivership, winding up or administration is carried out in accordance with a provision of a law of a State or Territory.

106. Chapter 5 of the Corporations Act is headed "External Administration". It deals with a variety of different species of the genus of external administration,[115] namely "Arrangements and reconstructions" (Part 5.1), "Receivers and other controllers of property of corporations" (Part 5.2), "Administration of a company's affairs with a view to executing a deed of company arrangement" (Part 5.3A), "Winding up" (Parts 5.4, 5.4A, 5.4B, 5.4C, 5.5, 5.6 and 5.7) and other matters (Parts 5.7B, 5.8, 5.8A and 5.9). Those species of external administration have differing characteristics. Some involve the administration of a company with a view to ensuring its ongoing operation. Others involve a process of winding up the affairs of the company ultimately leading to the end of its life. Some, like a winding up, involve a judicial process conducted by an officer of the court. Others, like receivership, involve a non-judicial process. Some, like a winding up or administration, are conducted for the benefit of creditors generally. In contrast, a receivership is conducted for the benefit of the secured creditor. Some forms of external administration, like a winding up, involve the administration of a company's assets; others, like a receivership, do not.[116] Finally, some, like a court ordered winding up, involve the appointment of a liquidator by the court; others, like receivership or voluntary winding up, involve a private appointment (by the holder of the security in the case of receivership and the members or creditors of the company in the case of a voluntary winding up).[117]

107. The provisions of each Part of Chapter 5 are distinct and, subject to minor exceptions, do not apply to each other form of external administration. Thus, for example, the provisions of Part 5.3A do not apply to a winding up. Even in relation to windings up, the provisions of Parts 5.4 to 5.7 do not apply equally. For example, the voluntary winding up provisions of Part 5.5 do not apply to winding up in insolvency under Part 5.4B.

108. It can be seen that the reference in s.5G(8) to *"scheme of arrangement"* corresponds to the form of external administration dealt with by Part 5.1, the reference to *"receivership"* corresponds with Part 5.2 and the reference to *"winding up"* corresponds with Parts 5.4, 5.4A, 5.4B, 5.4C, 5.5, 5.6 and 5.7. It follows that the reference in s.5G(8) to *"other external administration of a company"* corresponds with the kind of external administration the subject of Part 5.3A. It is common ground that there was no scheme of arrangement, receivership or other external administration in

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[115] *Saraceni v Jones* (2012) 42 WAR 518 (***Saraceni***) at [24] and [52] (Martin CJ).
[116] *Bank of New South Wales v The Commissioner of Taxation* (1979) 145 CLR 438 at 443 (Barwick CJ) and 449-450 (Gibbs J, with whom Barwick CJ, Stephens, Mason, Aickin and Wilson JJ agreed).
[117] See *Saraceni* at [24]-[49] (Martin CJ) and [142]-[181] (McLure P with whom Newnes JA agreed).

respect of any WA Bell Company immediately prior to the transfer day; that is, the WA Bell Companies were only subject to a winding up.[118]

109. As a matter of construction, the use of the definite article *"the"* to describe "the scheme", "the receivership", "the winding up" and "the administration" in s.5G(8), in contrast to the earlier use of the word *"a"*, combined with the nexus required by the words *"to the extent to which"* and *"in accordance with"* means that the section is to be read as follows:

109.1. the scheme of arrangement provisions of Part 5.1 of Chapter 5 of the Corporations Act do not apply to a scheme of arrangement of the WA Bell Companies to the extent to which that scheme is carried out in accordance with a provision of the Bell Act;

109.2. the receivership provisions of Part 5.2 of Chapter 5 do not apply to a receivership of the WA Bell Companies to the extent to which the receivership of those companies is carried out in accordance with a provision of the Bell Act;

109.3. the winding up provisions of Parts 5.4, 5.4A, 5.4B, 5.4C and 5.5 to 5.7 of Chapter 5 do not apply to a winding up of the WA Bell Companies to the extent to which the winding up of those companies is carried out in accordance with a provision of the Bell Act; and

109.4. the administration provisions of Part 5.3A of Chapter 5 do not apply to an administration of the WA Bell Companies to the extent to which that administration is carried out in accordance with a provision of the Bell Act.

110. Put another way, s.5G(8) only dis-applies the relevant provisions of Chapter 5 to a winding up if the "replacement" State law itself provides for a winding up. Thus s.5G(8) would not dis-apply the winding up provisions of Chapter 5 as they apply to the WA Bell Companies if, for example, the State law does not provide for a winding up of those companies but, instead, provides for, say, a receivership of them.

111. Because, prior to the transfer day, the WA Bell Companies were only subject to a winding up and not a scheme of arrangement, receivership or other external administration, s.5G(8) will only operate to dis-apply the winding up provisions of Chapter 5 if it can be said that the Bell Act provides for a winding up of those companies. The plaintiffs say it does not. In addition, even if s.5G(8) applies, it will only dis-apply the relevant provisions of Chapter 5 of the Corporations Act. It does not dis-apply any other provision of the Corporations Act. In particular, it does not dis-apply the transitional provisions, such as s.1408, located in Chapter 10 of the Corporations Act. The significance of this will be addressed after explaining why the Bell Act does not provide for a winding up of the WA Bell Companies.

112. In *Re Crust 'n' Crumbs Bakers (Wholesale) Pty Ltd* [1992] 2 Qd R 76 McPherson SPJ asked himself the question "what is meant by 'winding up'"? He answered that question, at 78, in the following terms:

Winding up is a process that consists of collecting the assets, realising and reducing them to money, dealing with proofs of creditors by admitting or rejecting them, and distributing the net proceeds, after providing for costs and expenses, to the persons entitled. It is a process, comparable to an administration in equity, that begins or 'starts' with and order of the court. However it is not the court order itself that 'winds up' the company; the order does no more than direct that the company be wound up, which is then carried into effect by an officer of the court, the liquidator, who does the

[118] ASC [83] (SCB p.191).

things that I have identified in order to liquidate the company's assets and wind up its affairs.

113. That statement was approved by the Full Federal Court in *Joye v Beach Petroleum NL* (1996) 67 FCR 275 at 287 (Beumont and Lehane JJ) and by the Queensland Court of Appeal in *Mier v FN Management Pty Ltd* [2006] 1 Qd R 339. In the latter case, after referring to McPherson SPJ's description of the essential characteristics of the winding up process Keane JA, with whom McMurdo P and Douglas J agreed, said, at [16]:

It follows, in my view, that where a statute makes reference, without more, to the "winding up" of an entity, it is referring to the application of a procedure containing these essential characteristics.

114. Thus the collection of activities generally described by McPherson SPJ constitutes the "winding up" with which s.5G(8) is concerned.[119]

115. The concept of "winding up", which is synonymous with that of liquidation, has long been central to the law of companies and the essential characteristics of the winding-up process have remained the same since the passage of the Companies Act 1862 (UK).[120] Those essential characteristics (and the differences between those characteristics and that provided for by the Bell Act) are described below.

116. The making of a winding up order brings into operation a statutory scheme for dealing with the assets of the company that is ordered to be wound up.[121] As liquidator of the WA Bell Companies, Mr Woodings was, as an officer of the Court, responsible for administering that statutory scheme.[122] This reflects an essential characteristic of the winding up process, namely that it is a judicial process.[123] In a compulsory winding up by the court, (the kind of winding up applying to the WA Bell Companies) the liquidator's office stems from the appointment by the court. The winding up is conducted by the court, which for the purposes the liquidator is. The decisions the liquidator makes are in effect made under the authority of the court by the liquidator as an officer of the Court.[124] A winding up by the Court resulting in the process of collecting and distributing a company's assets, is thus an administration conducted by the Court,[125] under the independent supervision of the court. This essential characteristic of a winding up is reflected in the third sentence of the passage from McPherson SPJ's judgment in *Re Crust 'n' Crumbs Bakers* set out above.

117. The court's broad and long established supervisory jurisdiction[126] is not limited to the winding up process. It extends to all forms of external administration under Chapter 5 of the Corporations Act.[127] This *"reflects a legislative intention that the special interests and risks which arise when a corporation ... goes into any form of external administration justify curial direction, supervision and control"*.[128] In contrast, the

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[119] *HIH* at [97] (Barrett J).
[120] *Mier v FN Management Pty Ltd* [2006] 1 Qd R 339 (***Mier***) at [15] (Keane JA, with whom McMurdo P and Douglas J agreed).
[121] *Ayerst v C & K (Construction) Ltd* [1976] AC 167 (Lord Diplock) at 176 and *Mier* at [15] (Keane JA, with whom McMurdo P and Douglas J agreed).
[122] *Tanning Research* at 352 (Deane and Gaudron JJ), approved in *FCT v Linter Textiles Aust Ltd* (2005) 220 CLR 592 (***Linter***) at [5] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ) and [120] (McHugh J).
[123] Winding up is a judicial process: *Gould v Brown* (1998) 193 CLR 346 (***Gould v Brown***) at [31] and [35] (Brennan CJ and Toohey J) [68] (Gaudron J) and [328] (Kirby J).
[124] *Hall v Poolman* (2009) 75 NSWLR 99 (***Hall v Poolman***) at [62] (Spigelman CJ, Hodgson JA and Austin J) and *Commissioner for Corporate Affairs v Harvey* [1980] VR 669 at 696 (Marks J).
[125] *Ogilvie-Grant v East as liquidator of Gordon Grant and Grant Pty Ltd (in liq)* [1983] 2 Qd R 314 at 317 (McPherson J with whom Campbell CJ and Sheahan J agreed).
[126] *Hall v Poolman* at [53], [61]-[67] and [100] (Spigelman CJ, Hodgson JA and Austin J).
[127] *Saraceni* at [55] (Martin CJ).
[128] *Saraceni* at [55] (Martin CJ).

Bell Act excludes such a supervisory jurisdiction. Section 74 of that Act excludes all forms of appeal and review other than for jurisdictional error.

118. The purpose of the statutory liquidation scheme is to ensure that the assets of the company are applied in favour of those who have the real interest in the liquidation.[129] Thus the statutory scheme obliges the liquidator to pay creditors and distribute any surplus among contributories.[130] It follows, as the authors of a leading Australian text note, in a passage approved in *FCT v Linter Textiles Aust Ltd* (2005) 220 CLR 592 at [54] that:

> *[u]nsecured creditors and contributories have the benefit of the liquidator's administration of the company's estate. Their special interest is to some extent like that of objects of a discretionary trust; they have a right to have a fund of assets protected and properly administered. That interest although not an interest in specific assets, will be protected against third persons.*

119. Underpinning the right of the creditors to have the fund properly administered is the *pari passu* principle. It has been a common feature of winding up for more than a century that the statutory scheme is designed to secure that the insolvent company's assets are rateably distributed amongst its creditors.[131] The matter was colourfully put by Kirby J in *International Air Transport Association v Ansett Australia Holdings Limited* (2008) 234 CLR 151 at [179]:

> *All airlines, and IATA itself, when they reflect upon it, would fully understand Mr Mokal's metaphor that creditors of an insolvent company must not "be allowed to leave [their] assigned place in the queue and step ahead of others". Airlines have to deal all the time with passengers and shippers who try to jump the queue. Such conduct is not acceptable at airports or in airline offices. Nor, without clear and express legal authority, is it acceptable in courts of law or elsewhere, once the provisions of insolvency law have been engaged and apply. There was no such legal authority here. The individual creditors must therefore be told to return and take their proper place in the queue.*

120. The Bell Act represents an attempt by the State to jump the queue.

121. In determining the claims of creditors a liquidator has a duty to act honestly and impartially as between creditors.[132] He is obliged to discharge out of the assets in his hands those claims which are legally enforceable. He has no discretion to meet claims which are not legally enforceable.[133] In determining whether to admit or reject a proof of debt the liquidator acts in a quasi-judicial role. "Appeals" from a liquidator's rejection of a proof of debt are heard by the court *de novo*.[134] This is reflected in the first sentence of the passage from McPherson SPJ's judgment in *Re Crust 'n' Crumbs Bakers* set out above, which highlights that the process of winding up has as its end purpose payment *"to the persons entitled"*. This may be contrasted with the position under the Bell Act described above when dealing with **Issue 3**.

122. Long-standing Australian authority confirms that, despite the making of a winding up order, the company is not deprived of any ownership that it has in any assets, unless the court makes a vesting order under s.474(2) of the Corporations Act.[135] In contrast,

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[129] *Linter* at [130] (McHugh).
[130] *Linter* at [121] (McHugh J) and *Re Jay-O-Bees Pty Ltd (in liq)* (2004) 50 ACSR 565 (***Jay-O-Bees***) at [40] (Campbell J).
[131] *Attorney General of Ontario v Attorney General for the Dominion of Canada* [1894] AC 189 at 200 (Herschell LC, Watson, MacNaghten and Shand LLJ and Sir Richard Couch).
[132] *Jay-O-Bees* at [85].
[133] *Tanning Research* at 339 (Brennan and Dawson JJ).
[134] *Tanning Research* at 340-341 (Brennan and Dawson JJ).
[135] *Linter* at [55] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ) and [121] (McHugh J).

under the Bell Act the WA Bell Companies are deprived of the ownership of their property on and from the transfer day. There is another point to note in this context. One of the aims of the law of insolvency is the discharge of debts by proof and payment.[136] Accordingly, in a winding up the administration of a company's assets is for the purpose of discharging the liabilities of the company and distributing those assets rateably amongst the company's unsecured creditors.[137] In this way, a winding up of a company is a collective enforcement process of debts for the benefit of the general body of creditors which results in the *pari passu* distribution of the company's assets.[138] In contrast, while the Bell Act purportedly provides for the "administration" of the WA Bell Companies, the Authority does not administer the property of the WA Bell Companies for *pari passu* distribution amongst the creditors of those companies. Rather, the Authority administers its own property. It does so in a way in which those formerly entitled to that property, the creditors of the companies, may receive nothing and persons who are not creditors of a relevant company, and therefore not entitled to a distribution in a winding up of that company, may obtain payments the quantum of which is determined by the Authority, Minister and Governor in their absolute discretion. This is the result of both the pooling arrangements under the Bell Act and the operation of s.3 which defines "creditor" to include a beneficiary of any trust. It has been settled law for more than 100 years that it is the trustee (LDTC), not the beneficiary (ICWA), who is the relevant creditor in these circumstances.[139] Yet s.3 turns this established principle on its head. The Bell Act thus provides for payments to be made to persons who would not be entitled to receive such a payment in a winding up and those payments do not need to be made on a *pari passu* basis. Finally, for reasons that have been explained, s.25(1) has the effect of disenfranchising the creditors of TBGL and BGF and prevents them from making a claim on the Authority. The Bell Act thus has nothing to do with administering the assets of the WA Bell Companies for the benefit of their creditors. The position of BGF illustrates the point. The appointment of the Authority as "administrator" of BGF is an empty charade. All of BGF's property has been transferred to the Authority. BGF is thus an empty shell and there is nothing for the Authority to administer.

123. It follows from the above discussion of the essential characteristics of a "winding up" that the Bell Act does not provide for a winding up of the WA Bell Companies. This is fatal to the State's reliance on s.5G(8). This conclusion is reinforced by two further considerations. First, the objects of the Bell Act contradict the suggestion that that Act provides for a winding up of the WA Bell Companies. A number of those objects have nothing to do with any form of external administration, let alone a winding up. Rather, those objects include providing compensation to those who funded the Bell litigation (s.4(c)), distributing property of the companies generally in accordance with the commercial substance of the Bell litigation funding agreements (s.4(g)) and distributing funds in a way which avoids litigation (s.4(a)). The closest the Bell Act comes to identifying as one of its objects the winding up of the WA Bell Companies is s.4(b) which suggests that one object is to provide a form of external administration of the WA Bell Companies. It is not clear what species of the genus of external administration identified in Chapter 5 of the Corporations Act, the Bell Act is intended to be. To the extent to which it is intended to be a winding up, it is not a winding up of the WA Bell Companies for the reasons explained above. If, contrary to the plaintiffs'

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[136] *In re Lehman Bros International (Europe) (No 4)* [2016] Ch 50 at [16] (Lewinson LJ).

[137] *Federal Commissioner of Taxation v Official Liquidator of E.O. Farley Ltd* (1940) 63 CLR 278 at 301 (Dixon J) and *Bank of New South Wales v The Commissioner of Taxation* (1979) 145 CLR 438 at 449-450 (Gibbs J, with whom Stephen, Mason, Aickin and Wilson JJ agreed).

[138] *In re Lines Bros Ltd* [1983] Ch 1 at 20 (Brightman LJ) and *Wight v Eckhardt Marine GmbH* [2004] 1 AC 147 at [26]-[27] (Lord Hoffmann).

[139] *In re Dunderland Iron Ore Company Limited* [1909] 1 Ch 446 at 452 (Swinfen Eady J).

case, the Bell Act provides for a form of winding up, it is, at most a winding up of the Authority, not a winding up of the WA Bell Companies. This is because the assets that are distributed are the assets of the Authority. The claims that are made on those assets are claims made on the Authority, not the WA Bell Companies. The costs and expenses deducted from those assets prior to their distribution are the costs and expenses of the Authority, not the costs and expenses of the WA Bell Companies (s.18). Section 5G(8), which requires the State based winding up to be a winding up of "a company", therefore cannot apply.

124. Secondly, the Bell Act purports to apply to de-registered companies which are not presently being wound up. This is fatal, insofar as the State's reliance on s.5G(8) is concerned, for the reasons given by Ashley J said in *D.P.P v Tat Sang Loo and Anor* [2002] VSC 231 at [64] (emphasis added):

> *The applicability of sub-s. (8) in the circumstances of this case seems to depend upon whether the operation of a pecuniary penalty order, in conjunction with a section 70 declaration and a s. 72(2) charge, this leading to a company being deprived of its property, could be regarded as a scheme of arrangement, receivership, winding up or other external administration of a company carried on in accordance with the law of a State. Whilst a pecuniary penalty order, a s. 70 declaration and a s. 72(2) charge may impact upon a company which is being wound up – the situation in the present case – I do not consider that the pertinent sections of the Act meet the description of a State law set out in s. 5G(8). The problem of so characterising the State provisions is made the more apparent by the fact that they may also impact upon a company which is not being wound up, or subject to any of the other regimes set out in s. 5G(8).*

125. So too in this case. Finally, even if all of the above contentions are wrong, so that s.5G(8) applies, all that s.5G(8) does is dis-apply Chapter 5 of the Corporations Act. It does not dis-apply other provisions of the Corporations Act, such as s.1408 (which is in Chapter 10), s.601CL(15)(c) (which is in Chapter 5B) or s.601AD (which is in Chapter 5A). There is a direct collision between those provisions and the Bell Act for the reasons explained in addressing **Issue 3**. Section 5G, even if it applies, does not avoid that direct collision.

The s.5G(11) consequence

126. Section 5G(11) provides:

> *A provision of the Corporations legislation does not operate in a State or Territory to the extent necessary to ensure that no inconsistency arises between:*
>
> *(a) the provision of the Corporations legislation; and*
>
> *(b) a provision of a law of the State or Territory that would, but for this subsection, be inconsistent with the provision of the Corporations legislation.*

127. The use of the word "in" in s.5G(11) means that Barrett J's territorial analysis in *HIH* concerning s.5F(2) (see paragraphs 94 to 97 above) applies equally to s.5G(11).[140] All that s.5G(11) can do is to cause a Corporations Act provision not to apply *in* Western Australia. If, however, the relevant provisions of the Corporations Act which are purportedly excluded or displaced do not have any distinct and separate territorial operation, s.5G(11) can have no role to play.

Issues 5 and 6: Judiciary Act inconsistency and Chapter III invalidity

128. **Issues 5** and **6** are inter-related. The plaintiffs advance three propositions in support of these grounds of challenge:

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[140] *HIH* at [94] (Barrett J).

128.1. **Proposition 1**: the Supreme Court of Western Australia was exercising federal jurisdiction and the judicial power of the Commonwealth in COR 146 of 2014 and COR 179 of 2014.[141]

128.2. **Proposition 2**: the Bell Act is inconsistent with s.39(2) of the Judiciary Act and is therefore invalid, to the extent of that inconsistency, by reason of s.109 of the Constitution; and

128.3. **Proposition 3**: the Bell Act is repugnant to Ch III of the Constitution and is therefore invalid.

Proposition 1: the Supreme Court was exercising federal jurisdiction

129. Federal jurisdiction is the authority to adjudicate derived from the Commonwealth Constitution and laws.[142] The Supreme Court of Western Australia in COR 146 and 179 of 2014 was exercising federal jurisdiction.[143] Federal jurisdiction was attracted in COR 146 of 2014 because the Commonwealth was a defendant[144] and the justiciable controversy the subject of the proceeding arose under a law of the Parliament: the rights of the parties in the action owed their existence to federal law or depended on federal law for their enforcement, namely s.1408 of the Corporations Act.[145] Federal jurisdiction was attracted in COR 179 of 2014 because the matter arose under a law of the Commonwealth, namely ss.600C and 1321 of the Corporations Act.[146] Both proceedings satisfied the "subject matter" and "justiciability" requirements[147] for the exercise of federal jurisdiction.

130. The exercise of federal jurisdiction by the Supreme Court has five consequences. First, the Supreme Court was exercising the judicial power of the Commonwealth[148] and thus acted as the judicial agent of the Commonwealth.[149] Secondly, the jurisdiction exercised by the Supreme Court was wholly federal; there was no room for the exercise of any concurrent State jurisdiction.[150] Thirdly, the federal jurisdiction exercised by the Supreme Court was national in nature and was exercised Australia wide and not simply "in" Western Australia.[151] Fourthly, the Supreme Court was, subject only to limited

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[141] Whether the Supreme Court was also exercising federal jurisdiction in COR 208 of 2014 depends on the outcome of the issue the subject of BGNV's removal application in S247 of 2014: if the jurisdiction of this Court is exclusive of the jurisdiction of the Supreme Court in respect of the justiciable controversy the subject of COR 208 of 2014 then the Supreme Court was not exercising federal jurisdiction (it had no jurisdiction). If, however, the jurisdiction of this Court was only exclusive of the Supreme Court in respect of the claims made by ICWA against the Commonwealth then the Supreme Court was exercising federal jurisdiction, the claims made by ICWA against the other defendants in that action arising under a law of the Commonwealth.

[142] *CGU Insurance Limited v Blakeley* [2016] HCA 2 at [24] (French CJ, Kiefel, Bell and Keane JJ).

[143] ASC [59] (SCB p.183).

[144] ASC [43] (SCB p. 179) and *Macleod* at [6], [16] and [20] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

[145] *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 at [32] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ), *L.N.C. Industries Ltd v B.M.W (Australia) Ltd* (1983) 151 CLR 575 at 581-582 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ) and *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1980) 145 CLR 457 at 476 (Stephen, Mason, Aickin and Wilson JJ).

[146] ASC [48] (SCB p.180).

[147] *CGU Insurance Limited v Blakeley* [2016] HCA 2 at [26]-[27] (French CJ, Kiefel, Bell and Keane JJ).

[148] Constitution, s.71.

[149] *Lorenzo v Carey* (1921) 29 CLR 243 at 252 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ) and *Le Mesurier v Connor* (1929) 42 CLR 481 at 516 (Isaacs J).

[150] *Ffrost v Stevenson* (1937) 58 CLR 528 at 573 (Dixon J), *Felton v Mulligan* (1971) 124 CLR 367 at 373 (Barwick CJ), 393 (Windeyer J), 411-413 (Walsh J), *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1980) 145 CLR 457 at 471-472 (Gibbs J) and 477, 479 and 481-482 (Stephen, Mason, Aickin and Wilson JJ), *ASIC v Edensor Nominees* (2001) 204 CLR 559 (***Edensor Nominees***) at [7] (Gleeson CJ, Gaudron and Gummow JJ) and *MZXOT v Minister for Immigration* (2008) 233 CLR 601 (***MZXOT***) at [23] (Gleeson CJ, Gummow and Hayne JJ).

[151] *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 at [8] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ), *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at [53] and 540, [88] (Gleeson CJ,

and well recognised exceptions which do not apply in the present case, bound to exercise the federal jurisdiction invested in it.[152] Fifthly, the federal jurisdiction invested in the Supreme Court was limited to deciding "matters" within the meaning of Ch III.[153] Central to the notion of a "matter" is the determination of rights, duties, liabilities and obligations in a legal proceeding.[154] A "matter" cannot exist in the abstract. It only has meaning in the context of a legal proceeding. Thus a legally enforceable remedy is as essential to the existence of a matter as the right, duty or liability which gives rise to the remedy. Without the right to bring a curial proceeding there can be no matter; equally, if there is no legal remedy, there can be no matter.[155] Each of COR 146 and 179 of 2014 was, prior to the Bell Act, a "matter".

Proposition 2: the Bell Act is inconsistent with s39(2) of the Judiciary Act

131. Federal jurisdiction, including that invested in State courts, is protected by s.109 of the Constitution.[156] That is why a State Parliament has no power to pass laws with respect to the exercise of federal jurisdiction.[157] In particular, the law of a State cannot withdraw or limit the exercise of federal jurisdiction.[158]

132. Section 39(2) of the Judiciary Act, a law made under s.77(iii) of the Constitution, invests the several courts of the States with federal jurisdiction in all matters in which this Court has original jurisdiction or in which original jurisdiction can be conferred upon it, subject to some presently irrelevant exceptions, conditions and restrictions. The federal jurisdiction invested in a State court by s.39(2) is the same jurisdiction vested in the High Court by ss.75 and 76 of the Constitution. The investment of federal jurisdiction effected by s.39(2) occurs whether or not the States wish their courts to exercise federal jurisdiction.[159] That is why it is has been said that the courts of one polity (the States) can be *"conscripted"* by the other polity (the Commonwealth) to exercise that other polity's judicial power without any need for the consent of the States.[160] By reason of s.77(iii) of the Constitution and s.39(2) of the Judiciary Act, the States are subjected to the exercise of the judicial power thus invested.[161]

133. A State law cannot diminish the federal jurisdiction conferred on a court of a State by s.39(2) of the Judiciary Act: by s 109 of the Constitution, the law of the Commonwealth prevails.[162] In particular, s.109 will invalidate any State law to the extent that the State law directly or indirectly precludes, overrides, excludes or renders

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Gaudron, McHugh, Gummow and Hayne JJ) and *Leeth v The Commonwealth* (1992) 174 CLR 455 at 498 (Gaudron J)

[152] *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 236 (Latham CJ), *The Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49 at 62 (Mason J) and 74 (Brennan J), *Gould v Brown* at [26] (Brennan CJ and Toohey J), *ASIC v Edensor Nominees* (2001) 204 CLR 559 at [52] (Gleeson CJ, Gaudron and Gummow J, with whom Hayne and Callinan JJ agreed on this point) and [148] (McHugh J) and *Re Macks; ex parte Saint* (2000) 204 CLR 158 (***Re Macks***) at [53] (Gaudron J).

[153] *Abebe v The Commonwealth* (1999) 197 CLR 510 (***Abebe***) at [24] (Gleeson CJ and McHugh J).

[154] *Abebe* at [24]-[25] (Gleeson CJ and McHugh J).

[155] *Abebe* at [31]-[32] (Gleeson CJ and McHugh J).

[156] *Re Residential Tenancies Tribunal (NSW); ex parte Defence Housing Authority* (1997) 190 CLR 410 at 463 (Gummow J, footnote 184).

[157] *Pioneer Park Pty ltd (in liq) & Ors v Australia and New Zealand Banking Group Limited* (2007) 25 ACLC 1707 at [37] (Basten JA with whom Tobias and McColl JJA agreed).

[158] *Edensor Nominees* at [59] (Gleeson CJ, Gaudron and Gummow JJ).

[159] *Gould v Brown* at [108] (McHugh J).

[160] See, for example, *Gould v Brown* at [26] (Brennan CJ and Toohey J), [123] (McHugh J), [186] and [201] (Gummow J).

[161] *British American Tobacco v WA* (2003) 217 CLR 30 at [50] (McHugh, Gummow and Hayne JJ).

[162] *Patrick Stevedores v MUA* (1998) 195 CLR 1 at [41] (Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ), *APLA* at [232] (Gummow J) and *MZXOT* at [24] (Gleeson CJ, Gummow and Hayne JJ) and [180] (Heydon, Crennan and Kiefel JJ).

ineffective the exercise of federal jurisdiction.[163] It follows that a State Parliament has no power to stultify federal jurisdiction or withdraw from courts exercising federal jurisdiction the effective authority to quell controversies in respect of Ch III "matters".[164] Put simply, it is beyond the power of a State Parliament to withdraw any "matter" from the grant of federal jurisdiction or to abrogate, negate, qualify or diminish that grant. Nor can it denude that jurisdiction of effective content.

134. The Bell Act alters, impairs and detracts from the exercise of federal jurisdiction invested in the Supreme Court in a number of respects. Section 25(5), which is backed by criminal sanctions in s.58(1), prevents any further steps being taken in COR 146 of 2014. It thus prevents a person from invoking the federal jurisdiction conferred on the Supreme Court. In addition, s.73 stays that action and prevents any person from continuing the proceeding, except with the leave of the Court. Finally, s.29 prevents Mr Woodings as liquidator of TBGL and BGF, from performing or exercising a function or power as liquidator of those companies without the Authority's prior written approval. Mr Woodings is the plaintiff in COR 146 of 2014 in his capacity as liquidator of TBGL and BGF. The Bell Act thus prevents him from proceeding with the action.

135. The Bell Act alters, impairs and detracts from the exercise of federal jurisdiction by the Supreme Court in another respect. It does so, in the case of COR 146 and 179 of 2014, by destroying their character as "matters" and, in the case of COR 208 of 2014, rendering that proceeding inutile. Section 22 of the Bell Act transfers all of TBGL and BGF's money to the Authority. Part 6 of that Act purportedly dis-applies the provisions of the Corporations Act, including s.1408 which applies s.564 of the Corporations Law. Section 26 voids the agreements the subject of COR 146 of 2014. It follows that no relief can now be granted in COR 146 of 2014. No monetary orders can be made in favour of BGNV (and others) in that action because the legislative basis for the making of those orders (s.564) no longer exists. And even if it was possible to make such an order there is no longer any property available in the windings up of TBGL and BGF to satisfy such an order. The absence of the ability of the Court to grant a legally enforceable remedy means that the Bell Act has deprived the subject matter for determination in COR 146 of 2014 of its character and status as a "matter" and denuded the federal jurisdiction of the Court of effective content. Put another way: before the Bell Act there was property in the winding up of each of TBGL and BGF that was susceptible to a s.564 order in the exercise of the judicial power of the Commonwealth.[165] After the Bell Act there was not. The destruction of COR 146 of 2014 inevitably makes COR 208 of 2014 redundant given that that action is ancillary to COR 146 of 2014.[166] COR 179 of 2014 has also ceased to be a "matter" (no relief can be granted because the statutory provisions relied upon no longer exist). This is so even though the Court remains reserved on two interlocutory applications in that action.[167]

136. As a result of the above, in both a legal and practical sense, the Bell Act has stultified, prevented and rendered ineffective the exercise by the Supreme Court of the judicial power of the Commonwealth invested in it by s.39(2) of the Judiciary Act. By

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[163] See *P v P* (1994) 181 CLR 583 at 601 (Mason CJ, Deane, Toohey and Gaudron JJ) and *Re Macks* at [213] (Gummow J). Although the passages in these judgments were directed to an inconsistency between a State law and a Commonwealth law conferring jurisdiction on a federal court they are equally applicable to an inconsistency between a State law and a Commonwealth law investing federal jurisdiction in a State court. See also *K-Generation v Liquor Licensing Court* (2009) 237 CLR 501 at [242] (Kirby J) and *APLA* at [331] (Kirby J).

[164] *Edensor Nominees* at [68] (Gleeson CJ, Gaudron and Gummow J) and [145] (McHugh J) and *British American Tobacco v WA* (2003) 217 CLR 30 at [113]-[114] (Kirby J).

[165] ASC [41] (SCB pp.178-179).

[166] Annexure 9 to the ASC, (SCB, p.336).

[167] ASC [50] (SCB p.180).

precluding the exercise of federal jurisdiction, alternatively by imposing conditions and limitations on its exercise (the requirement to obtain leave to proceed under s.73), the Bell Act alters, impairs and detracts from the operation of s.39(2). In short, the Supreme Court, which is obliged to exercise the federal jurisdiction invested in it, has been prevented from doing so. By curtailing the exercise of federal jurisdiction in this way the Bell Act is inconsistent with s.39(2) of the Judiciary Act and invalid, to the extent of the inconsistency, by reason of s.109 of the Constitution.

Proposition 3: the Bell Act is repugnant to Ch III

137. In support of proposition 3, the plaintiffs advance two independent contentions. The first is that by reason of Ch III a State Parliament has no power to contract or interfere with the exercise of federal jurisdiction. The second is that the Bell Act is an impermissible interference with the exercise of the judicial power of the Commonwealth and is thereby repugnant to Ch III. Before developing these contentions, it is convenient to note four uncontentious propositions about Ch III. First, it is settled and fundamental constitutional law that Ch III is an exhaustive statement of the manner in which the judicial power of the Commonwealth is or may be vested.[168] Secondly, it is equally well settled that Ch III contains negative implications that impose limitations on the power of State legislatures. Chapter III is binding on the States and no State legislature may deny the operation of any of its provisions or the implied limitations on State legislative power which flow from it.[169] Thirdly, federal jurisdiction is protected by Ch III.[170] Fourthly, in construing Ch III the concern of the Court is with substance, not form,[171] otherwise fundamental constitutional limitations could be flouted by a mere drafting device.

The plaintiffs' first contention

138. The power of the Commonwealth Parliament to confer, define and invest federal jurisdiction under s.77 of the Constitution is the only source of power to vest federal jurisdiction. That power is exclusive of the legislatures of the States; only the federal Parliament may define the federal jurisdiction of a State court. [172] As the power to invest State courts with federal jurisdiction comes exclusively from Ch III, State legislatures may not expand, contract or otherwise impair that jurisdiction.[173] This has another consequence: as the federal jurisdiction invested in a State court is limited to deciding "matters" within the meaning of Ch III, it follows that a State Parliament has no power to withdraw a "matter" from a Court exercising federal jurisdiction or denude that matter of effective content.

139. Immediately before the Bell Act, COR 146 of 2014 comprised a Ch III "matter". But for the Bell Act the Supreme Court would, in the exercise of the authority to adjudicate derived from Ch III, have exercised the judicial power of the Commonwealth in resolving the justiciable controversy the subject of that proceeding. It would quell that controversy by acting openly, impartially and in accordance with fair and proper procedures, ascertaining the facts and the law, applying the law to those facts and delivering reasons for judgment and making orders that could be appealed to this Court

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[168] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ) and *Gould v Brown* at [15] (Brennan CJ and Toohey J), [113] and [116] (McHugh J), [178] and [206] (Gummow J) and [276] (Kirby J).

[169] *APLA* at [227] (Gummow J), *MZXOT* at [19]-[20] and *Gould v Brown* at [1124] (McHugh J)..

[170] *Re Residential Tenancies Tribunal (NSW); ex parte Defence Housing Authority* (1997) 190 CLR 410 at 463, footnote 184 (Gummow J).

[171] *Nicholas v The Queen* (1998) 193 CLR 173 at [148] (Gummow J) and [206] (Kirby J).

[172] *APLA* at [229] (Gummow J) and *MZXOT* at [20] (Gleeson CJ, Gummow and Hayne JJ) and *Edensor Nominees* at [145] (McHugh J).

[173] *Edensor Nominees* at [59] (Gleeson CJ, Gaudron and Gummow JJ) and *MZXOT* at [20] (Gleeson CJ, Gummow and Hayne JJ).

under s.73 of the Constitution.[174] After the introduction of the Bell Act, however, that Ch III "matter" no longer exists for the reasons explained in paragraphs 135 and 136 above. The effect of the legislation has therefore been to withdraw the "matter" from the Supreme Court and prevent the Court from exercising the judicial power of the Commonwealth invested in the Court under Ch III to resolve the controversy.

140. The States cannot enact legislation that attempts to alter or interfere with the working of the federal judicial system set up by Ch III.[175] 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".*[176] The implications derived from Ch III *"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".*[177]

141. It is plain that the Bell Act was directed to rendering nugatory the "matter" the subject for determination in COR 146 of 2014 and prevent the Court from exercising the judicial power of the Commonwealth in that matter. That is why, for example, s.26 voided the agreements essential to the determination of that matter and s.22 transferred the property the subject of the litigation to the Authority. Indeed, one of the objects of the Bell Act was to avoid further litigation (s.4(h)). The litigation that the legislation sought to avoid was that pending in the Supreme Court in the exercise of federal jurisdiction. However, a State simply has no power to legislate to reduce or interfere with litigation in federal jurisdiction.[178] By doing so, the Bell Act subverts the efficacy of the integrated legal system established by Ch III and stultifies the exercise of the judicial power of the Commonwealth. While it may be open to a State Parliament to avoid further litigation conducted in the exercise of State jurisdiction by bringing that litigation to an end, it is not open to a State Parliament to legislatively truncate federal jurisdiction conferred on State courts. In doing so the Bell Act detracts from the effective operation of Ch III and is repugnant to it. The legislation is an impermissible attempt to impede effective access to State courts exercising federal jurisdiction. It thereby impermissibly impairs the capacity of a court exercising federal jurisdiction to hear and determine "matters" that Ch III authorises and for which the Parliament has legislated in the expectation that those "matters" will be determined in federal jurisdiction.[179] This attempt, to adopt the words of Kirby J in *APLA Ltd v Legal Services Cmmr (NSW)* (2005) 224 CLR 322 at [272], *"cannot stand with the text, structure and implications of the Constitution".*

The plaintiffs' second contention

142. A law that purports to direct the manner in which judicial power should be exercised is invalid.[180] Whether legislation directed to the course of particular proceedings impermissibly usurps or interferes with judicial power is a concept which is not susceptible of precise and comprehensive definition.[181] Ultimately, the Court is engaged in an evaluative line drawing exercise. However, there is no hard and fast line marking off those statutes which are beyond power because they impermissibly

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[174] See *Wainohu v New South Wales* (2011) 243 CLR 181 at [44], [56] and [58] (French CJ and Kiefel J) and [92]-[94] (Gummow, Hayne, Crennan and Bell JJ).
[175] *APLA* at [78] (McHugh J).
[176] *APLA* at [82] (McHugh J).
[177] *APLA* at [73] (McHugh J). While McHugh J dissented in the result in that case, his Honour's statement of the relevant principles was, however, orthodox.
[178] *APLA* at [87] (McHugh J).
[179] *APLA* at [87] (McHugh J).
[180] *Nicholas v The Queen* (1998) 193 CLR 173 at [20] (Brennan CJ).
[181] *R v Humby; ex parte Rooney* (1973) 129 CLR 231 at 249-250 (Mason J).

interfere with the exercise of judicial power from those which are not.[182] Rather, whether legislation impermissibly interferes with the exercise of judicial power in federal jurisdiction depends on *how* the impugned legislation affects the litigation.[183] That assessment involves a balancing exercise to be undertaken as a matter of substance.[184]

143. How then does the Bell Act affect the pending litigation in the Supreme Court? The Bell Act directly affects and interferes with the judicial process itself. The legislation is specifically targeted at and directed to the pending litigation in the Supreme Court to fit like a glove around it. The legislation has been designed with three ends in mind. First, to prevent the Supreme Court from exercising the judicial power of the Commonwealth. Secondly, to "shift" determination of the "matters" the subject of COR 146 and 208 of 2014 from an exercise of judicial power by the Supreme Court (with all that entails) to the arbitrary, unreviewable decision of the executive. Thirdly, to overcome problems which confronted the State in the pending litigation. For example, a significant problem that confronted the State in the pending litigation was BGNV's argument that LDTC (the trustee of the TBGL and BGF Trust Deeds), and not ICWA (the beneficiary of those trusts), was the relevant creditor of BGF. As a result, no s.564 order could be made in favour of ICWA.[185] This problem is overcome by the Bell Act: s.3 defines "creditor" to include "a beneficiary of any trust" and s.40(1) permits the Authority to make a recommendation in favour of "a creditor of any kind". Section 40(1) was expressly included to defeat BGNV's argument.[186] Another problem (whether a s.564 award is capped or uncapped)[187] is resolved by ss. 40(1), 40(6)(a), 40(6)(b), 41(2) and 42(2) in favour of an uncapped payment, the position advanced by the State in COR 146 of 2014. A third problem (the proceeds of any s.564 order paid to LDTC or ICWA are caught by the turnover trust provisions of the TBGL and BGF Trust Deeds)[188] is sought to be overcome by ss.40(2) and 42(3)(b) characterising any payment with respect to funding as "compensation" for providing that funding. In this way the Bell Act resolves the very issues arising in the pending litigation in favour of the State. The high particularity of the legislation in seeking to address and resolve in favour of the State the issues confronting it in the pending litigation is a very relevant consideration in judging whether the law amounts to an invalid legislative intrusion into the judicial domain.[189] In essence the legislation amounts to a legislative adjudication in favor of one of the parties to the litigation in substitution of the rights and questions of law which were in issue in the pending litigation and which would have been determined by the Supreme Court in the exercise of the judicial power of the Commonwealth. The Bell Act thus resolves conclusively (in favour of the State) the issues arising in the pending litigation, even though the power to resolve conclusively and to dispose of litigation is an exercise of judicial power.[190]

144. The Bell Act also directs the Supreme Court as to the manner and outcome of the exercise of its jurisdiction. It does so because, as the State accepts,[191] s.73 imposes a statutory stay of COR 146 of 2014. Chapter III authorises the bringing before courts exercising federal jurisdiction of controversies about existing legal rights to be quelled

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[182] *AEU v Fair Work Australia* (2012) 246 CLR 117 (***AEU***) at [76]-[77] (Gummow, Hayne and Bell JJ).
[183] *AEU* at [85].
[184] *AEU* at [87] and [90].
[185] ASC [45.1]. [45.2] and [45.5] (SCB p.179).
[186] Annexure 14 to the ASC, (SCB, p.509, par. 2.12).
[187] ASC [45.6] (SCB p.180).
[188] Annexures 1 and 2 to the ASC (SCB, pp.212-234).
[189] *Nicholas v The Queen* (1998) 193 CLR 173 at [205] (Kirby J).
[190] *Nicholas v The Queen* (1998) 193 CLR 173 at [51] (Toohey J).
[191] Annexure 10 to the ASC, (SCB, pp.341-343).

in the exercise of the judicial power of the Commonwealth.[192] Rather than quell that controversy in the exercise of federal jurisdiction s.73, together with s.25(5) and s.58(1), effectively direct the Court not to proceed in the matter. The Bell Act thus directs the Court as the outcome of the exercise of its jurisdiction.

145. That s.73 confers a discretion on the Court to grant or withhold leave to proceed does not alter this conclusion. That discretion is not a "real" discretion. There is no possibility of the Court exercising its discretion in favour of an applicant for leave to proceed given: (a) the plaintiffs in COR 146 of 2014 are prohibited from proceeding with the action by ss.25(5) and 29; (b) no relief can be granted in the action because s.564 has ceased to apply; and (c) there are no longer any funds in the windings up of TBGL and BGF from which such an order could be satisfied . There is thus only one available outcome to such an application, namely dismissal of the application. This Court will not be blind to the practical operation of s.73, the effect of which must be assessed as a matter of substance and reality. The outcome of any application for leave is effectively pre-determined as a result of the operation of the Bell Act. Thus the section effectively imposes a legislated impossibility by which an applicant for leave to proceed is doomed to fail. Such an application would thus be a meaningless charade. As a result, the discretion conferred by s.73 is devoid of content and illusory. Section 73 is a device to attempt to cloak the work of the political branches in the neutral colours of judicial action.[193] As a practical matter it amounts to an impermissible direction to the Court not to grant leave to proceed. Such a direction is repugnant to Ch III.

Issue 7: Severance

146. This is not a case where less than the whole of the State Act is invalid for inconsistency. There is thus no occasion for the application of the principles of severance discussed, for example, in *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at [246]-[252] (Gummow, Crennan and Bell JJ) and [389]-[393] (Hayne and Kieffel JJ). The operation of, for example, s.22 of the Bell Act is an integral part of a package which was intended to operate as a whole. Each of the provisions of the Act are so bound up with s.22 that the former cannot stand without the continued operation of the latter. Put another way, the operation of all the other provisions of the Act assume the valid operation of s.22. Those other provisions necessarily fall as a result of the invalidity of s.22 and cannot be severed. As Dixon J said in *Wenn v Attorney-General* (Vic) (1948) 77 CLR 84 at 122 *"every part of a completely interdependent and inseperable legislative provision must fall within 'the extent of the inconsistency'"* in s.109. The Bell Act was intended to operate fully and completely according to its terms or not at all. The Act thus stands or falls in its entirety

VII. APPLICABLE PROVISIONS

147. The applicable legislative provisions are set out in the plaintiffs' list of authorities.

VIII. ORDERS SOUGHT

148. The questions stated for the opinion of the Full Court should be answered as follows:

Question 1 Do the plaintiffs have standing to seek relief in respect of the alleged invalidity of Parts 3 and 4 of the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds Act 2015* (WA) on the grounds alleged in paragraph 56 of the statement of claim?

Answer: **Yes.**

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[192] *APLA* at [222] (Gummow J).
[193] *Mistretta v United States* (1989) 488 US 361 at 407.

Question 1A Does any justiciable controversy arise in respect of the alleged invalidity of Parts 3 and 4 of the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds Act 2015* (WA) on the grounds alleged in paragraphs 56.1 and 56.2 of the statement of claim insofar as the grounds rely upon former s.215 of the *Income Tax Assessment Act 1936* (Cth) (and alternatively s.260-45 of Schedule 1 to the *Taxation Administration Act 1953* (Cth)?

Answer: **Yes.**

Question 3 Is the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds Act 2015* (WA) invalid in its entirety?

Answer: **Yes.**

Question 4 If the answer to question 2 is "no" are any of the provisions of Parts 3 and 4 and any of ss.48, 54, 55, 56, 58 and 69 to 74 of the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds Act 2015* (WA) invalid (and, if so, to what extent)?

Answer: **Unnecessary to answer.**

Question 5 If the answer to question 3 is yes is the invalid provision severable from the rest of the Act (and, if so, to what extent)?

Answer: **Unnecessary to answer.**

Question 6: Who should pay the costs of the special case?

Answer: **The defendant.**

149. The plaintiffs seek the following orders:

1. A declaration that the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Act 2015* (WA) is invalid.
2. Alternatively, a declaration that each of the provisions of Parts 3 and 4 and each of ss.48, 54, 55, 56, 58 and 69 to 74 of the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Act 2015* (WA) is invalid.
3. The defendant pay the plaintiffs' costs.

IX. ESTIMATE OF ORAL ARGUMENT

150. The plaintiffs will require 4 hours to present their oral argument.

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