IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY **No. P4 of 2016**

BETWEEN:

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

10 **ANTONY LESLIE JOHN WOODINGS**
Second Plaintiff

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

AND

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STATE OF WESTERN AUSTRALIA
First Defendant

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

30 **ANNOTATED WRITTEN SUBMISSIONS OF THE FIRST DEFENDANT**

PART I: SUITABILITY FOR PUBLICATION

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

PART II: ISSUES

2. Is the *Bell Act* in its entirety, or are parts of it, inconsistent with the scheme of s.215 of the *Income Tax Assessment Act 1936* (Cth) or s.260-45 in Schedule 1 to

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the *Taxation Administration Act 1953* (Cth)[1] in that the *Bell Act* alters, impairs or detracts from such scheme? If so, can provisions of the *Bell Act* be read down?

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

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

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

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

7. Other than in respect of s.254(1)(d) of the *ITAA 1936* (Cth), does Maranoa have standing, and is there a justiciable controversy, to bring a challenge in respect of the alleged inconsistencies between the *Bell Act* and the Commonwealth taxation legislation?

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

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

PART IV: MATERIAL FACTS

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

PART V: RELEVANT CONSTITUTIONAL PROVISIONS AND LEGISLATION

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

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[1] Former s.215 of the *ITAA 1936* has been replaced by s.260-45 in Pt.4-15, Sch.1 to the *Taxation Administration Act 1953* (Cth). Part 4-15 was inserted into the *TAA 1953* by item 1, Sch.2 of the *A New Tax System (Tax Administration) Act 1999* (Cth) with effect from 22 December 1999. Former s.215 of the *ITAA 1936* continues to apply to the liquidator of a company that was being wound up if it applied to the liquidator "just before" its repeal in 2006: see item 12, Pt.3, Sch.6 to the *Tax Laws Amendment (Repeal of Inoperative Provisions) Act 2006* (Cth). As noted by Wigney J in *Bell Group Limited (in liq) v Deputy Commissioner of Taxation* [2015] FCA 1056 at [24], s.215 of the *ITAA 1936* and s.260-45 of the *TAA 1953* operate in relevantly the same way. The Plaintiffs in each matter accept that former s.215 continues to apply in respect of all of the WA Bell Companies except for Albany Broadcasters Ltd, in respect of which s.260-45 applies; and that nothing turns on this distinction — see Maranoa's Submissions at [107]–[108].

PART VI: SUBMISSIONS

11. Maranoa puts the following propositions.

12. *First*, that the *Bell Act* in its entirety is, or parts of it are, inconsistent with the scheme of s.215 of the *Income Tax Assessment Act 1936* (Cth) or s.260-45 in Schedule 1 to the *Taxation Administration Act 1953* (Cth) in that the *Bell Act* alters, impairs or detracts from such scheme and so is invalid by reason of s.109 of the Commonwealth *Constitution*[2].

13. *Second*, that provisions of the *Bell Act* alter, impair or detract from s.215(3)(b)[3].

14. *Third*, that the *Bell Act* in its entirety is, or parts of it are, inconsistent with the scheme of s.254 of the *ITAA 1936* (Cth)[4] in that the *Bell Act* alters, impairs or detracts from such scheme[5].

15. *Fourth*, s.51 of *Bell Act* invokes s.5F of the *Corporations Act 2001*, but such invocation does not operate to avoid any inconsistency that would otherwise arise between the *Bell Act* and the *Corporations Act 2001*[6].

16. *Fifth*, s.52 of *Bell Act* invokes s.5G of the *Corporations Act 2001*, but none of ss.5G(4), 5G(8) or 5G(11) operate to avoid any inconsistency that would otherwise arise between the *Bell Act* and the *Corporations Act 2001*[7].

17. *Sixth*, further to the issues concerning s.5G(8) of the *Corporations Act*, that numerous provisions of the *Bell Act* that are not displaced by s.5G(8) are directly inconsistent with, or otherwise alter, impair or detract from provisions of the *Corporations Act* not and are thereby invalid[8].

STANDING AND THE JUSTICIABLE CONTROVERSY

18. The State denies that the Maranoa plaintiffs have standing in respect of the alleged inconsistency of the *Bell Act* with the Commonwealth taxation regime, except to the extent that they allege that the *Bell Act* undermines the liquidator's obligation to retain money to meet the taxation liabilities of the company under s.254(1)(d) of the *ITAA 1936*[9]. The Maranoa plaintiffs assert that Mr Woodings has standing because he remains or potentially remains subject to the duties and personal liabilities imposed by former s.215 and s.254 of the *ITAA 1936*[10].

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[2] Maranoa's Submissions at [107]-[108].
[3] Maranoa's Statement of Claim ('SOC') at [56.1] (SCB at 29); Amended Special Case at question 3(a) (SCB at 130–131).
[4] As to post-liquidation tax liabilities, the plaintiffs accept that s.254 of the *ITAA 1936* is and has always been the relevant source of a liquidator's obligations — see Maranoa's Submissions at [107]–[108].
[5] Maranoa's SOC at [56.1] (SCB at 29); Amended Special Case at question 3(a) (SCB at 130–131).
[6] Maranoa's SOC at [77]–[82] (SCB at 40-44); Amended Special Case at question 3(b) (SCB at 130–131).
[7] Maranoa's SOC at [83]–[91] (SCB at 40-45); Amended Special Case at question 3(b) (SCB at 130–131).
[8] Maranoa's SOC at [88] (SCB at 45); Amended Special Case at question 3(b) (SCB at 130–131).
[9] State's Amended Defence at [56] (SCB at 99).
[10] Maranoa's Submissions at [124]–[126].

19. The Maranoa plaintiffs do not have standing insofar as their grounds of challenge relate to the Commissioner of Taxation's rights under former s.215 and ss.254(1)(a), 254(1)(e) and 254(1)(h) of the *ITAA 1936*, (and if they do challenge them) the Commonwealth's rights under s.208 of the *ITAA 1936* and s.255-5(1) of Schedule 1 to the *TAA 1953* and the Commonwealth's use of the conclusive evidence provisions. It is not for the Maranoa plaintiffs to agitate the rights of the Commissioner and the Commonwealth.

20. The State does not concede that if others have standing to agitate issues concerning rights of the Commissioner, that the Commissioner then has standing to intervene. The foreshadowed submissions of the Commissioner do not add to those of the plaintiffs, such that the Commissioner's involvement is unlikely to add to the submissions to be presented to the Court[11].

21. The State accepts the Maranoa plaintiffs have standing to contend that the *Bell Act* undermines Mr Woodings' obligation to retain money to meet the taxation liabilities of the relevant company under s.254(1)(d) of the *ITAA 1936*[12]. If the Commissioner of Taxation has standing and is granted leave to intervene, then the Court does not need to determine whether the Maranoa plaintiffs have standing on the issues for which the Commissioner is granted leave[13].

22. There is a question as to whether there is a justiciable controversy for this Court to determine in respect of former s.215 of the *ITAA 1936* or s.260-45 of Schedule 1 to the *TAA 1953*[14] in circumstances where it is not alleged by Mr Woodings that he has at any material time received a notification in accordance with former s.215 or s.260-45 of Schedule 1 to the *TAA 1953*[15]. The State denies that any such notice has issued and therefore any liabilities arising under former s.215 and s.260-45 are merely hypothetical questions.

23. The proofs of debt do not constitute notice under s.215 of the *ITAA 1936*. Given the legislative purpose of s.215, the notice should at least put the liquidator properly on notice of the tax liability and inform the liquidator of the courses open to him or her[16]. Lodgement of a proof of debt does not do this.

24. In any event, whether or not a proof of debt constitutes notice for s.215 may not need to be determined here because the original proofs of debt were issued prior to Mr Woodings becoming the liquidator of those companies[17], and the replacement proofs of debt issued after Mr Woodings became the liquidator were

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[11] *Roadshow Films Pty Ltd v iiNet Ltd (No 1)* [2011] HCA 54; (2011) 248 CLR 37 at 39 [3] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).
[12] See the State's Amended Defence at [56.1.1] (SCB at 99).
[13] See *Williams v Commonwealth* [2012] HCA 23; (2012) 248 CLR 156 at 181 [9] (French CJ), 223 [112] (Gummow and Bell JJ), 240 [168] (Hayne J), 341 [475] (Crennan J), 361 [557] (Kiefel J).
[14] Question 1 in the Amended Special Case (SCB at 130).
[15] State's Amended Defence at [56.2.2] (SCB at 100).
[16] See, by analogy, *Deputy Commissioner of Taxation v Woodhams* [2000] HCA 10; (2000) 199 CLR 370 at 384 [33]–[38] (Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ) which dealt with the liability under s.222AOC of the *ITAA 1936* of a director to pay the Commissioner of Taxation the unpaid amount of the company's unpaid liability.
[17] Amended Special Case at [71B] (SCB at 185–186).

all under the cover of a letter stating that "this advice should ***not*** be taken as notification pursuant to section 215(2) of the" *ITAA 1936*[18].

25. Because no notice was given to Mr Woodings enlivening the obligation to set aside money, he had no such obligation and any liability under s.215(3)(b)–(c) is hypothetical. There is no justiciable controversy because no immediate question of right, interest or liability arises. While this Court has accepted a party has standing if he or she will "in the immediate future probably" be affected by the impugned law[19], there is nothing to suggest imminence here.

GENERAL SUBMISSION IN RELATION TO INCONSISTENCY

26. Most of the inconsistency contentions are that the *Bell Act* 'alters, impairs or detracts from' various Commonwealth laws. These words are not statutory, nor is the principle that they embody clarified much by synonyms. That much said, as observed in *Jemena Asset Management (3) Pty Ltd v Coinvest Limited*[20], the words "altering", "impairing" or "detracting from" encapsulate a notion or idea of "undermining". The notion of undermining focuses attention on that which is contended to be undermined. The most common form of undermining is contradiction; but contradiction requires close attention to what is actually required by and precluded by State and Commonwealth laws. Any consideration of whether laws are contradictory, or whether one undermines another, involves evaluative judgment[21]. Such matters do not invite a search for contradiction or incongruence but proceed on an understanding that often Commonwealth statutes assume the operation of the common law or long standing State statutory law, with which Commonwealth law has co-existed and which provides the context of or "setting for" Commonwealth law. As observed in *Attorney General (Vic) v Andrews*[22], in such circumstances it is right to conceive of the Commonwealth statute as; "... operat[ing] within the setting of other laws so that it is supplementary to, or cumulative upon, the State law in question".

27. As will be developed, perhaps the best example in Australian law of this co-existence is the manner in which ss.208, 209, 215 and 254 of the *ITAA 1936* have operated over time with State laws that have provided for distribution of the assets of insolvent companies.

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[18] Amended Special Case at [71D] (SCB at 186–187), Annexure 12 (SCB at 411–472).
[19] *Kuczborski v Queensland* [2014] HCA 46; (2014) 254 CLR 51 at 87 [99] (Hayne J).
[20] [2011] HCA 33; (2011) 244 CLR 508 at 525 [41] (French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ): "[t]he 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. Therefore any alteration or impairment of, or detraction from, a Commonwealth law must be significant and not trivial".
[21] See, *APLA Limited v Legal Services Commissioner* [2005] HCA 44; (2005) 224 CLR 322 at 425 [302] (Kirby J).
[22] [2007] HCA 9; (2007) 230 CLR 369 at 401–402 [54] (Gummow, Hayne, Heydon and Crennan JJ).

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

28. Neither s.215 nor s.254 of the *ITAA 1936* creates a right in the Commonwealth to receive any sum. Neither provision assures that the Commonwealth will receive anything in a winding up.

29. Section 215 of the *ITAA 1936*[23] applies in respect of pre-liquidation liabilities and requires the following. *First*, that a liquidator give notice to the Commissioner within fourteen days of his appointment (s.215(1)(a)). In this matter this occurred[24]. There is nothing in the *Bell Act* that is inconsistent with this.

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

31. *Third*, the liquidator of a WA Bell Company is not to part with assets of a WA Bell Company without the leave of the Commissioner until he is notified of the amount sufficient to provide for tax (s.215(3)(a)) and is to "set aside" an amount provided for in s.215(3)(b) of the *ITAA 1936*; in essence a sum reflecting the proportion which the amount notified under s.215(2) bears (excluding the notified amount) to the aggregate of other (unsecured) debts. There is no inconsistency between any provision of the *Bell Act* and this provision, and nothing in the *Bell Act* undermines its operation. This is because the Authority has the assets and property transferred to it pursuant to s.22 of the *Bell Act*. So long as the Authority has the same assets available for distribution to creditors of WA Bell Companies, pursuant to the *Bell Act*, as did the liquidator, then the Commissioner, by reason of s.215(3)(a) and (b) of the *ITAA 1936*, is in precisely the same

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[23] In the terms it provided immediately prior to its repeal on 14 September 2006 (by item 161, Sch.1 to *the Tax Laws Amendment (Repeal of Inoperative Provisions) Act 2006* (Cth)), which, as explained above, continue to apply to Mr Woodings as liquidator of each of the WA Bell Companies, save for Albany Broadcasters.

[24] Amended Special Case at [71C] (SCB at 123).

[25] Amended Special Case at [71G.2] (SCB at 125).

position in respect of the *Bell Act* as it would be under the legislation that would otherwise (that is, but for the *Bell Act*) be applicable. To the extent that the Commissioner has notified the liquidator of the amount sufficient to provide for tax in terms of s.215(2) of the *ITAA 1936*, and assuming that all the proofs of debt submitted, including those submitted prior to Mr Woodings becoming the liquidator, constitute notice for s.215(2), this amount is approximately $167,706,491[26]. The sum held by the Authority immediately following the transfer day is in excess of $1.7 billion[27]. So any set aside amount is actually held by the Authority, in the same way that it was putatively held (or but for the *Bell Act* would putatively have been held) by a liquidator.

32. There is little authority on what is meant or comprehended by the notion of "setting aside". Plainly it does not mean quarantining or placing in a separate account or holding in a separate place. Such a meaning would defy logic and be meaningless in current times. Setting aside can only mean maintaining or having available. So, because the *Bell Act* Authority has the same assets available for distribution as did the liquidator, then the Commissioner is in precisely the same position in relation to the assets. Any inconsistency is not real[28].

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

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

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[26] See Amended Special Case at [21] (SCB at 107–108).

[27] The bank accounts holding the trust property immediately before the transfer day held $1,038,359,017.21 and the bank accounts holding the uncontested amount immediately before the transfer day held $689,300,429.72 — see Amended Special Case at [40] (SCB at 115–116), Attachment F (SCB at 148–149).

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

35. *First*, that the liquidator is authorized and required to retain a sum sufficient to pay tax which is or will become due on such income (s.254(1)(d)), and is personally liable for the tax payable to the extent of any amount retained, or that should have been retained. In respect of the retention obligation, it is the same as the setting aside and not parting with obligations of s.215(3)(a) and (b) of the *ITAA 1936*. For the same reasons as stated above, in respect of these provisions, there is no inconsistency between any provision of the *Bell Act* and s.254(1)(d). The Authority has the assets and property transferred to it pursuant to s.22 of the *Bell Act*. They are the same assets available for distribution to the creditors of the WA Bell Companies, pursuant to the *Bell Act*, as would have been available to a liquidator for distribution. As such, the Commissioner is in precisely the same position in respect of the *Bell Act* as it would have been but for the *Bell Act*. To the extent that the liquidator, prior to the transfer day, retained an amount sufficient to provide for tax in terms of s.254 of the *ITAA 1936*, this amount is $298,190,348.70[29]. The sum held by the Authority immediately following the transfer day is $1.7 billion[30]. So, an amount at least equivalent to the retained amount is held by the Authority and available for distribution according to law.

36. *Second*; the liquidator of a WA Bell Company is, by reason of s.254(1)(e), liable to the Commissioner to pay the retained amount, or an amount that should have been retained. Like the equivalent obligation under ss.215(3)(c) and (4) of the *ITAA 1936*, this liability is illusory, because, for so long as a process exists by which distributions to the Commissioner, in respect of liability for tax to which s.254 of the *ITAA 1936* relates, can be made, there is no liability; and the *Bell Act* effects such a process. As with ss.215(3)(c) and (4) of the *ITAA 1936*, to the extent that it is contended that s.254(1)(e) is part of a scheme to "ensure" that the retained amount is available to distribute to the Commissioner, and provisions of the *Bell Act* are contended to alter, impair or detract from this[31], the same responses apply. As with s.215, s.254 does not "ensure" that the retained amount will be paid to the Commissioner. Indeed the purpose of s.254 is not to ensure this. As with the set aside amount for the purpose of s.215 (if it has been invoked) the s.254 retained amount is now held by the *Bell Act* Authority. The total sum held by the Authority is greater than any notional retained amount. This total sum is available to the Authority to distribute according to law.

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

38. The manner in which this provision operated with the various corporate insolvency provisions of certain State Acts prior to the (relatively) uniform States' *Companies Act 1961* will be seen in the consideration below of *Farley*[32], *Uther*[33]

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[29] See Amended Special Case at [73] (SCB at 125).

[30] The bank accounts holding the trust property immediately before the transfer day held $1,038,359,017.21 and the bank accounts holding the uncontested amount immediately before the transfer day held $689,300,429.72 —Amended Special Case at [40] (SCB at 115–116), Attachment F (SCB at 148–149).

[31] See BGNV's Submissions at [51]–[54].

[32] *Commissioner of Taxation (Cth) v Official Liquidator of EO Farley Ltd (In Liq)* [1940] HCA 13; (1940) 63 CLR 278 ('*Farley*').

and *Cigamatic*[34]. Before doing so, it is instructive to illustrate the operation of s.215 of the *ITAA 1936*, having regard to the winding up provisions of the *Companies Act 1961*.

Example — s.215 and the *Companies Act 1961* scheme

39. The distribution provision of the *Companies Act 1961* was s.292[35]. Section 292(1) provided that in a winding up, the fifth and last priority to all other unsecured debts was:

> (e) fifthly, the amount of all municipal or other local rates due from the company at the date of the commencement of the winding up and having become due and payable within the twelve months next preceding that date, the amount of all land tax and income tax assessed under any Act or Act of the Commonwealth before the date of the commencement of the winding up and not exceeding in the whole one year's assessment; and any amount due and payable by way of repayment of any advance made to the company, or in payment of any amount owing by the company for goods supplied or services rendered to it under any Act or Act of the Commonwealth or law of a Territory of the Commonwealth relating to or providing for the improvement development or settlement of land or the aid development or encouragement of mining.

40. Section 292(2) of the *Companies Act 1961* provided that the debts in each class ranked equally between themselves.

41. At the time that the *Companies Act 1961* commenced, s.215 of the *ITAA* was, relevantly, in the following terms[36]:

> (1) Every [liquidator] — … shall within fourteen days after he has become liquidator,… give notice thereof to the Commissioner.
>
> (2) The Commissioner shall as soon as practicable thereafter, notify to the [liquidator] the amount which appears to the Commissioner to be sufficient to provide for any tax which then is or will thereafter become payable by the company…
>
> (3) The [liquidator] —
>
> (a) shall not without the leave of the Commissioner part with any of the assets of the company or principal until he has been so notified;
>
> (b) shall set aside out of the assets available for the payment of the tax assets to the value of the amount so notified, or the whole of the assets so available if they are of less than that value; and

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[33] *Richard Foreman & Sons Pty Ltd, Re; Uther v Commissioner of Taxation (Cth)* [1947] HCA 45; (1947) 74 CLR 508 ('*Uther*').
[34] *Commonwealth v Cigamatic Pty Ltd (in liq)* [1962] HCA 40; (1962) 108 CLR 372 ('*Cigamatic*').
[35] The text of the whole of s.292, as it was originally enacted, is in the proposed Court Book.
[36] This is taken from the consolidated reprint of the Act as at 31 December 1950. At that date, the Act was entitled the *Income Tax and Social Services Contribution Assessment Act 1936–1950* (the change in name was effected by s.1(3) of the *ITAA 1950* and remained in force until s.1(3) of the *ITAA 1965* reverted the title to the *Income Tax Assessment Act 1936–1965*). The next subsequent amendment to s.215 was in 1965; the penalty in subsection (4) (which is not set out) was amended, by s.6 (referring to the Schedule) of the *ITAA 1965*, to reflect the change to decimal currency.

(c) shall, to the extent of the value of the assets which he is so required to set aside, be liable as [liquidator] to pay the tax.

(4) If the [liquidator] fails to comply with any provision of this section (or fails as [liquidator] duly to pay the tax for which he is liable under the last preceding sub-section), he shall, to the extent of the value of the assets of which he has taken possession and which were available at any time for the payment of tax, be personally liable to pay the tax, and shall be guilty of an offence...

42. By s.292(1)(e) of the *Companies Act 1961*, one year's unpaid tax on pre-liquidation income had a priority, though prior only to the remnant unsecured creditors. Unpaid tax for any years greater than one ranked with the remnant pool of unsecured creditors.

43. The operation of these provisions can be illustrated. Assume a Commonwealth income tax liability of $100 for 5 years' unpaid tax ($20 per year). Of this, $20 is accorded priority under s.292(1)(e), leaving $80 to rank with other non-priority unsecured creditors. A company has total assets available for distribution of $1,000. There are creditors with a priority above the Commissioner with debts of $800. There are non-priority unsecured creditors with total debts of $500, comprising the $80 due to the Commissioner and $420 in other claims. The Commissioner would, pursuant to s.215(2) of the *ITAA 1936*, notify to the liquidator the sum of $100. The Commissioner would not know at the time of the commencement of liquidation what total assets would be available for distribution in the winding up, nor the sums owed to creditors with a priority above the Commissioner. So, the Commissioner could not and would not, pursuant to s.215(2), notify the liquidator of any sum other than $100. That is "the amount ... sufficient to provide for any tax". It is not necessarily the amount that the Commissioner will receive. Of the $1,000 available for distribution; the priority creditors ranking before the Commissioner get $800. The Commissioner then gets the next $20, pursuant to s.292(1)(e) of the *Companies Act 1961*. Of the remaining $180 available for distribution to non-prioritized unsecured creditors, the Commissioner gets 80/480 ($30, for a total of $50 out of a total tax liability of $100), assuming that there were no others in the same class in s.292(1)(e) as the Commissioner.

44. As can be seen, s.215 did not require a liquidator to pay to the Commissioner the sum notified or set aside, or ensure that the Commissioner would receive the sum set aside. Further, this was so even though the liquidator had available assets sufficient to discharge the whole of the tax liability. So, in the example above, the liquidator had $1,000 to distribute, the notified sum to set aside was $100 and the Commissioner received (at most) $50.

45. That s.292(1)(e) of the *Companies Act 1961* expressed a specific priority to only part of "tax assessed" before the commencement of the winding up is revelatory. Even though, pursuant to s.215 of the *ITAA 1936*, a liquidator was required to "set aside" an amount sufficient to provide for the tax liability (s.215(3)(b)) and personally liable to pay the tax to the extent of the amount required to be set aside (s.215(3)(c)), the Commissioner was not assured of receiving this amount.

46. This example also illustrates the operation, important in this matter, of s.215(3)(c) and s.215(4). Unless s.215 operated on the basis that the personal liability of the liquidator, imposed by s.215(3)(c) and s.215(4), required that the liquidator, on the example above, personally pay the balance to make up $100[37], then this personal liability, likewise, did not ensure that the Commissioner would receive the assessed amount, or entitle the Commissioner to it.

47. In terms of ss.215(3) and (4), so long as the liquidator set aside the relevant amount, in the sense that the relevant amount was available to be distributed according to law, and otherwise complied with the section (in terms of s.215(4)), there was not a personal liability to pay the difference between the distributed amount and the set aside amount. This is the effect of s.215(4). Section 215(3)(c) merely stated the maximum amount of the possible liability in the event that the liquidator did not comply with the requirements of the section.

48. Further, even within the priority accorded by s.292(1)(e), the priority for Commonwealth income tax ranked equally with the other debts within that class (s.292(2)). So, if not inevitably, it was likely, by reason of the terms of ss.292(1)(e) and (2) alone, that a liquidator would distribute less to the Commissioner than was required to be set aside under s.215(3)(b) of the *ITAA 1936*. Further, and equally obviously, because there were creditors with a higher statutory priority than that of the Commissioner (ss.292(1)(a)–(d)), a liquidator could readily distribute less to the Commissioner than he or she had been required to set aside.

***Farley*[38] and *Uther*[39]**

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

50. These propositions are referable to this matter. Unless departed from or overruled, *Farley* and *Uther* compel the conclusion that the *Bell Act* is not

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[37] In the example, for a total of $50 out of a total tax liability of $100.
[38] [1940] HCA 13; (1940) 63 CLR 278.
[39] [1947] HCA 45; (1947) 74 CLR 508.

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

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

Cigamatic[40]

52. *Cigamatic,* in respect of this issue of construction. is to the same effect as *Farley* and *Uther*. This was stated expressly by Menzies J[41], with whom Dixon CJ[42], Kitto J[43] and Owen J[44], in this respect, agreed. It follows that *Cigamatic*, with *Farley* and *Uther*, is authority for the propositions stated above as arising from *Farley*.

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

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

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

56. When considering the purpose and effect of s.215 of the *ITAA 1936*, to determine whether the *Bell Act* undermines it, s.215 is not concerned with receipt, let alone does it confer on the Commonwealth a right to receive anything. As found in *Farley*, *Uther* and *Cigamatic*, s.215 is consistent with State laws that provide

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[40] [1962] HCA 40; (1962) 108 CLR 372.
[41] *Cigamatic* [1962] HCA 40; (1962) 108 CLR 372 at 388–389.
[42] *Cigamatic* [1962] HCA 40; (1962) 108 CLR 372 at 379.
[43] *Cigamatic* [1962] HCA 40; (1962) 108 CLR 372 at 381.
[44] *Cigamatic* [1962] HCA 40; (1962) 108 CLR 372 at 390.

nothing to the Commonwealth, and State laws that provide a payment to the Commonwealth of less than an amount set aside by a liquidator.

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

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

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

Section 254 of the *Income Tax Assessment Act 1936* (Cth)

60. An equivalent of s.254 of the *ITAA 1936* has been in Commonwealth income tax legislation from the first Commonwealth income tax Act.

The operation and effect of s.254

61. It is notable that s.254 applies to several discrete classes of persons — a liquidator is one of several defined "trustees". In certain respects, the obligations of liquidators are different to those of trustees 'proper' and all others captured by the definition of "trustee", and by the notion of "agent".

62. In *Australian Building Systems*[45] Keane J observed, in considering the purpose of s.254, that[46]:

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

63. Neither of these two essential characteristics of "trustees" for the purpose of s.254 applies to liquidators. This inapplicability of certain of Keane J's reasoning to liquidators applies equally to reasoning of Gordon J[47]. Again, this notion of interruption is inapposite to a liquidator, even though it applies to a trustee facing the demand of a beneficiary, or an agent *qua* principal.

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[45] *Federal Commissioner of Taxation v Australian Building Systems* [2015] HCA 48; (2015) 326 ALR 590 ('*Australian Building Systems*').
[46] *Australian Building Systems* [2015] HCA 48; (2015) 326 ALR 590 at 619 [130].
[47] *Australian Building Systems* [2015] HCA 48; (2015) 326 ALR 590 at 631 [192].

64. The reasoning of Keane J[48] and Gordon J[49] in *Australian Building Systems* that the retention obligation ensures that there is sufficient money in the hands of the agent or trustee to pay his or her liability too is inapposite to liquidators. Unsecured creditors are different, in this respect, to the beneficiaries of a trustee or the principal of an agent.

65. Central to an understanding of the purpose of the provision, in respect of liquidators, is that it does not ensure that the Commissioner will receive the amount that is lawfully payable in tax, or the sum actually retained or that should have been retained. This can be illustrated. Assume that the amount properly to be retained was $500 on total income, profit or gain of $1,200. The sole assets available for distribution in the winding is that sum up of $1,200. The liquidator's expenses (excluding deferred expenses) of the winding up, other than tax, are $1,000. Assume that the $1,200 is to be distributed pursuant to (say) the current s.556(1) of the *Corporations Act 2001*. Sections 556(1)(a) and 559 require that the tax liability of $500 and expenses of $1,000 rank *pari passu*. So, the Commissioner would receive 1/3(500/1500) of $1,200; that is, less than the retained amount.

66. This scenario illustrates that the position of liquidators under s.254 of the *ITAA 1936* is different to that of others who fall within the definition of trustee. This is so because s.254, like s.215 of the *ITAA 1936*, "do[es] not give a right to the Commonwealth to receive the sum which is set aside"[50] or retained, actually or putatively. This is because the entitlement of the Commissioner to receive from the liquidator is not determined by s.254, and never has been.

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

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

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

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[48] *Australian Building Systems* [2015] HCA 48; (2015) 326 ALR 590 at 619–620 [130]–[132].
[49] *Australian Building Systems* [2015] HCA 48; (2015) 326 ALR 590 at 631 [193]. Both her Honour and Keane J considered that s.254(1)(a) imposes an ancillary liability for tax on an agent or trustee for the purpose of ensuring the payment of the tax — see [2015] HCA 48; (2015) 326 ALR 590 at 614 [104] (Keane J), 627 [171], 628 [176] (Gordon J).
[50] *Farley* [1940] HCA 13; (1940) 63 CLR 278 at 289 (Latham CJ).

70. For completeness it should be noted that no issue arises with s.254(1)(h) of the *ITAA 1936*. Wigney J in *Bell Group Limited (in liq) v Deputy Commissioner of Taxation*[51] determined that; "...s 254(1)(h) of the *ITAA36* ... does not confer any remedy on the Commissioner against the property of a company after the commencement of the winding up of the company because such property is not attachable property"[52].

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

71. Decisions of this Court establish that provisions of Commonwealth law that require that a liquidator set aside or retain sums out of the assets of the company sufficient to provide for tax liabilities are not inconsistent with State legislative regimes that may involve the Commonwealth receiving nothing in a final distribution. Such decisions also establish that provisions of Commonwealth law that impose liability on a liquidator who "fails to provide for payment of the tax as required" are not inconsistent with such State laws.

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

73. So long as the Authority has the same assets available for distribution to creditors of WA Bell Companies, pursuant to the *Bell Act*, as did the liquidator, then the Commissioner is in precisely the same position in respect of the *Bell Act* as it would be under the legislation that would otherwise (that is, but for the *Bell Act*) be applicable. Because the amounts notified by the Commissioner to the liquidator sufficient to provide for tax in terms of s.215 ($167,706,491) and s.254 ($298,190,348.70) is less than the sum held by the Authority (being in excess of $1.7 billion) the Commissioner is in precisely the same position under the *Bell Act* as it would be otherwise. Any sums that were to be putatively set aside or retained by the liquidator are actually held by the Authority.

READING DOWN — *ITAA* INCONSISTENCY

74. Section 7 of the *Interpretation Act* 1984 (WA) is in a common form. Certain provisions of the *Bell Act* can be readily read down without affecting the Act's purpose or requiring a strained or unnatural meaning or effect. No reading down here requires that the Court "perform a feat which is in essence legislative and not

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[51] *Bell Group Limited (in liq) v Deputy Commissioner of Taxation* [2015] FCA 1056.
[52] *Bell Group Limited (in liq) v Deputy Commissioner of Taxation* [2015] FCA 1056 at [69].

judicial"[53] or seeks to depart from or undermine the legislative purpose of any provision[54].

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

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

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

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

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

77. All plaintiffs contend that numerous sections of the *Bell Act* are inconsistent with Parts 5.4B and 5.6 of the *Corporations Act*. Those arguments are dealt with elsewhere. All plaintiffs also contend that those sections of the *Bell Act* are inconsistent with Parts 5.4 and 5.6 of the pre-23 June 1993 *Corporations Law* and that the relevant provisions of the *Bell Act* are inconsistent with s.1408[55]. This contention is only pleaded by Maranoa and no submissions are put. The only party that puts submissions is BGNV. Accordingly, this matter is addressed only in the State's submissions responding to BGNV.

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

78. Section 51 of the *Bell Act* invokes s.5F of the *Corporations Act 2001* (Cth) and s.52 of the *Bell Act* invokes s.5G of the *Corporations Act 2001*. Maranoa contends that ss.5F and 5G, as invoked, do not operate so as to 'save' the *Bell Act* or provisions of it that are inconsistent with provisions of the *Corporations Act 2001*[56].

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

80. It is apparent from the text and context of Part 1.1A that its underlying purposes included preserving a referring State's ability to withdraw specified matters from

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[53] *Pidoto v Victoria* [1943] HCA 37; (1943) 68 CLR 87 at 109 (Latham CJ).
[54] *Victoria v Commonwealth* [1996] HCA 56; (1996) 187 CLR 416 at 502 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ). See also *Pidoto v Victoria* [1943] HCA 37; (1943) 68 CLR 87 at 108 (Latham CJ); *Re Dingjan; Ex parte Wagner* [1995] HCA 16; (1995) 183 CLR 323 at 348 (Dawson J).
[55] See Maranoa's SOC at [72] (SCB at 40).
[56] See Maranoa's Submissions at [67]–[97].

the operation of Commonwealth Corporations legislation, including the *Corporations Act 2001*, and to legislate in a manner which may otherwise be inconsistent with such Commonwealth Corporations legislation[57], without withdrawing completely as a referring State.

81. *First*, s.5E(1) of the *Corporations Act* provides that the Corporations legislation is not intended to exclude or limit the concurrent operation of State and Territory laws. So the *Corporations Act* does not cover a field[58]. *Second*, s.5F facilitates a State or Territory excluding certain matters from the operation of the Commonwealth Corporations legislation (in whole or in part). No inconsistency arises because the Commonwealth legislation simply does not apply to the excluded matter. *Third*, s.5G provides an alternative mechanism to s.5F which operates (relevantly here) on State "post-commencement provisions". Section 5G provides for a number of particular consequences in the interaction of these State post-commencement provisions with particular provisions of and things provided for in the Commonwealth Corporations legislation. As with s.5F, the essential means of s.5G is to state that Commonwealth legislation, that might otherwise apply to the same thing as the State post-commencement provision, does not. Section 5I is in effect a mirror of s.5F. It empowers the Commonwealth to modify by regulation the operation of the Commonwealth Corporations legislation to exclude itself from matters dealt with by specified State or Territory laws.

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

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

83. The *Corporations Act 2001* was preceded by the national scheme by which the States and the Northern Territory adopted, as a law of each State and the Northern Territory, the model *Corporations Law*[59].

84. Section 5 of the *Corporations ([State or Territory]) Act 1990* of each State and the Northern Territory dealt with future amendment to the adopted *Corporations Law* by States[60]. Section 6 provided that State laws inconsistent with, but which preceded, the *Corporations Law*, continued to apply.

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[57] The point is expressed a little differently by Barrett J in *HIH Casualty & General Insurance Ltd v Building Insurers' Guarantee Corporation* [2003] NSWSC 1083; (2003) 188 FLR 153 at 182 [72].

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

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

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

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

86. Another feature of the *Corporations Law* scheme was that such laws operated to the extent of the legislative power of each State and Territory. The existence of the mechanism in s.5 for a particular State to change the *Corporations Law* of that State illustrates that conflicts could have arisen, and such real conflicts were recognised and accommodated by s.5(2) and s.6. If the New South Wales Parliament amended the *Corporations Law* (NSW) to have had an effect (say) in Western Australia, there was no limit on the power of the Western Australian Parliament to legislate to 'deal with' such NSW legislation. If this gave rise to a real conflict between the *Corporations Law* (WA) and the *Corporations Law* (NSW) then this conflict would be resolved in accordance with law[61].

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

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

89. Section 8 of the *Corporations (Ancillary Provisions) Act 2001* (WA) was enacted to complement the *Corporations Act 2001* and is part of the overall legislative package. All referring States have similar provisions[62]. By reason of this provision and s.5F(4) of the *Corporations Act 2001*, any Western Australian laws existing at the commencement of the *Corporations Act 2001*, that were inconsistent with the new *Corporations Act 2001* (or any "Corporations legislation" in the meaning in s.5F) were valid, even if they had not complied with s.5 of the *Corporations (Western Australia) Act 1990*.

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

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

Section 5F of the *Corporations Act 2001*

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

91. The plaintiffs rely on the reasoning of Barrett J in *HIH Casualty and General Insurance Ltd v Building Insurers' Guarantee Corporation*[63]. Barrett J's reasoning should be rejected for the following reasons. The words "in the State or Territory" in s.5F(2) are to be understood having regard to the inevitable fact that a State will not declare a matter to be an excluded matter, and thereby 'disapply' the Commonwealth legislation, unless the State fills the gap. Invariably the State Act that declares the matter to be an excluded matter in relation to one or other of s.5F(1)(a)–(d) also positively fills the gap that this declaration leaves. This is so in respect of all of the scenarios set out in s.5F(1)(a)–(d). The *Bell Act* is an example of this. This informs the meaning of the words "in the State or Territory" in s.5F(2).

92. The words "in the State or Territory" in s.5F(2) refer to the State or Territory where the matter is or the States and Territories where the matter is. This properly emphasises the importance of the word "the" in "in the State or Territory". The singular "State or Territory" includes the plural[64].

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

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[63] *HIH Casualty and General Insurance Ltd v Building Insurers' Guarantee Corporation* [2003] NSWSC 1083; (2003) 188 FLR 153 at 193 [88] (*'HIH'*). See Maranoa's Submissions at [74]–[75].
[64] *Acts Interpretation Act 1901* (Cth) s.23.

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

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

Section 5G of the *Corporations Act 2001*

96. If s.5F(2) does not provide a complete answer to the alleged inconsistency with the Corporations legislation, s.5G does[65].

Section 5G(11)

97. If any inconsistency between one of the above displacement provisions of the *Bell Act* is not avoided through the operation of an earlier subsection of s.5G, it, in any event, is avoided by operation of s.5G(11). The reference in s.5G(3)(b) to a provision of "a law of the State or Territory" is a reference to a provision of the law of the State or Territory that enacted the law. The term "in a State or Territory" means any State or Territory in which the law operates. For the reasons explained above this need not be State or Territory that enacted the law.

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

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

Section 5G(8)

100. Further to s.5G(11), s.5G(8) operates to exclude the operation of Chapter 5 of the *Corporations Act 2001* to the winding up or other external administration of a WA Bell Company to the extent that it is effected by the displacement provisions of the *Bell Act*.

101. Maranoa's essential contention concerning s.5G(8) is that it does not dis-apply Chapter 5 of the *Corporations Act 2001* because s.5G(8) only dis-applies the *Corporations Act 2001* if the State law is one that that effects a winding up or

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

administration[66], and the *Bell Act* does neither[67]. This contention proceeds on an erroneous construction of the provision.

102. The construction of Maranoa emphasises the word "the" in s.5G(8) — to contend that Chapter 5 provisions do not apply to "a" winding up only to the extent to which "the" winding up is carried out in accordance with a provision of law of a State or Territory[68]. So, a State law can only displace Chapter 5 of the *Corporations Act 2001* to the extent that the State replaces the Commonwealth's regime with an identical or near identical[69] regime. Such a construction denies s.5G(8) of any sensible operation. Why would a State ever displace in such a circumstance?

103. The section operates so long as that which is provided for in State law meets the description of a scheme of arrangement, receivership, winding up or other external administration of a company.

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

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

105. In denying this, the plaintiffs rely upon McPherson SPJ's statement in *Crust 'n' Crumb*. However, the core of what MacPherson SPJ referred to is entirely apposite: "winding up is a process that consists of collecting the assets, realising and reducing them to money, dealing with proofs of creditors by admitting them or rejecting them and distributing the net proceeds after providing for costs and expenses, to the persons entitled".[70]

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

The asserted 'necessity' of judicial supervision of windings up

107. It is erroneous to contend that a process that consists of getting in assets, realising and reducing them to money, admitting or rejecting claims of creditors and distributing the net proceeds after providing for costs and expenses, to the persons entitled, does not attract the description of winding up because it is not subject to judicial supervision[71]. Voluntary winding up from the first did not involve court supervision[72]. Further, countless corporations, in particular statutory corporations, have been 'wound up' without court 'supervision' in the sense contended for[73]. In

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[66] Maranoa's Submissions at [90], [92].
[67] Maranoa's Submissions at [95]–[97].
[68] Maranoa's Submissions at [90], [92].
[69] Maranoa says that the State may modify the winding up regime or provide for another regime that incorporates the key features of the winding up — Maranoa's Submissions at [94].
[70] *Re Crust 'n' Crumb Bakers (Wholesale) Pty Ltd* [1991] QSC 185; [1992] 2 Qd R 76 at 78.
[71] Maranoa's Submissions at [41].
[72] V Markham Lester, *Victorian Insolvency: Bankruptcy, Imprisonment for Debt, and Company Winding-up in Nineteenth-Century England* (Clarendon Press, 1995) at 226.
[73] For example, States have legislated to dissolve companies previously incorporated under companies legislation. In Western Australia, this includes companies dissolved by the *City Club Act 1965* (WA),

the United Kingdom, dissolution by statute without court supervision has been common[74].

108. Contrary to Maranoa's submissions, the history of windings up includes administrative windings up without curial direction[75]. Winding up is and has always been a statutory process[76]. There is not common law company law or winding up[77]. The process does not inhere to judicial control.

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

109. *Pari passu* distribution is not inherent to a winding up as Maranoa contends[78]. The *pari passu* principle is not only not immutable; but rare[79]. Statutory priorities can be and have been changed according to legislative policy over time[80].

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

110. If the *Bell Act* does not effect a winding up, it effects an "external administration", or an "other external administration". The phrase "other external administration" is not used anywhere other than s.5G(8) of the *Corporations Act 2001*. The *Corporations Act 2001* does not limit "external administration" to particular parts of Chapter 5. The *Bell Act* creates a form of "other external administration" if not a winding up.

Section 5G(4)

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

Collie Club Act 1953 (WA), *Fremantle Buffalo Club (Incorporated) Act 1964* (WA), *Goldfields Tattersalls Club (Inc.) Act 1986* (WA), *Kalgoorlie Country Club (Inc) Act 1982* (WA), *Perth and Tattersall's Bowling and Recreation Club (Inc.) Act 1979* (WA), *West Australian Club Act 1948* (WA) and *The Westralian Buffalo Club Act 1949* (WA). None were conducted via judicial supervision.

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

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

[76] See, eg, Review Committee, Parliament of the United Kingdom, *Report of the Review Committee on Insolvency Law and Practice* (1982) at 24 [74]; Thomson Reuters, *McPherson's Law of Company Liquidation* (at January 2016) at [1.30], [1.40].

[77] *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1; (2007) 231 CLR 160 at 186 [36] (Gummow J).

[78] Maranoa's Submissions at [97].

[79] Review Committee, Parliament of the United Kingdom, *Report of the Review Committee on Insolvency Law and Practice* (1982) at 61 [223].

[80] See, eg, changes made by the *Corporate Law Reform Act 1992* (Cth) to s.556 of the then-applicable *Corporations Law*.

112. The operation of this provision is explained by Barrett J in *HIH*[81]. Maranoa in effect contends that s.5G(4) of the *Corporations Act 2001* does not operate in relation to provisions of the *Bell Act* which effect an outcome, because this is not to authorise or require the performance of an act[82]. An example given is the transfer and vesting of property in the Authority under s.22(1) of the *Bell Act*. This is too narrow a reading of the words "authorises or requires the doing of" an act. These are plainly words of breadth. Section 22(1) of the *Bell Act* is apposite. By it things are "transferred to and vested in" the Authority. That is the doing of an act. A summary of the principal provisions which do so and the nature of the acts that are specifically authorised or required is set out in Attachment A scheduled to these submissions.

Section 5G(5)

113. There are numerous provisions of the *Bell Act* that, in effect, provide that each WA Bell Company is subject to the control and direction of a person (the Authority[83]) and authorise the Authority to give instructions to the directors or other officers (including the liquidator[84]) of each WA Bell Company.

114. For instance, see ss.27, 28, 29, 33. By reason of the operation of s.5G(5), the Authority can control and direction the WA Bell Companies notwithstanding anything contained in the Corporations legislation.

Sections 5F and 5G of the *Corporations Act 2001* — Maranoa

115. A specific contention is put by Maranoa in respect of ss.5F and 5G of the *Corporations Act 2001*, concerning Maranoa[85].

116. Section 5F answers this. The effect of s.5F(2) of the *Corporations Act 2001* is that the *Bell Act*, including s.22, operates unimpeded by the operation of the Corporations legislation, even though the *Bell Act* has an effect on the winding up of Maranoa. The declaration that WA Bell Companies are excluded matters has the effect of rendering inapplicable any provision of the Corporations legislation that relate to WA Bell Companies. To the extent that a WA Bell Company has (say) a joint but not severable interest in property with X, that does not mean that X or the joint property is not an aspect of the excluded matter. The joint property is part of the excluded matter, and the Corporations legislation, that would otherwise apply to or in respect of it, does not.

117. It is to be borne in mind that the interest of Maranoa is accommodated by the *Bell Act*. The fund in which Maranoa has an equitable interest vests in the Authority free from that equitable interest (s.22(10)). Section 25(4) of the *Bell Act* then provides that Maranoa's equitable interest can be proved as a liability in accordance with Part 4 Division 2.

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[81] *HIH* [2003] NSWSC 1083; (2003) 188 FLR 153 at 195 [95]–[96].
[82] Maranoa's Submissions at [88].
[83] The Authority is established as a body corporate and has, both within and outside the State, the legal capacity of an individual — see *Bell Act* ss.7(1), (2) and (4).
[84] *Corporations Act 2001* (Cth) s. 9 (definition of "officer" of a corporation).
[85] Maranoa's Submissions at [98]–[103].

118. The s.5G answer is similar. If s.5F(2) does not enable s.22 and other *Bell Act* displacement provisions to operate unimpeded by the *Corporations Act 2001*, ss.5G(4), (5), (8) and (11) of the *Corporations Act 2001* do, even though those provisions have an effect on other matters, such as the winding up of Maranoa.

119. All of the *Bell Act* displacement provisions, including s.22, relate to WA Bell Companies. To the extent the operation of a *Corporations Act 2001* provision may be inconsistent with the operation of those provisions, the *Corporations Act* provision "has an application" in relation to a WA Bell Company. It then falls within the scope of the invocation of s.5G by the *Bell Act*.

10 120. Then, for the reasons outlined above, ss.5G(4), (5) and (11) displace the *Corporations Act 2001* provisions that otherwise would have created an inconsistency with s.22 of the *Bell Act* and the other displacement provisions.

121. The effect of this is that the *Bell Act* displacement provisions operate unimpeded by the *Corporations Act 2001*, whether or not they may have an effect on other matters, such as the winding up of Maranoa.

A further contention of Maranoa concerning s.5F of the *Corporations Act 2001* — *situs* of debts

122. Maranoa contend that s.5F(2) only operates to 'disapply' provisions of the Corporations legislation in the territory of Western Australia; and that in this
20 matter certain assets that have been transferred to and vested in the Authority pursuant to s.22 were choses in action not situate "in" Western Australia[86]. This contention should not be accepted. The *situs* of all property immediately before the transfer date was Western Australia.

123. This answer requires separate consideration of the property of the WA Bell Companies to which s.22 of the *Bell Act* applies. All are choses in action. There are five categories.

124. *First*, term deposits of Uncontested Amounts held by WA Bell Companies with NAB[87]. *Second*, term deposits of Uncontested Amounts held by TBGL and BGF with Westpac[88]. *Third*, NAB term deposits in which monies were deposited
30 pursuant to the Deed of Settlement[89]. In respect of each of these choses in action, Maranoa concedes that all were located in Western Australia immediately before the transfer date[90]. *Fourth*, choses in action comprising term deposits of Uncontested Amounts held by other WA Bell Companies with Westpac[91]. *Fifth*,

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[86] Maranoa's SOC at [81], [81A] (SCB at 43–44).
[87] See Amended Special Case at [32]–[34] (SCB at 111–112).
[88] See Amended Special Case at [32]–[33], [35.4.2] (SCB at 111, 113).
[89] See Amended Special Case at [36]–[37], [40.1] (SCB at 113–115).
[90] Maranoa's Submissions at [49]. It is not understood that any other plaintiff contends otherwise, though WAG's Submissions at [50] state that the "property of the WA Bell Companies was held in the form of term deposit accounts with NAB and Westpac which were governed by the laws of Victoria and New South Wales respectively and located outside of Western Australia". See also WAG's Submissions at fn.54, resiling from claims made concerning the *situs* of debts in WAG's Reply at [40] (SCB at 63–64).
[91] See Amended Special Case at [32]–[33], [35] (SCB at 111–113).

Westpac term deposits in which monies were deposited pursuant to the Deed of Settlement[92].

125. In respect of these fourth and fifth categories of choses in action, Maranoa contends that the *situs* of each immediately before the transfer date was New South Wales[93]. This contention should not be accepted. The *situs* of these fourth and fifth categories of choses in action immediately before the transfer date was Western Australia.

The fourth category of choses in action

126. In respect of the *fourth* category — Uncontested Amounts held by other WA Bell Companies with Westpac — the rule for establishing the *situs* or law area of such choses in action is the place where the debt (created by the term deposit) would be paid in the ordinary course of business[94]. This is and was at the transfer date Western Australia, for the following reasons.

127. Westpac had branches in all Australian States and Territories and their capital cities, and no specific stipulation had been given as to where payment on maturity was to be made[95]. Mr Woodings, the liquidator of the companies, was resident in Western Australia and had his office and principal place of business in Western Australia[96]. Written communications from Westpac in respect of the term deposits held with them in relation to the Uncontested Amount were addressed to Mr Woodings' business mailing address in Western Australia[97]. Each of the WA Bell Companies that held a term deposit with Westpac, and Maranoa had a transaction account with the ANZ at a branch in Western Australia[98]. If instructions were provided to not roll over the deposit, the depositor would receive their deposit together with any unpaid interest[99]. On maturity the term deposits and the relevant account holder for TBGL and BGF were subject to a standing instruction making them payable to the Western Australian ANZ transaction account maintained by each company[100]. For the remaining accounts held by other WA Bell Companies with Westpac, the relevant account holder had instructed the bank to "contact depositor" in relation to how the deposit was to be paid on maturity[101]. The "depositor" in each instance could only have been Mr Woodings as he was the liquidator of each of the WA Bell Companies.

128. By reason of these facts the inference is overwhelming that, in respect of this *fourth* category of debt, the place where the debt (created by the term deposit)

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[92] See Amended Special Case at [36]–[37], [40.2] (SCB at 113–117).
[93] Maranoa's Submissions at [49]–[51].
[94] *AssetInsure Pty Ltd v New Cap Reinsurance Corp Ltd* [2006] HCA 13; (2006) 225 CLR 331 at 352 [58] (Kirby and Hayne JJ); *Jabbour v Custodian of Absentee's Property of Israel* [1954] 1 WLR 139 at 146.
[95] See Amended Special Case at [35.1], [35.4.3] (SCB at 112–113).
[96] See Amended Special Case [1C.4]–[1C.5] (SCB at 104).
[97] See Amended Special Case at [35.5] (SCB at 113).
[98] See Amended Special Case at [30] (SCB at 110).
[99] See Amended Special Case at [35.4.1] (SCB at 112–113).
[100] See Amended Special Case at [35.4.2] (SCB at 113).
[101] See Amended Special Case at [35.4.3] (SCB at 113).

would be paid in the ordinary course of business was Western Australia. Accordingly, the *situs* of each was Western Australia.

The fifth category of choses in action

129. Properly understood, the position with these choses in action is the same as with the fourth category. These choses in action are term deposits with Westpac in which monies were deposited pursuant to the Deed of Settlement[102]. The account holder of each is Mr Woodings as trustee for the Bell Judgment Creditors. Even though Mr Woodings holds these funds on trust, the debt, the *situs* of which is to be located, is the debt created by the bank account — by which Mr Woodings is the creditor and Westpac the debtor.

130. Maranoa alludes to a further contention about all of this[103]; relating to the *situs* or (perhaps) proper law of the equitable interest of beneficiaries of the Deed of Settlement in the fund that was on the transfer day on a terms deposit with Westpac[104].

131. This is a false inquiry. The context in which the inquiry arises is the territorial one for the purpose of Barrett J's reasoning in *HIH*. If this territorial inquiry is required to determine whether the Corporations legislations or the *Bell Act* apply to a particular matter, it is essential that there be a clear indicia of territoriality. This is why the debt *situs* rule — applied in choice of law rules requiring *situs* — is most apt. Even if Barrett J's formulation is to be applied, there must be certainty and clarity to the effect of the word "in" in the phrase "in the State or Territory" in s.5F(2).

132. In respect of this debt or these debts, there is no reason why the same rule for establishing *situs* does not apply; the place where the debt (created by the term deposit) would be paid — by the debtor to the creditor — in the ordinary course of business[105]. For the following reasons this was, at the transfer date, Western Australia.

133. As with the accounts in the fourth category, Westpac had branches in all Australian States and Territories and their capital cities, and no specific stipulation had been given as to where payment on maturity was to be made[106]. Mr Woodings, was resident in Western Australia and had his office and principal place of business in Western Australia[107]. Written communications from Westpac in respect of this category of term deposits were addressed to Mr Woodings' business mailing address in Western Australia[108]. If instructions were provided to not roll over the deposit, the depositor would receive their deposit together with

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[102] See Amended Special Case at [40.2] (SCB at 116–117).
[103] Maranoa's Submissions at [44]–[45], [51] appear to make this contention.
[104] See Amended Special Case at [40.2] (SCB at 116–117).
[105] *AssetInsure Pty Ltd v New Cap Reinsurance Corp Ltd* [2006] HCA 13; (2006) 225 CLR 331 at 352 [58] (Kirby and Hayne JJ); *Jabbour v Custodian of Absentee's Property of Israel* [1954] 1 WLR 139 at 146.
[106] See Amended Special Case at [40.2.1], [40.2.6] (SCB at 116–117).
[107] See Amended Special Case [1C.4]–[1C.5] (SCB at 104).
[108] See Amended Special Case at [40.2.4] (SCB at 117).

any unpaid interest[109]. In the case of this account, no express stipulation had been made by the relevant account holder, Mr Woodings, as to how the deposit was to be paid on maturity[110].

134. As with the fourth category, the finding is inevitable that the place where the debt (created by the term deposit) would be paid in the ordinary course of business was Western Australia; and so the *situs* of each was Western Australia.

A further contention of Maranoa — deriving from the nature of trust property

135. Maranoa advances a further contention in anticipation of a contention as to the reading down of s.22 of the *Bell Act* to deal with any inconsistency with ss. 468, 474 and 478 of the *Corporations Act 2001*[111].

136. This requires some explanation.

The trust property

137. The property held on trust consists of the two choses in action being the NAB and Westpac bank accounts into which the additional proceeds of the settlement of the Bell litigation were deposited in accordance with a Deed of Settlement (call this here "the Settlement Sum"). These are the third and fifth categories of chose in action referred to above in respect of Maranoa's contentions about the *situs* of property.

138. Mr Woodings, in his capacity as liquidator of all of the Australian Bell companies[112], including the Western Australian Bell Companies, entered into the Deed of Settlement pursuant to which he received the Settlement Sum on behalf of each of the Bell Judgment Creditors. The Bell Judgment Creditors included certain WA Bell Companies and Maranoa.

139. Relevant provisions of the Deed of Settlement are extracted in the Special Case Book[113]. Relevant are the following.

140. The Settlement Sum[114] was $981,865,342.12 to be paid *severally* to Mr Woodings. The operative settlement provision[115] provided for the payment of

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[109] See Amended Special Case at [40.2.5] (SCB at 118).
[110] See Amended Special Case at [40.2.6] (SCB at 117).
[111] Maranoa's Submissions at [131]–[135].
[112] See clause 1.5(b) of the Deed of Settlement: "each of Mr Woodings, ... are parties to this deed only in their respective capacities as liquidators, provisional liquidators ... of the relevant companies to which they are appointed." — Amended Special Case, Annexure 1 (SCB at 170).
[113] The material terms of the trust are recorded in the Amended Special Case at [37] (SCB at 114–115). The relevant provisions are extracted at 155–177 of the Special Case Book.
[114] Defined in cl.1.1 of the Deed of Arrangement in the Amended Special Case in P4 of 2016, Annexure 1 (SCB at 166). The "Settlement Sum" also included a settlement adjustment amount to be paid severally to Mr Woodings.
[115] Clause 5(e) of the Deed of Settlement relevantly provides, following the making of consent orders, for the Appellants, the Main Respondents and the BGNV Respondents to take all reasonable steps to procure certain things, including the "payment of the Settlement Sum from the Suspension Funds to Mr Woodings, to be received in his capacity as trustee of the trustee referred to in clause 5(l)" (this provision is not contained in the extract in the Special Case Book).

the Settlement Sum to Mr Woodings to be held on the trust specified in clause 5(l) of the Deed of Settlement. That, and subsequent key provisions, provide as follows:

> 5(l) Upon receipt of the Settlement Sum and any additional amount paid to Mr Woodings as contemplated in clause 5(ja), Mr Woodings declares that he holds the Settlement Sum and any such additional amount on trust for each of the Bell Judgment Creditors, in the proportions specified in Annexure R, and the provisions of the *Trustees Act 1962* (WA) apply to that trust.
>
> (m) Upon receipt, Mr Woodings will pay the Settlement Sum and any additional amount paid to Mr Woodings as contemplated in clause 5(ja) into an interest bearing trust account … to be dealt with by Mr Woodings as trustee … and those parties will have a vested and indefeasible interest in their proportion of the interest earned.
> …
>
> (p)(i) [if schemes of arrangement are approved] and pursuant to the approved Schemes of Arrangement the Bell Judgment Creditors direct that their proportion of the Settlement Sum … is to be paid in accordance with the terms of the Schemes of Arrangement, Mr Woodings is to pay the Settlement Sum … in accordance with those directions, and the trust terminates at that time; or alternatively
>
> (p)(ii) [If this does not happen], Mr Woodings will within 10 Business Days, pay the Settlement Sum (and any additional amount paid to Mr Woodings as contemplated in clause 5(ja)) and any accrued interest to the Bell Judgment Creditors in accordance with the proportions referred to in clause 5(l), and the trust terminates at that time.

141. In Annexure R to the Deed of Settlement[116], Maranoa Transport Pty Ltd's proportionate interest is to the value of 5.28% (i.e. approximately $51.9 million out of the $981.9 million Settlement Sum).

142. Until the trust terminates the beneficiaries had no entitlement to possession of any trust property. The funds including income derived from it were permitted to be invested in one or more bank accounts. While so invested the funds might (or equally might not) be comingled.

143. Maranoa contends that the Bell Judgment Creditors, including it, have an interest in the Settlement Sum which has two aspects. *First*, a chose in action to compel performance of the trust — the right of due administration — and *second*, a proprietary interest in the subject of the trust[117]. This much is accepted, though the right to due administration is not dependent upon the existence of a fixed or transmissible beneficial interest[118].

The contention

144. Maranoa contends that ss.22(1) and (10) of the *Bell Act* are invalid as they purport to transfer the legal interest in that property to, and vest it in, the Authority

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[116] See Amended Special Case, Annexure 1 (SCB at 176–177).

[117] Maranoa's Submissions at [44]–[45]. The nature of the proprietary interest is explained at [45].

[118] *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 at 729, adopted in *CPT Custodian Pty Ltd v Commissioner of State Revenue* (2005) HCA 53; (2005) 224 CLR 98 at 110 [17] (Gleeson CJ, McHugh, Gummow, Callinan and Heydon JJ).

(s.22(1)) absolutely freed from any encumbrance, trust, equity or interest to which it was subject immediately before so vesting (s.22(10))[119].

145. Section 22(10) can be read down as follows to avoid inconsistency:

> All property transferred to the Authority under this section vests absolutely in the Authority freed from any encumbrance, trust, equity or interest (of any kind and howsoever arising) to which it was subject immediately before so vesting except that the Authority holds on trust for Maranoa Transport Pty Ltd in the terms of clause 5 of Deed of Settlement[120] 5.28% of the funds in NAB bank account 77-175-2286 and Westpac bank account 4161386 or any substituted account or accounts.

146. Section 22(1) of the *Bell Act* need not be read down.

147. Applied to Maranoa, the choses in action in respect of the NAB and Westpac deposit accounts held on trust by Mr Woodings would transfer to, and vest in, the Authority. The choses in action would remain subject to the trust in respect of Maranoa's interest.

148. Maranoa's right to due administration of the trust and interest in the trust property, remain in existence.

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

149. This genus of argument emerges out of ss.5F and 5G of the *Corporations Act 2001*.

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

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

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

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[119] Maranoa's Submissions at [101].

[120] The Deed of Settlement is the Deed of Settlement dated 17 September 2013 between, amongst others, the defendant banks to the Bell litigation, various Bell group companies and their liquidators, LDTC and ICWA. See Amended Special Case at [36]–[40] (SCB at 113–117), Annexure 1 (SCB at 155–177).

Sections 9 and 10 of the *Bell Act*

153. Sections 9 and 10 of the *Bell Act* are alleged by Maranoa to be directly inconsistent with ss.474(1), 477 and 478(1)(a) of the *Corporations Act 2001*[121].

154. The answer to this is that ss.5G (4), (5), (8) and (11) displace ss.471A, 474(1), 477 and 478(1)(a) *re* ss.22, 27,28 and 29 of the *Bell Act*. As such the sections have no remaining operation that affects, and could thereby be inconsistent with, ss.9 and 10 of the *Bell Act*.

Sections 54, 56(1) and (2), 56(4), 68(2)(b)(ii), 72 and 73 of the *Bell Act*

155. Maranoa contends that the above sections of the *Bell Act* are inconsistent with ss.468(1), (3) and (4) of the *Corporations Act 2001*. This contention is premised on s.468(1) having the effect that the disposition effected by s.22 of the *Bell Act* is void. Section 468(1) of the *Corporations Act 2001* does not have this effect because of the operation of ss.5G(8) and (11). It is also alleged by Maranoa that ss.54(2), 56(2), 69(2)(b)(ii), 72(2)(a)–(b) and 73 of the *Bell Act* are inconsistent with ss.474, 477(2)(a) and 478 of the *Corporations Act 2001*[122]. Again, this is really a contention concerning s.22 of the *Bell Act*. The answer to it this is that ss.5G (4), (5), (8) and (11) displace ss.474(1), 477 and 478(1)(a) *re* s.22 of the *Bell Act*.

Section 73(1) *Bell Act*

156. This contention, as understood, is that s.73(1) of the *Bell Act* is inconsistent with s.471B of the *Corporations Act 2001*[123]. There is no inconsistency. Section 471B of the *Corporations Act 2001* does not "cover the field". Both provisions, which provide for leave, operate together.

Section 74 of the *Bell Act*

157. Maranoa says that s.74 of the *Bell Act* is inconsistent with ss.554A and 1321 of the *Corporations Act 2001* which provide an aggrieved party with a right to appeal[124].

158. This is really a grievance concerning the regime established by the major parts of the State regime principally set up by Parts 3 to 4 of the *Bell Act* which are all displacement provisions. The answer to this s.5G(8) of the *Corporations Act* allows the State to displace the Commonwealth regime, and implement its regime. If that has been validly done, then ss.554A and 1321 of the *Corporations Act* have no remaining operation that affects, and could thereby be inconsistent with, the impugned sections of the *Bell Act*. Section 554A provides an appeal in respect of a person who is aggrieved by "the liquidator's estimate of the value of the debt or

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[121] Maranoa's Submissions, Annexure A at 34, 36. See also Amended Special Case at [60] (SCB at 33).
[122] Maranoa's Submissions, Annexure A at 39.
[123] See Maranoa's SOC at [71] (SCB at 39). It is briefly referred to in Maranoa's Submissions, Annexure A at 40.
[124] See Maranoa's SOC at [62] (SCB at 34–35); Maranoa's Submissions, Annexure A at 35. However, note that Maranoa's question 3 does not specify a question as to whether s.74 of the *Bell Act* is invalid (SCB at 130).

claim" and s.1321 provides an appeal for act, omission or decision of a person who is effectively, dealing with an administration, compromise, scheme, receivership or liquidation under Chapter 5. Neither section has any operation if s.5G(8) has been utilised to replace the Chapter 5 regime with the *Bell Act* regime.

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

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

Section 33(7) of the *Bell Act*

160. Maranoa contends that s.33(7) of the *Bell Act* is inconsistent with ss.530B, 531 and 542(2) of the *Corporations Act 2001* and reg.5.6.02 of the *Corporations Regulations 2001* (Cth)[125]. Section 33(7) of the *Bell Act* requires a liquidator of a WA Bell Company to hand over the books to the Authority. It is a displacement provision and ss.530B, 531 and 542(2) of the *Corporations Act 2001* are all contained in Chapter 5. So they are all displaced by the operation of s.5G(8) of the *Corporations Act 2001*.

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

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[125] See Maranoa's SOC at [66] (SCB at 37); Maranoa's Submissions, Annexure A at 37.

PART VII: LENGTH OF ORAL ARGUMENT

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

Dated: 25 March 2016

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ATTACHMENT A

Bell Act displacement provisions that specifically authorise or require acts to be performed within scope of section 5G(4)

Bell Act	Acts specifically authorised or required
22(1), (2) and (3)	Confers on the Authority the powers of an owner over property vested in it under s.22 and thereby, in effect, specifically authorises the Authority to act in exercise of the powers ((1)-(3), (9)-(11)). Specifically authorise and require that certain actions in relation to the issue of certain certificates in respect of vested property ((12)-(15)).
23	Specifically authorises the Authority to issue notices which may require recipients to do specified things including providing access to records in relation to property to which the Act applies, account for their dealings with the property and do all things necessary to deliver to the Authority the property specified in the notice. This provision also, in effect, specifically requires that a person receiving the notice comply with it.
24	Specifically authorises and requires the Minister and the Authority to take all practicable steps for the purpose of securing the effect sought to be achieved by s.22 if a transfer and vesting of property under s.22 is not, to any extent, fully effective.
25	Specifically authorise a person to prove various liabilities under Part 4 Division 2(1) to (4). Specifically requires that no action, claim or proceeding arising out of a liability that may be proved in accordance with Part 4 Division 2 may be made or maintained against the specified persons.
26	Specifically requires that each of the specified agreements is taken and always has been taken to be void (1). Specifically authorises a person to prove a claim the person had to be repaid under an agreement voided under that section in accordance with Part 4 Division 2 (3).
27 & 28	Section 28, read with s.27, specifically authorises the Authority to control the company's property and affairs and to exercise various powers and functions.
29	In effect, specifically authorises the Authority to give written approval to a person performing or exercising a function or power as an officer of the company.
30	Specifically authorises the Governor to by proclamation dissolve a WA Bell Company and requires them to be treated as such ((1)-(2)). Specifically authorises the Authority to be substituted in place of a WA Bell Company in pending proceedings or under an agreement ((3)-(5)).
31	Specifically authorises the Authority to give a copy of a certificate issued by it under s.22(2) to a relevant official and requires the relevant official to then take certain actions.
33	Specifically requires the liquidator of a WA Bell Company to do certain acts, including to give to, or as directed by, the Authority various books of the company and the liquidator that are relevant to the affairs of the company as at immediately before the transfer day (7).
34	Specifically requires and permits the Authority to do certain things in relation to calling for proofs of liabilities.
36	Specifically requires and/or authorises the Authority to take certain steps in relation to the preparation of a draft report/s and specifically authorises a recipient of a report to make a written submission.
37	Specifically requires the Authority to determine the property and liabilities of each WA Bell

	Company and, in doing so, to have regard to certain matters and, in effect, specifically authorises the Authority to exercise an absolute discretion.
38	Specifically requires and/or authorises the Authority to report to the Minister on the property and liabilities of each WA Bell Company ((1)-(5)).
39(1), (2), (4), (5) and (6)	Specifically requires and/or authorises the Authority to make recommendations to the Minister with respect to the amount (if any) to be paid to a person, or the property (if any) to be transferred to or vested in a person (instead of or in addition to the payment of money), in respect of the aggregate of all liabilities of all WA Bell Companies to that person as a creditor; and, in effect, authorises the Authority to exercise an absolute discretion including as to whether all, some or none of the money is paid ((1), (2), (4)-(7), (9)).
40	Specifically authorises the Authority to recommend to the Minister an amount to be paid to, or property to be transferred or vested in the creditor of any kind of a WA Bell Company who had provided funding for, or an indemnity against costs or liability in relation to, the Bell litigation, and, authorises and requires certain acts to be done by the Authority in relation thereto, and, in effect, specifically authorises the Authority to exercise an absolute discretion.
41	Specifically authorises the Minister to submit to the Governor an interim report of the Authority and the Governor to determine an amount to be paid to, or property to be transferred to or vested in, a person.
42	Specifically requires the Minister to submit to the Governor the report of the Authority and the Governor to determine an amount to be paid to, or property to be transferred to or vested in, a person.
43	Specifically requires the Minister to give a determination of the Governor to the Authority. Specifically authorises and requires that every liability of a WA Bell Company to a person not receiving a distribution is discharged and extinguished (8).
44	specifically requires the Authority to notify specified persons of the Governor's determination, pay out of the Fund the amounts specified and transfer or vest property; in effect specifically authorises and requires the Authority not to take such an action unless the person first gives the Authority an executed deed in an approved form and that provides for a release or discharge of any person from any liability the Minister considers appropriate. Specifically authorises and requires that every liability of a WA Bell Company to a specified person is discharged and extinguished ((4)-(5), (6)-(7)).
45	Specifically authorises and requires the discharge of the liquidator of WA Bell Companies on their dissolution.
46	Specifically authorises and requires the closure of the Fund and that any money standing to the credit of the Fund when it is closed has to be credited to the Consolidated Account.
48	Specifically authorises and requires the vesting of certain property in the State absolutely and free from encumbrance after closure of the fund.
55	In effect, specifically requires certain persons not take any step for achieving the reinstatement of the registration of a deregistered company listed in Schedule 1 without the written approval of the Authority; and specifically authorises the imposition of a penalty if such a person takes such a step.
56(3)	In effect, specifically requires that a person must take any steps that are within the person's power to take and that are necessary to ensure that the transfer to, and vesting in, the Authority by s.22 of property located outside the State is made effective; and specifically authorises the imposition of a penalty if the person refuses or fails to take any such steps.