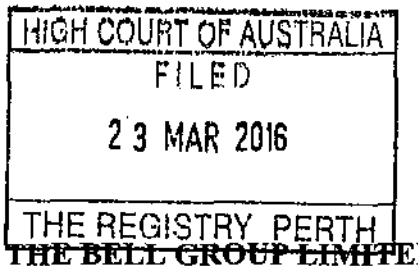
IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY **No. P4 of 2016**
BETWEEN:

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

ANTONY LESLIE JOHN WOODINGS
Second Plaintiff

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



AND

STATE OF WESTERN AUSTRALIA
First Defendant

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

ANNOTATED WRITTEN SUBMISSIONS OF THE FIRST DEFENDANT

PART I: SUITABILITY FOR PUBLICATION

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

PART II: ISSUES

These are stated at the commencement of Part VI of these submissions.

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

The Plaintiffs have given notice in compliance with section 78B of the *Judiciary Act 1903* (Cth).

Date of Document: 23 March 2016

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PART IV: MATERIAL FACTS

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

PART V: RELEVANT CONSTITUTIONAL PROVISIONS AND LEGISLATION

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

PART VI: SUBMISSIONS

The submissions in this matter are to be read with the State's submissions in S248 of 2015 and P63 of 2015.

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

345. This is the contention that because under most companies regimes the company being wound up is not divested of assets until final distribution, the process of the *Bell Act* is not a winding up because the assets to be distributed are vested in the Authority[375]. This is a distinction without a difference. The transfer of assets by s.22 of the *Bell Act* is simply a transfer from the companies to the Authority. The assets ultimately to be distributed are formerly the assets of the companies. Similar is the response to BGNV's contention concerning s.18 of the *Bell Act.*[376] That provision provides for the payment of the expenses, not only of the Authority but also certain expenses of the liquidator, in the same way that expenses of a liquidator are paid in priority out of the assets in a winding up in accordance with s.556 of the *Corporations Act.*

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

346. There seems to be put a contention that fatal to the characterisation of the *Bell Act* process as a winding up is that certain of objects of the Act do not relate to winding up[377]. The *Corporations Act 2001*does not deal only with winding up.

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

347. It is contended that, because the *Bell Act* regime deals with deregistered companies, its processes cannot be a winding up regime[378]. What the *Bell Act* does in respect of deregistered companies is very limited. The *Bell Act* does not take any property of deregistered companies[379]. Only if a deregistered company is reinstated will the property revested in the company as a consequence of its reinstatement (and which is taken to then be received by the company) transfer to

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[375] BGNV's Submissions at [122], [123]; WAG's Submissions at [57]; Maranoa's Submissions at [40].
[376] BGNV's Submissions at [123].
[377] BGNV's Submissions at [123].
[378] BGNV's Submissions at [124]; WAG's Submissions at [58].
[379] Section 22(4)(b) of the *Bell Act.*

or vest in the Authority at the time at which it is received[380]. None of that is contrary to the notion of a winding up.

348. The *Bell Act*'s limited effect on a deregistered company is different from the legislation considered in *DPP v Loo*[381] which is relied on by BGNV[382]. BGNV refer to Ashley J's decision in *DPP v Loo*[383]. The question there was whether whether s.5G(8) was invoked where the State law may also have impacted on a company not being wound up or subject to the regimes in s.5G(8). Ashley J did not decide this question[384]. On appeal, Ashley J's comments were the subject of a notice of contention, which did not need to be determined[385].

349. In any event, it is (with respect of Ashley J) rather a tame propositon that a winding up of Company A may impact upon Company B, which interacts with Company A in some way. This does not alter the character of the winiding up of Company A. That a winding up of Company A may be impacted by deregistered company B is not unusual, and nor does it mean that what is bieng done *re* Company A is not a winding up.

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

350. If the *Bell Act* does not effect a winding up, it effects an "external administration", or an "other external administration". Neither phrase is defined in the *Corporations Act 2001*. The phrase "other external administration" is not used anywhere other than s.5G(8) of the *Corporations Act 2001*. BGNV submits that "other external administration" should be read solely as a reference to, and confined in its meaning by, Part 5.3A of the *Corporations Act 2001*[386].

351. This limited approach to defining "other external administration" should be rejected. The *Corporations Act 2001* does not limit "external administration" to particular parts of Chapter 5. Part 5.3A deals only with the "administration of a company's affairs with a view to executing a company arrangement". Part 5.3A is not an exhaustive example of external administration. When Part 5.3A was introduced[387], it was noted in second reading that "in addition to the new voluntary scheme of administration, consideration should also be given to a form of insolvency administration that can be readily invoked by unsecured

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[380] Section 22(3) of the *Bell Act* read with the definition of "reinstated WA Bell Company" in s.3 of the *Bell Act*.
[381] [2002] VSC 231; (2002) 130 A Crim R 452 at 467 [64] (Ashley J).
[382] BGNV's Submissions at [124].
[383] [2002] VSC 231; (2002) 130 A Crim R 452 at 467 [64] (Ashley J).
[384] *Loo v Director of Public Prosecutions* [2005] VSCA 161; (2005) 12 VR 665 at 675 [21] (Winneke P, Charles JA agreeing).
[385] *Loo v Director of Public Prosecutions* [2005] VSCA 161; (2005) 12 VR 665 at 686 [36] (Winneke P, Charles JA agreeing).
[386] BGNV's Submissions at [108].
[387] By the *Corporate Law Reform Act 1992* (Cth).

creditors"[388]. Cross-references in the *Corporations Act 2001* to a Part 5.3A administration are described as "administration" not "external administration"[389].

352. WAG submits that its meaning is shaped by Parts 5.1 to 5.3A[390] of the *Corporations Act 2001*[391]. This approach too should be rejected. The *Corporations Act 2001* refers to "external administration" outside of the context of Parts 5.1 and 5.2 and 5.3A[392]. Indeed, Chapter 5 is headed "external administration" (and was observed in *Saraceni v Jones* to deal with different species of external administration[393]). Similarly, bodies corporate which are "externally-administered" include bodies corporate that are being administered in ways other than Parts 5.1, 5.2 and 5.3A[394].

353. The meaning of "other external administration" goes beyond the forms of external administration provided for in Chapter 5 of the *Corporations Act 2001*. *First*, in its ordinary and natural meaning, "other external administration" is not limited to the forms in Chapter 5. It relates to administration by an external agency not in accordance with the constitution of the company. In effect, it refers to administration other than by the directors. Chapter 5 is but one example of such external administration. Another example, outside of Chapter 5 of the *Corporations Act 2001*, is provided for by the *Payment Systems and Netting Act 1998* (Cth), which does not limit the meaning of external administration to the *Corporations Act 2001* definitions but includes the circumstance where "someone takes control of the person's property for the benefit of the person's creditors because the person is, or is likely to become, insolvent"[395]. That definition is the subject of a proposed amendment to also include statutory management regimes for authorised deposit-taking institutions under the *Banking Act 1959* (Cth) and judicial management regimes under various insurance Acts[396].

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[388] Commonwealth, *Parliamentary Debates*, House of Representatives, 3 November 1992 at 2404 (Michael Duffy).

[389] See, for example, ss.9 (definition of "administration") (which refers to Part 5.3A), 471A(1A), 471A(2A), 513A, 513C, 556, 588FE(2A), 589(1), 589(5).

[390] The State assumes WAG is referring to Part 5.3A of Chapter 5, when it refers to Part 5.3 of Chapter 5. Parts 5.1 to 5.3A deal with schemes of arrangement, receivership and administration of a company's affairs with a view to executing a company arrangement. Part 5.3 which was present in the corporations legislation regime prior to 23 June 1993 dealt with "official management".

[391] WAG's Submissions at [59].

[392] For example, the definition of property in s.9 describes Part 5.8 of the Corporations Act as "offences relating to external administration". Part 5.8 deals with offences relating to all types of external administration referred to in Chapter 5. Clause 39 of Schedule 4 of the Corporations Act provides for regulations to be made applying Chapter 5 of the Act or a similar law about external administration to transferring financial institutions if, inter alia, before the transfer the institution is under "external administration (however described)".

[393] *Saraceni v Jones* [2012] WASCA 59; (2012) 42 WAR 518 at 527 [24] (Martin CJ).

[394] *Corporations Act 2001* (Cth) s.9 (definition of "externally-administered bodies corporate"). The phrase is used in a range of contexts which are not limited to Part 5.3A administration: see, for example s.1282(2)(b) which provides that ASIC must grant an applicant's application for registration as a liquidator if it is satisfied of the applicant's experience in connection with "externally-administered bodies corporate" and s.1298A which provides the power to cancel or suspend a person's registration as liquidator as liquidator, receiver or administrator of an externally administered body corporate.

[395] *Payment Systems and Netting Act 1998* (Cth) s.5.

[396] Explanatory Memorandum, *Financial System Legislation Amendment (Resilience and Collateral Protection) Bill 2016* (Cth) at [1.28]–[1.30].

354. *Second*, even if "external administration" is limited to a method provided for in Chapter 5 of the *Corporations Act 2001*, for the adjective "other" to have any work to do, it likely refers to external administrations beyond Chapter 5. As mentioned, "other external administration" appears only in s.5G(8) of the *Corporations Act 2001*. It is impossible to contend that "external administration" and "other external administration", in this context, are co-extensive. If this was proposed, the word "other" would not appear.

355. *Third*, it is difficult to discern that the purpose of s.5G(8) is to limit the legislative power of the States and Territories to only establish forms of external administration provided for by the Commonwealth Parliament in Chapter 5 of the *Corporations Act 2001*. In providing for displacement of the external administration provisions of the *Corporations Act 2001*, it is impossible to conceive of why s.5G(8) would then exclude substitution of different forms of external administration. Such an interpretation prevents a State or Territory from implementing (say) a form of official management, which was provided for under Part 5.3 of the *Corporations Law*, or from enacting *sui generis* external administration schemes.

356. Such a *sui generis* regime was utilised in the *James Hardie Former Subsidiaries (Winding Up and Administration) Act 2005* (NSW). This form of external administration was expressed to differ "from a winding up or other form of external administration of a company under the *Corporations Act*"[397]. The NSW Act retained the day-to-day control of the companies in directors, but subjected them to external administration in the form of oversight and direction by the Special Purpose Fund Trustee, and in some circumstances, the Minister and the Supreme Court[398]. Although the Special Purpose Fund Trustee performed functions akin to a liquidator, others were more like a Committee of Inspection[399]. That regime was implemented relying upon, inter alia, ss.5G(8), (9) and (11) to displace, amongst other things, Chapter 5 of the *Corporations Act 2001*[400].

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

Section 5G(4)

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

359. Dealing first with s.5G(4). It provides that a provision of the Corporations legislation does not prohibit the doing of an act, or impose a liability (whether

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[397] Explanatory Note, James Hardie Former Subsidiaries (Winding up and Administration) Bill 2005 (NSW) at 3.

[398] Explanatory Note, James Hardie Former Subsidiaries (Winding up and Administration) Bill 2005 (NSW) at 4. See Part 2 of the *James Hardie Former Subsidiaries (Winding Up and Administration) Act 2005* (NSW) which established the special purpose fund trust. See also ss.12–17 and Part 4, which set out various functions of the Minister and the SPF Trustee.

[399] Explanatory Note, James Hardie Former Subsidiaries (Winding up and Administration) Bill 2005 (NSW) at 4. See, eg, Part 4 Division 5 on the process of making and paying claims and Part 4 Division 8 on the process of completing the winding up.

[400] See ss.19, 60 of the *James Hardie Former Subsidiaries (Winding Up and Administration) Act 2005* (NSW).

civil or criminal) for doing an act, if a provision of a law of a State or Territory specifically authorises or requires the doing of that act.

360. The operation of this provision is explained by Barrett J in *HIH Casualty and General Insurance Ltd v Building Insurers' Guarantee Corporation*[401]. BGNV contend that for s.5G(4) to operate it is necessary for the defendant to identify every specific provision of the Corporations legislation that prohibits the doing of an act or imposes liability for doing the act[402]. Section 5G(4) operates differently to this. The section is invoked by State law in respect of provisions of State law that "specifically authorises or requires the doing" of acts. They are valid, and any provision of Corporations legislation that might be contended to be inconsistent does not prohibit the act or impose a liability for it.

361. Numerous provisions of the Corporations legislation displacement provisions of the *Bell Act* specifically authorise or require the doing of acts within the meaning of s.5G(4). 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.

362. So, the *Corporations Act 2001* does not prohibit the doing of any of the specifically authorised acts or impose a liability (whether civil or criminal) for doing the act, thereby enabling the requirements of the State displacement provisions to be complied with.

363. BGNV[403] and Maranoa[404] in effect contend that s.5G(4) of the *Corporations Act 2001* does not operate in relation to provisions of the *Bell Act* which effect an outcome, because this is not to authorise or require the performance of an act. The example given is the transfer and vesting of property in the Authority under s.22(1) of the *Bell Act*. This is too narrow a reading of the words "authorises or requires the doing of" an act. These are plainly words of breadth. Section 22(1) of the *Bell Act* is apposite. By it things are "transferred to and vested in" the Authority. That is the doing of an act.

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[401] *HIH Casualty and General Insurance Ltd v Building Insurers' Guarantee Corporation* [2003] NSWSC 1083; (2003) 188 FLR 153 at 195 [95]–[96]: "In such a case, a provision of the Corporations legislation (including the Corporations Act) does not prohibit the doing of the act or impose a liability (whether civil or criminal) for doing it. The specific authority or requirement of State or Territory law is thus accommodated to the extent of removal of any prohibition or liability that would otherwise apply or arise under the Corporations legislation. It is not said, in any explicit way, that the State or Territory provision may be obeyed and given effect to despite a provision of the Corporations legislation that would otherwise stand in the way. But that, it seems to me, must be the effect of s 5G(4). Section 5G(4) displaces the prohibition or liability that would arise from the Corporations Act to such an extent as to enable the authority conferred by State or Territory law to be exercised or the requirement imposed by State or Territory Law to be met. There is no geographical or territorial quality to the way in which Commonwealth law yields."

[402] BGNV's Submissions at [101], [103].

[403] BGNV's Submissions at [102]–[103].

[404] Maranoa's Submissions at [88].

Section 5G(5)

364. Section 5G(5) of the *Corporations Act 2001* operates[405] in respect of provisions of the *Bell Act* that authorise a person to give instructions to the directors or other officers of a company or body (s.5G(5)(a)); or provides that a company or body is subject to the control or direction of a person (s.5G(5)(c)). In such circumstances, the Corporations legislation does not, *inter alia*, "prevent the person from... exercising control or direction over the company or body"(s.5G(5)(d)).

365. 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[406]) and authorise the Authority to give instructions to the directors or other officers (including the liquidator[407]) of each WA Bell Company.

366. For instance, see s.27, which makes the Authority the administrator of each WA Bell Company. Section 28, which provides that while a WA Bell Company is under the administration of the Authority, the Authority has control of, and may manage, the company's property and affairs, may dispose of any of that property and may perform any function, and exercise any power that, the company or any of its officers could perform or exercise if the company were not under the administration of the Authority. Section 29, which prevents another person performing or exercising a function or power as an officer of a company except where it is with the Authority's written approval or is in the exercise of a power or duty under the *Bell Act*. Section 33, which, amongst other things, requires the liquidator of a WA Bell Company to do various things including give to the Authority an account and statement, give to, or as directed by, the Authority relevant books of the WA Bell Company, authorises the Authority to give notice to the liquidator requiring preparation of a report about property and liabilities and requires the liquidator to comply with the notice.

367. 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

368. A specific contention is put by Maranoa in respect of ss.5F and 5G of the *Corporations Act 2001*[408], concerning Maranoa.

369. Maranoa[409] is not a WA Bell Company. It is being wound up and Mr Woodings is the liquidator. Immediately before the transfer date under the *Bell Act*, Maranoa

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[405] In relation to the Corporations displacement provisions of the *Bell Act*.
[406] 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).
[407] *Corporations Act 2001* (Cth) s. 9 (definition of "officer" of a corporation).
[408] Maranoa's Submissions at [98]–[103].
[409] And BGUK.

was a beneficiary in the term deposits held by Mr Woodings on trust for the Bell Group judgment creditors pursuant to the Deed of Settlement[410].

370. An effect of s.22 of the *Bell Act* is that the property held by Mr Woodings in trust for the WA Bell Companies and Maranoa is transferred to and vests in the Authority (ss.22(1)(b), (c)). That property is freed from Maranoa's equitable interest as beneficiary (s.22(10)). It is contended that this is, within the meaning and for the purpose of s.468(1) of the *Corporations Act 2001*, a void disposition, effected by s.22 of the *Bell Act*[411]. It is then contended that this gives rise to inconsistency between s.22 of the *Bell Act* and s.468(1) of the *Corporations Act 2001*[412].

371. It is further contended that other provisions of the *Bell Act* are inconsistent with provisions of the *Corporations Act 2001* pursuant to which Mr Woodings is conducting the liquidation of Maranoa[413]. In short, the vesting of property, in which Maranoa held an interest, in the Authority and the extinguishing of Maranoa's interest, undermines those provisions of the *Corporations Act 2001* that require Mr Woodings as liquidator to maintain Maranoa's property and apply it in discharge of its liabilities.

372. There are two answers to this. One relies on s.5F, the other on s.5G.

373. The s.5F answer is 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.

374. 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.

375. 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*, ss.5G(4), (5), (8) and (11) of the *Corporations Act* do, even though those provisions have an effect on other matters, such as the winding up of Maranoa.

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[410] See Amended Special Case in P4 of 2016 at [37] (SCB 114–115), and Annexure I (SCB at 172–173, 176–177).
[411] Maranoa's Submissions at [102].
[412] Maranoa's Submissions at [102].
[413] Maranoa's Submissions at [103].

376. All of the *Bell Act* displacement provisions, including s.22, relate to WA Bell Companies. To the extent the operation of a *Corporations Act* 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*.

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

378. The effect of this is that the *Bell Act* displacement provisions operate unimpeded by the *Corporations Act*, 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

379. Maranoa advances a further proposition premised upon the correctness of Barrett J's reasoning in respect of s.5F in *HIH Casualty and General Insurance Ltd v Building Insurers' Guarantee Corporation*. It is that s.5F(2) only operates to 'disapply' provisions of the Corporations legislation in the territory of Western Australia; and that in this 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[414]. The contention then is that the *Bell Act* simply does not apply to such assets.

380. For the reasons put above, Barrett J's reasoning in in *HIH Casualty and General Insurance Ltd v Building Insurers' Guarantee Corporation* should not be accepted. If the submission made above as to the operation of s5F is accepted, this argument simply falls away.

381. There is a further answer to this contention. The *situs* of all property immediately before the transfer date was Western Australia.

382. 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.

383. *First*, term deposits of Uncontested Amounts held by WA Bell Companies with NAB[415]. *Second*, term deposits of Uncontested Amounts held by TBGL and BGF with Westpac[416]. *Third*, NAB term deposits in which monies were deposited pursuant to the Deed of Settlement[417]. In respect of each of these choses in action, Maranoa concedes that all were located in Western Australia immediately before the transfer date[418]. *Fourth*, choses in action comprising term deposits of

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[414] Maranoa's Statement of Claim at [81], [81A] (SCB at 43–44).
[415] See Amended Special Case in P4 of 2016 at [32]–[34] (SCB at 111–112).
[416] See Amended Special Case in P4 of 2016 at [32]–[33], [35.4.2] (SCB at 111, 113).
[417] See Amended Special Case in P4 of 2016 at [36]–[37], [40.1] (SCB at 113–115).
[418] 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

Uncontested Amounts held by other WA Bell Companies with Westpac[419]. *Fifth*, Westpac term deposits in which monies were deposited pursuant to the Deed of Settlement[420].

384. 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[421]. 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.

385. Before dealing with these, it is necessary to dispose of an issue in relation to all the categories of choses in action which is raised only by WAG. As noted, in respect of the first, second and third categories of choses in action, Maranoa concedes that all were located in Western Australia immediately before the transfer date[422]. WAG contends that the property comprised in all five of the categories of choses in action is located outside of Western Australia. This is said to be because the NAB and Westpac accounts were governed by the law of Victorian and New South Wales contracts with Mr Woodings[423]. There is a short answer to this. If s.5F of the *Corporations Act 2001* operates in the manner contended for by Barrett J, there is no sensible basis to apply the proper law of any contract to determine the *situs* or law area of debts. The *situs* 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[424], not the proper law of any underlying contract.

The fourth category of choses in action

386. 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[425]. This is and was at the transfer date Western Australia, for the following reasons.

387. 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[426]. Mr Woodings, the liquidator of the companies, was resident in Western Australia and had his office and principal place of business in Western

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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).

[419] See Amended Special Case in P4 of 2016 at [32]–[33], [35] (SCB at 111–113).

[420] See Amended Special Case in P4 of 2016 at [36]–[37], [40.2] (SCB at 113–117).

[421] Maranoa's Submissions at [49]–[51].

[422] Maranoa's Submissions at [49].

[423] WAG's Submissions at [50].

[424] *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.

[425] *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.

[426] See Amended Special Case in S248 of 2015 at [35.1], [35.4.3] (SCB at 173–174).

Australia[427]. 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[428]. 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[429]. If instructions were provided to not roll over the deposit, the depositor would receive their deposit together with any unpaid interest[430]. 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[431]. 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[432]. The "depositor" in each instance could only have been Mr Woodings as he was the liquidator of each.

388. 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) 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

389. 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[433]. 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.

390. Maranoa alludes to a further contention about all of this[434]; 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[435].

391. 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 Casualty and General Insurance Ltd v Building Insurers' Guarantee Corporation*. 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

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[427] See Amended Special Case in S248 of 2015 at [8] (SCB at 166–167).
[428] See Amended Special Case in S248 of 2015 at [34.5], [35.5], [40.1.5], [40.2.4] (SCB at 173–174, 177–178).
[429] See Amended Special Case in S248 of 2015 at [30] (SCB at 172).
[430] See Amended Special Case in S248 of 2015 at [35.4.1] (SCB at 173–174).
[431] See Amended Special Case in S248 of 2015 at [35.4.2] (SCB at 174).
[432] See Amended Special Case in S248 of 2015 at [35.4.3] (SCB at 174).
[433] See Amended Special Case in S248 of 2015 at [40.2] (SCB at 177–178).
[434] Maranoa's Submissions at [44]–[45], [51] appear to make this contention.
[435] See Amended Special Case in S248 of 2015 at [40.2] (SCB at 177–178).

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).

392. 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[436]. For the following reasons this was, at the transfer date, Western Australia.

393. 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[437]. Mr Woodings, was resident in Western Australia and had his office and principal place of business in Western Australia[438]. Written communications from Westpac in respect of this category of term deposits were addressed to Mr Woodings' business mailing address in Western Australia[439]. If instructions were provided to not roll over the deposit, the depositor would receive their deposit together with any unpaid interest[440]. 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[441].

394. 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

395. 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*[442].

396. This requires some explanation.

The trust property

397. 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.

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[436] *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.

[437] See Amended Special Case in S248 of 2015 at [40.2.1], [40.2.6] (SCB at 177–178).

[438] See Amended Special Case in S248 of 2015 at [8] (SCB at 166–167).

[439] See Amended Special Case in S248 of 2015 at [40.2.4] (SCB at 178).

[440] See Amended Special Case in S248 of 2015 at [40.2.5] (SCB at 178).

[441] See Amended Special Case in S248 of 2015 at [40.2.6] (SCB at 178).

[442] Maranoa's Submissions at [131]-[135].

398. Mr Woodings, in his capacity as liquidator of all of the Australian Bell companies[443], 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.

399. Relevant provisions of the Deed of Settlement are extracted in the Special Case Book[444]. Relevant are the following.

400. The Settlement Sum[445] was $981,865,342.12 to be paid *severally* to Mr Woodings. The operative settlement provision[446] provided for the payment of 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.

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[443] 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 in P4 of 2016, Annexure 1 (SCB at 170).

[444] The material terms of the trust are recorded in the Amended Special Case in P4 of 2016 at [37] (SCB at 114–115). The relevant provisions are extracted at 155–177 of the Special Case Book in P4 of 2016.

[445] 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.

[446] 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 in P4 of 2016).

401. In Annexure R to the Deed of Settlement[447], 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).

402. 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.

403. 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[448]. This much is accepted, though the right to due administration is not dependent upon the existence of a fixed or transmissible beneficial interest[449].

The contention

404. 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 (s.22(1)) absolutely freed from any encumbrance, trust, equity or interest to which it was subject immediately before so vesting (s.22(10))[450]. This is said to bring about a transfer and alienation of Maranoa's equitable interest as beneficiary and constitute a void disposition within the meaning of and for the purpose of s 468(1) of the *Corporations Act 2001*[451]. It is also said that the purported transfer of the trust property, and extinguishment of Maranoa's interest in it, interferes with Mr Woodings' performance of his obligations and duties under ss.474 and 478 of the *Corporations Act 2001* to maintain Maranoa's property in his custody and control, collect it, and apply the proceeds of the property in discharge of Maranoa's liabilities[452].

A reading down of s.22(10) of the *Bell Act*

405. 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 <u>except that the Authority holds on trust for Maranoa Transport Pty Ltd in the terms of clause 5 of Deed of Settlement[453] 5.28% of the funds in NAB bank account 77-175-2286 and Westpac bank account 4161386 or any substituted account or accounts.</u>

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[447] See Amended Special Case in P4 of 2016, Annexure 1 (SCB at 176–177).
[448] Maranoa's Submissions at [44]–[45]. The nature of the proprietary interest is explained at [45].
[449] *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).
[450] Maranoa's Submissions at [101].
[451] Maranoa's Submissions at [102].
[452] Maranoa's Submissions at [103].
[453] 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

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

407. The effect of reading down s.22(10) of the *Bell Act* in this way is that: *first*, s.22 would operate so that the entirety of the property the subject of s.22(1) would still be transferred to, and vested in, the Authority; *second*, the vesting would be absolute except to the extent of the Maranoa trust. There is no reason why the Authority cannot exercise these trustee obligations. Maranoa can in due course expect to have distributed to it its fixed proportionate interest in the two bank deposits, being 5.28% of the sums in these accounts. The remainder would be expected to be distributed to the Authority and then distributed in accordance with the *Bell Act*.

408. 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.

409. Maranoa's right to due administration of the trust and interest in the trust property, remain in existence. The trustee has simply been replaced. The contended invalidity with ss.468, 474 and 478 of the *Corporations Act 2001* falls away. The interest of Maranoa as beneficiary is not subject to a 'disposition' within the meaning of s.468(1). Mr Wooding's obligations as liquidator of Maranoa are unaffected by the change of trustee.

410. Maranoa contend that the right to due in administration extended across the totality of the trust assets, it being said the beneficiaries have no separate or separable property in any particular subset of the asset[454]. From that it is said that Maranoa had a proprietary interest in all the property subject to the trust, citing *Charles v FCT*[455] and *Read v Commonwealth*[456]. This is said to be a reason as to why ss.22(1)(b) and (c) of the *Bell Act* cannot be severed, as it would result in some 60% of the Bell litigation funds being outside the *Bell Act*'s mechanism for distribution of funds[457]. The reading down of s.22(10) avoids this.

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

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

412. 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

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ICWA. See Amended Special Case in P4 of 2016 at [36]–[40] (SCB at 113–117), Annexure 1 (SCB at 155–177).

[454] Maranoa's Submissions at [46].

[455] *Charles v Federal Commissioner of Taxation* [1954] HCA 16; (1954) 90 CLR 598 at 609 (Dixon CJ, Kitto and Taylor JJ).

[456] *Read v Commonwealth* [1988] HCA 26; (1988) 167 CLR 57 at 61–62 (Mason CJ, Deane and Gaudron JJ).

[457] Maranoa's Submissions at [132]–[135].

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.

413. 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.

414. 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.

Sections 9 and 10 of the *Bell Act*

415. Sections 9 and 10 of the *Bell Act* are alleged by BGNV and Maranoa to be directly inconsistent with ss.474(1), 477 and 478(1)(a) of the *Corporations Act 2001*[458]. As pleaded, the alleged inconsistency is in essence that, by authorising the Authority to do things in relation to a WA Bell Company, ss.9 and 10 prevent Mr Woodings, as liquidator, from exercising his powers under s.477 and discharging his obligation under s.478(1)(a) of the *Corporations Act 2001*. They also allege inconsistency with s.471A of the *Corporations Act 2001*. It is apparent from the submissions of BGNV and Maranoa that this is really a contention concerning ss. 22, 27, 28 and 29 of the *Bell Act*[459] that vest property and control of it in the Authority and requires the Authority to administer the companies.

416. 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*.

Section 18 of the *Bell Act*

417. BGNV contends that s.18 of the *Bell Act* is inconsistent with ss.555 and 556 of the *Corporations Act 2001* because it provides that the Authority's expenses and the Administrator's remuneration are to be paid first. This contrasts with ss.556 and 559 of the *Corporations Act* which ranks those claims equally and pays them proportionately if there are insufficient funds to pay them in full[460]. There is no real inconsistency between these provisions. The fund subject to the *Bell Act* is over $1.7 billion[461]. Having regard to their functions[462] and the time limits in the

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[458] BGNV's Submissions at [69]; Maranoa's Submissions, Annexure A at 34, 36. See also Special Case in S248 of 2015 at [60] (SCB at 39); Amended Special Case in P4 of 2016 at [60] (SCB at 33). WAG does not advance such a contention.

[459] BGNV's Submissions at [69]; Maranoa's Submissions, Annexure A at 34, 36.

[460] BGNV's Submissions at [76].

[461] 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 in S248 of 2015 at [33], [40] and Attachment F (SCB at 172, 176–178, 210–211), Amended Special Case in P63 of 2015 at [33], [40] and Attachment F

Act[463], the Authority's expenses and Administrator's remuneration cannot exhaust the fund so that persons, who in the absence of the *Bell Act* would be paid under ss.556, would not be paid or would not be paid proportionately to creditors who hold same class of debts in s.556(1). De minimis impairments do not give rise to a s.109 inconsistency[464].

Sections 54, 56(1) and (2), 56(4), 58, 68(2)(b)(ii), 72 and 73 of the *Bell Act*

418. BGNV and Maranoa contend that the above sections of the *Bell Act* are inconsistent with ss.468(1), (3) and (4) of the *Corporations Act 2001*. The contention is that the *Bell Act* provisions prevent a WA Bell Company or its liquidator from enjoying the protection afforded by s.468 in respect of dispositions of property of WA Bell Companies[465].

419. 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). As the transfer and vesting effected by s.22 of the *Bell Act* is valid, the basis for this challenge to the validity of these sections falls away too.

420. It is also variously alleged by BGNV and Maranoa that ss.54(2), 56(2), 58(1), 69(2)(b)(ii), 72(2)(a)–(b) and 73 of the *Bell Act* are inconsistent with ss.474, 477(2)(a) and 478 of the *Corporations Act 2001* because these provisions of the *Bell Act* are calculated, or have the tendency, to prevent proceedings being taken to recover property transferred by s.22 of the *Bell Act*[466]. Again, this is really a contention concerning s.22 of the *Bell Act*. The answer to it 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* and as such, these *Corporations Act* provisions have no remaining operation that affects, and could thereby be inconsistent with, the impugned sections of the *Bell Act*.

Section 73(1) *Bell Act*

421. This contention, as understood, is that s.73(1) of the *Bell Act* is inconsistent with s.471B of the *Corporations Act*[467].

(SCB at 97, 101–104, 162–163) and Amended Special Case in P4 of 2016 at [33], [40] and Attachment F (SCB at 111, 115–117, 148–149). Adding together the various sums arrives at the stated amounts.

[462] See s.9 of the *Bell Act*.

[463] See Part 4 of the *Bell Act*.

[464] *APLA Ltd v Legal Services Commissioner (NSW)* [2005] HCA 44; (2005) 224 CLR 322 at 400 [206] (Gummow J), 433 [324]–[325] (Kirby J); *Jemena Asset Management (3) Pty Ltd v Coinvest Limited* [2011] HCA 33; (2011) 244 CLR 508 at 525 [41] (French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ).

[465] See BGNV's Amended Statement of Claim at [70] (SCB at 45); BGNV's Submissions at [78]–[81]; Maranoa's Statement of Claim at [70] (SCB at 38–39); Maranoa's Submissions at [65], Annexure A at 34, 36. Although not pleaded, reference is also made in BGNV's Submissions at [79] to s.58(1) of the *Bell Act* and by Maranoa's Submissions, Annexure A at 39–40 to ss.68(2)(b)(ii) and 72(2)(a) of the *Bell Act*. Those provisions are not invalid for the same reasons outlined.

[466] Maranoa's Submissions, Annexure A at 39.

[467] See BGNV's Amended Statement of Claim at [71] (SCB at 46); Maranoa's Statement of Claim at [71] (SCB at 39). This claim does not appear to be referred to in BGNV's Submissions. It is briefly referred to in Maranoa's Submissions, Annexure A at 40.

422. Section 73(1) of the *Bell Act* provides that on and from the transfer day, a person cannot begin or continue proceedings in a court with respect to property that was, immediately before that day, property of a WA Bell Company, except with leave of the Supreme Court and in accordance with the terms, if any, of that leave. This is contended to be inconsistent with s.471B of the *Corporations Act 2001* because s.73(1) of the *Bell Act* prevents a proceeding from being commenced or proceeded with, even if leave has already been given under s.471B of the *Corporations Act 2001*[468].

423. There is no inconsistency. Section 471B of the *Corporations Act* does not "cover the field" in the sense that it is the only restriction on a person commencing proceedings in relation to property of a company in liquidation. Both provisions, which provide for leave, operate together. Leave could be sought under s.471B of the *Corporations Act* and also under s.73 of the *Bell Act* (or *vice versa*).

Section 74 of the *Bell Act*

424. WAG contends that s.74 of the *Bell Act* is inconsistent with s.554A of the *Corporations Act* because s.554A of the *Corporations Act* provides a right to appeal in respect of an adjudication of a proof of debt and s.74 denies a right to appeal[469]. Maranoa says that s.74 of the *Bell Act* is inconsistent with ss.554A and 1321 of the *Corporations Act* which provide an aggrieved party with a right to appeal[470].

425. 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 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.

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[468] See BGNV's Amended Statement of Claim at [71] (SCB at 46); Maranoa's Statement of Claimat [71] (SCB at 39). In Maranoa's Submissions, Annexure A at 40, it is suggested that the relevant inconsistency is the ouster of jurisdiction of "Courts" other than the Supreme Court of Western Australia to grant leave to begin with or proceed with proceedings in a court with respect to property of a WA Bell Company.

[469] See WAG's Amended Statement of Claim at [72.3] (SCB at 39–40); WAG's Submissions at [22].

[470] See Maranoa's Statement of Claim 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).

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

426. 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*

427. BGNV and Maranoa contend 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)[471]. 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*.

428. 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*.

Section 55 of the *Bell Act*

429. BGNV contends that s.55 of the *Bell Act* is invalid for inconsistency with s.601AH of the *Corporations Act 2001*[472]. While s.55 is a displacement provision, s.601AH is not in Chapter 5 of the *Corporations Act 2001*. Section 55 creates an offence of a person, without the Authority's approval, seeking to reinstate the registration of a company[473]. Section 55 of the *Bell Act* also, in BGNV's submission, prevents ASIC from applying to the Court for the

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[471] See BGNV's Amended Statement of Claim at [66] (SCB at 43); BGNV's Submissions at [86.2]; Maranoa's Statement of Claim at [66] (SCB at 37); Maranoa's Submissions, Annexure A at 37; Special Case in P63 of 2015 (SCB at 42 [72.5]); WAG's Submissions at [25] (but which do not refer to r.5.6.0.2 of the *Corporations Regulations*).

[472] BGNV submissions at [83].

[473] See BGNV's Amended Statement of Claim at [73] (SCB at 47); BGNV's Submissions at [83]. See also Maranoa's Statement of Claim at [74] (SCB at 40) but Maranoa have not advanced any submissions on this issue.

reinstatement of the company and thereby prevents the Court from making an order that ASIC reinstate the registration of such a company. By s.601AH of the *Corporations Act 2001* a person aggrieved by the deregistration of a company may apply to the Court to reinstate a company.

430. Section 51(3)(c) of the *Bell Act* removes from the excluded matter registration of a WA Bell Company to be reinstated and s.601AH of the *Corporations Act*. So, *prima facie*, s.601AH continues to operate. But, because s.55 of the *Bell Act* is also a displacement provision for the purposes of s.5G, s.601AH continues to operate in respect of WA Bell Companies but not to the extent it would be inconsistent with s.55 of the *Bell Act*. In effect, this means that the Authority is the only entity that can take a step for achieving the reinstatement of the registration of a deregistered company listed in Schedule 1 under s.601AH of the *Corporations Act*.

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

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

Interference with the BGNV liquidator

433. BGNV contends that ss.22, 25, 26 and 30 of the *Bell Act* are inconsistent with s.601CL(15)(c) of the *Corporations Act 2001*[474]. While those parts of the *Bell Act* are all displacement provisions, s.601CL(15)(c) is not in Chapter 5 of the *Corporations Act*.

434. It is contended, in effect, that by reason of s.601CL(15)(c) of the *Corporations Act 2001* Mr Trevor, as liquidator of BGNV, is obliged to recover and realise the property of BGNV in Australia. This includes BGNV's contractual rights under the Agreement for Indemnification and Post Termination Inter-Creditor Agreement dated 23 September 1999 between the Commonwealth, ICWA, Garry Trevor as Australian liquidator of BGNV and BGNV, as amended by an agreement dated 26 June 2000[475] and its admitted proofs of debt in the windings up of TBGL and BGF. It is contended that s.26(1)(i) of the *Bell Act* has the effect of preventing Mr Trevor from discharging his duties as liquidator by avoiding this agreement. It is further contended that ss.22 and 25(5) deprive BGNV of the capacity to be paid a dividend on its proofs of debt in the windings up of TBGL and BGF and that by reason of s.25(1) of the *Bell Act* BGNV is precluded from lodging a proof with the Authority.

435. No inconsistency arises.

436. For the reasons elsewhere explained, s.25(1) of the *Bell Act* does not prevent BGNV lodging a proof of debt with the Authority and ss.42 and 44 allow for BGNV to be paid a dividend with respect of that proof. Under the *Bell Act*, Mr Trevor can recover and realise the property of BGNV in this jurisdiction and thereafter perform his duties accoring to law.

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[474] See BGNV's Amended Statement of Claim at [75] (SCB at 47–48); BGNV's Submissions at [87].
[475] Defined in s.3 of the *Bell Act* as the PTICA.

437. As to the contention that the *Bell Act* prevents Mr Trevor from recovering and realising the property of BGNV in Australia, it simply does not. Mr Trevor is charged with this duty, whatever that property may be and whether, by law, that property changes character or nature or, by law, ceases to exist. The avoidance of a property right does not affect Mr Trevor's duties, any more than the compulsory acquisition of real property of a company in liquidation does not prevent a liquidator from discharging his/her duties.

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

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

439. BGNV and WAG contend the following. *First*, that s.25(5) of the *Bell Act* "prevents further steps"[476] being taken in particular matters before the Supreme Court of Western Australia, which are matters in federal jurisdiction. It is contended that this prevents a person from invoking the federal jurisdiction conferred on the Supreme Court; thereby alters, impairs and detracts from the exercise of federal jurisdiction by the Supreme Court and is thereby inconsistent with the conferral of such jurisdiction by s.39(2) of the *Judiciary Act*[477]. This inconsistency with s.39(2) is contended to be that these effects of s.25(5) of the *Bell Act*, in a "legal and practical sense" stultify, prevent and render ineffective the exercise of judicial power in federal jurisdiction by the Supreme Court, and by doing so alter, impair and detract from s.39(2) of the *Judiciary Act*[478].

440. *Second*, the same contention is made in respect of s.73 of the *Bell Act*[479].

441. *Third*, the same contention is made in respect of ss.27 and 29 of the *Bell Act*.

442. *Fourth*, that s.22 of the *Bell Act* renders certain actions before the Supreme Court of Western Australia, in exercise of federal jurisdiction, "inutile". This "destroys" their character as matters in federal jurisdiction, which is inconsistent with the conferral of federal jurisdiction in respect of such matters and inconsistent with s.39(2) of the *Judiciary Act*[480]. Again, this inconsistency is (it is thought) that this effect of s.22 of the *Bell Act* renders ineffective the exercise of judicial power in federal jurisdiction by the Supreme Court, and by doing so alters, impairs and detracts from s.39(2) of the *Judiciary Act*[481].

443. As part of this contention, it is said that s.26 of the *Bell Act* denies the legal basis (and likely utility) of these actions, that are before the Supreme Court of Western

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[476] BGNV's Submissions at [134].
[477] BGNV's Submissions at [134]–[135]; WAG's Submissions at [121].
[478] BGNV's Submissions at [134].
[479] BGNV's Submissions at [134].
[480] BGNV's Submissions at [135]. It may be that the same contention is advanced at WAG's Submissions at [136].
[481] BGNV's Submissions at [134].

Australia in exercise of federal jurisdiction. This "destroys" their character as matters in federal jurisdiction, which is contrary to the conferral of federal jurisdiction and inconsistent with s.39(2) of the *Judiciary Act*[482]. This is contended to give rise to an inconsistency in the same sense as that in respect of s.22.

First — the *Bell Act* s.25(5) contention

444. Section 25(5) of the *Bell Act* prohibits the making or maintenance of an action against certain entities arising out of or relating to a liability that may be proved in accordance with Part 4 Division 2 of the *Bell Act*.

445. The section is not a direction to any Court as to the manner or outcome of the exercise of jurisdiction[483] or a withdrawal of jurisdiction. It is in the nature of numerous uncontroversial legislative restrictions on the bringing of claims. The most obvious analogy is the restriction on creditors bringing or maintaining an action against a company once a winding up order has been made[484]. Although courts have a power to grant leave, the analogy is none-the-less apt. No party to these proceedings has contended that the 'winding up' of companies is an exclusively judicial function[485].

446. This Court has never characterised winding up as an exclusive judicial function, though it has acknowledged that winding up orders have long fallen to courts[486]. Merely because they have long been made by courts, however, does not equate to a proposition that they can only ever be done by courts. So much was recognised in *R v Davison*[487]. Similarly, Gaudron J in *Gould v Brown* stated[488]:

> Courts have long exercised jurisdiction with respect to the bankruptcy of individuals and the insolvency of companies... It may be that those powers need not be conferred on courts, but, being so conferred, they are readily characterised as judicial in character.

447. The history of such matters is shallower than often thought. Dr Cooke[489] details such matters as does Professor Lester[490]. As explained, prior to the *Joint Stock Companies Act 1844* (UK)[491], the joint stock corporation, incorporated by Royal Charter under letters patent, and the joint stock company, created by deed, co-

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[482] BGNV's Submissions at [135].
[483] See *Chu Kheng Lim v The Minister for Immigration, Local Government and Ethnic Affairs* [1992] HCA 64; (1992) 176 CLR 1 at 37 (Brennan, Deane and Dawson JJ).
[484] See s.471B of the *Corporations Act 2001* (Cth). See also the discussion in *Re Gordon Grant and Grant Pty Ltd* [1983] 2 Qd R 314 at 316–317.
[485] Cf. their contention that it is subject to judicial supervision — see BGNV's Submissions at [116]; Maranoa's Submissions at [41].
[486] *R v Davison* [1954] HCA 46; (1954) 90 CLR 353 at 368 (Dixon CJ and McTiernan J).
[487] *R v Davison* [1954] HCA 46; (1954) 90 CLR 353 at 384 (Kitto J), 390 (Taylor J).
[488] *Gould v Brown* [1998] HCA 6; (1998) 193 CLR 346 at 404 [68].
[489] Colin Cooke, *Corporation, Trust and Company: An Essay in Legal History* (Manchester University Press, 1950).
[490] See V Markham Lester, *Victorian Insolvency: Bankruptcy, Imprisonment for Debt, and Company Winding-up in Nineteenth-Century England* (Clarendon Press, 1995) in particular at Chapter 6.
[491] Which Cooke describes as "set[ting] up the structure of modern company law" — see Colin Cooke, *Corporation, Trust and Company: An Essay in Legal History* (Manchester University Press, 1950) at 138.

existed. The joint stock company, like all companies, was created by deed and unincorporated. So any action against it, in the event of failure was brought against all of its members[492]. The *Joint Stock Companies Act 1844* (UK) and the *Joint Stock Companies Winding-up Act 1848* (UK) in effect created modern winding up.

448. Professor Lester notes that prior to the enactment of the *Joint Stock Companies Winding-up Act 1848* (UK) thought was given to vesting the whole of the jurisdiction for the winding-up of insolvent companies in the existing bankruptcy commissioners, with neither the Bankruptcy Court nor Chancery having any role[493]. As recorded by Professor Lester, this proposal was rejected because of the possibility that matters might arise in the course of winding up that relied upon the equitable jurisdiction, which made efficient an ongoing role for Chancery[494].

449. It is also notable that the *Joint Stock Companies Act 1856* (UK) introduced processes for the voluntary winding-up of a company in the absence of court supervision[495].

450. That there is nothing inherent in the nature of a winding up that renders it exclusively judicial is exemplified by the 1870s experience with the Albert Life Assurance Company. In 1869, the Albert Life Assurance Company collapsed. At this time, the Court of Chancery under the *Companies Act 1862* (UK) had jurisdiction in respect of winding-up. The Court struggled to deal with the complexities of the winding up of the company. As stated by James LJ, who in rejecting a scheme of reconstruction for the company said: "[i]n truth, it is a difficulty so vast, from the number of these companies, and the circumstances applying to them, and the different rights and positions of different classes of creditors, that I can see no way of extricating them from the ruinous process of liquidation in this Court, except an application to Parliament; and I sincerely hope that Parliament will find some means of accomplishing that object"[496].

451. This sentiment has a certain resonance to this matter.

452. Subsequently, *The Albert Life Assurance Company Arbitration Act 1871*[497] was enacted. It created "an arbitrator specially constituted for the purpose, to determine the rights and settle the affairs of the said companies and their creditors"[498]. Lord Cairns was appointed[499]. His Lordship was empowered to

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[492] There was another class of unincorporated joint stock company deriving certain privileges associated with incorporation not from letters patent but from special Acts of Parliament. These were commonly railway, canal, dock and other public utility companies — Colin Cooke, *Corporation, Trust and Company: An Essay in Legal History* (Manchester University Press, 1950) at 142.

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

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

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

[496] *Re Albert Life Assurance Company* (1871) LR 6 Ch App 381 at 387.

[497] 34 & 35 Vict. c.31.

[498] Premable to *The Albert Life Assurance Company Arbitration Act 1871* 34 & 35 Vict., c.31.

[499] Section 3 of *The Albert Life Assurance Company Arbitration Act 1871* 34 & 35 Vict., c.31.

settle a scheme of arrangement, compromise and finally and conclusively settle all or any part of the affairs of the companies[500], rendered compulsory on all interested persons[501]. The arbitrator had the power to get in and apply or distribute the assets of the companies[502]. The liquidator's books, papers and documents and the moneys and securities under the control of the Courts of Chancery were delivered up to the arbitrator[503]. The arbitrator was empowered to settle and determine the matters under the Act "upon such terms and in such manner in all respects as he in his absolute and unfettered discretion may think most fit, equitable, and expedient, and as fully and effectually as could be done by Act of Parliament"[504]. The Act also prohibited the commencement or carrying on of any liquidation, suit, action or proceeding in respect of matters referred by the Act to arbitration, except with the leave of the arbitrator[505]. Every award, order, certificate or instrument of the arbitrator was to be binding and conclusive on all parties and could not be removed by prerogative writ or injunction to the Courts and they were prohibited from being subject to review or appeal[506]. The awards were to be enrolled in the High Court of Chancery after execution for certification by the proper officer of the enrolment office of the Court The awards made by the arbitrator were, by force of the Act, binding on all without appeal and had the same effect as if the same had been enacted by Parliament[507].

453. This circumstance evidences that winding up has never been an exclusively judicial function. The *Bell Act* employs a similar non-judicial process for the finalisation of the winding up and division of assets of companies.

454. Another example of a legislative provision that is not a direction to a Court as to the manner or outcome of the exercise of its jurisdiction is the privative clause; valid subject to maintenance of superior court's jurisdiction to grant prerogative relief for jurisdictional error[508]. Section 74(4) of the *Bell Act* is in such terms.

455. Relevant also is the *BLF Case*[509]. It involved a challenge as to the validity of legislation cancelling the registration of a union registered under the *Conciliation and Arbitration Act 1904* (Cth). The legislation cancelling registration was introduced into Parliament days after the Australian Conciliation and Arbitration

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[500] Section 5 of *The Albert Life Assurance Company Arbitration Act 1871* 34 & 35 Vict., c.31.
[501] Section 24 of *The Albert Life Assurance Company Arbitration Act 1871* 34 & 35 Vict., c.31.
[502] Section 9 of *The Albert Life Assurance Company Arbitration Act 1871* 34 & 35 Vict., c.31.
[503] Section 14 of *The Albert Life Assurance Company Arbitration Act 1871* 34 & 35 Vict., c.31.
[504] Section 11 of *The Albert Life Assurance Company Arbitration Act 1871* 34 & 35 Vict., c.31.
[505] Sections 12–13 of *The Albert Life Assurance Company Arbitration Act 1871* 34 & 35 Vict., c.31.
[506] Section 21 of *The Albert Life Assurance Company Arbitration Act 1871* 34 & 35 Vict., c.31.
[507] Section 24 of *The Albert Life Assurance Company Arbitration Act 1871* 34 & 35 Vict., c.31.
[508] *Kirk v Industrial Court (New South Wales)* [2010] HCA 1; (2010) 239 CLR 531.
[509] *Australian Building Construction Employees' & Builders Labourers' Federation v Commonwealth* [1986] HCA 47; (1986) 161 CLR 88 ('*BLF Case*'). The impugned legislation in that case is similar to Schedule 6A of *The Albert Life Assurance Company Arbitration Act 1871*, in that it also contains a recitation, by which the Parliament made certain findings. The recital is set out at 92–93 of the reported decision: "WHEREAS the Parliament considers that it is desirable, in the interest of preserving the system of conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of anyone State, to cancel the registration of The Australian Building Construction Employees' and Builders Labourers' Federation under the Conciliation and Arbitration Act 1904".

Commission published adverse findings in respect of the union[510]. De-registration had severe consequences for the union and its members. The union ceased to have legal personality. The challenge to the validity of the legislation cancelling registration failed[511]. One of the matters put by the union was that the purpose of the cancelling Act was to deny the union a right to continue with other litigation that was on foot. That litigation was in federal jurisdiction. Gibbs CJ, Mason, Brennan, Deane and Dawson JJ observed that the cancelling Act[512]:

> ... simply deregisters the Federation, thereby making redundant the legal proceedings which it commenced in this Court. It matters not that the motive or purpose of the Minister, the Government and the Parliament in enacting the statute was to circumvent the proceedings and forestall any decision which might be given in those proceedings.

456. Their Honours also noted that the provisions in "Ch. III governing the judicial power [do not] prevent Parliament from exercising its legislative power so as to abrogate or alter rights and liabilities which would otherwise be subject to a judicial determination"[513].

457. The *BLF Case* highlights the critical operation of s.25(5). The section does not remove jurisdiction, federal or otherwise, from the Supreme Court. Of course, State laws that do remove jurisdiction are invalid by reason of inconsistency with s.39(2). Menzies J in *Commonwealth v Rhind* referred to; "a law prohibiting persons within the description to be found therein from resorting to the jurisdiction of the Court and not a section depriving the Supreme Court of jurisdiction"[514]. The latter, if its purpose was to deprive the Supreme Court of federal jurisdiction, would be contrary to s.39(2)[515]. As Menzies J also observed in *Commonwealth v Rhind*[516]:

> ...it would need clear and compelling language to show that the law of a State which could be regarded as having a different and less drastic operation, does operate to deprive the Supreme Court of the State of part of its historic [meaning federal] jurisdiction.

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[510] These were summarised in the *BLF Case* [1986] HCA 47; (1986) 161 CLR 88 at 92 as follows: "(a) engaged in industrial action that constituted a contravention of certain undertakings and agreements; (b) engaged in industrial action in support of claims that constituted a contravention of such undertakings; (c) engaged in industrial action that was inconsistent with the undertakings and agreements already referred to; and (d) engaged in conduct that prevented or seriously hindered the achievement of certain objects of the Conciliation and Arbitration Act."

[511] See, in particular, *BLF Case* [1986] HCA 47; (1986) 161 CLR 88 at 95 (Gibbs CJ, Mason, Brennan, Deane and Dawson JJ): "[T]here is nothing in the nature of participation in that system or in deregistration which makes deregistration uniquely susceptible to judicial determination ... Just as it is entirely appropriate for Parliament to select the organizations which shall be entitled to participate in the system of conciliation and arbitration, so it is appropriate for Parliament to decide whether an organization so selected should be subsequently excluded and, if need be, to exclude that organization by an exercise of legislative power." This was unanimously confirmed by the High Court in *Owens v Commonwealth* [1991] HCA 20; (1991) 100 ALR 513 at 513 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

[512] *BLF Case* [1986] HCA 47; (1986) 161 CLR 88 at 96–97.

[513] *BLF Case* [1986] HCA 47; (1986) 161 CLR 88 at 96.

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

[515] This is the effect of the reasoning in *Commonwealth v Rhind* [1966] HCA 83; (1966) 119 CLR 584 at 606 (Menzies J). It is likely also the reasoning of Barwick CJ at 599.

[516] *Commonwealth v Rhind* [1966] HCA 83; (1966) 119 CLR 584 at 606–607 (Menzies J).

458. The authorities cited by the plaintiffs, or in judgments cited by them, in this context are at all fours with this, or do not deal with the point. The genesis of much of this is the reference in numerous judgments[517] to the one page judgment in *Commissioner of Stamp Duties (NSW) v Owen (No 2)*[518]. There the Court dismissed an application for indemnity costs available under New South Wales legislation, in respect of a matter in the Court's original jurisdiction. The basis of the decision was that the New South Wales law could not apply directly to the High Court and was not picked up by s.79 of the *Judiciary Act 1903* (Cth). *John Robertson & Co v Ferguson Transformers Pty Ltd*[519] did not address s.39(2), but rather the application of a State limitation statute to a matter before the High Court in its original jurisdiction, by reason of s.79 of the *Judiciary Act*.

459. The basal proposition in all of this is as expressed by Gleeson CJ, Gaudron and Gummow JJ in *Edensor*[520]:

> ...the law of a State cannot withdraw from this Court federal jurisdiction conferred by s 75 of the *Constitution*, nor the federal jurisdiction which a court (State or federal) otherwise may exercise under a conferral or investment of jurisdiction by a law made under s 76 or s 77 of the *Constitution*; nor may a State law otherwise limit the exercise of federal jurisdiction.

460. The necessary distinction is between depriving or withdrawing or limiting the exercise jurisdiction and (say), "prohibiting persons within [a] description ... from resorting to the jurisdiction of the Court and not a section depriving the Supreme Court of jurisdiction"[521].

461. The former is not inconsistent with s.39(2) of the *Judiciary Act*. Section 25(5) of the *Bell Act* is of this genus.

462. An illustration of 'infringing' legislation is that considered in *P v P*[522]. There a State law was inconsistent with a Commonwealth law and invalid because it purported to render Federal Court orders ineffective in the absence of a grant of a Court order under State law.

463. There is nothing in the *Bell Act* that has any like or analogous effect. None of these conclusions are affected by s.58 of the *Bell Act* which BGNV says criminalises a failure to observe s.25(5) of the *Bell Act*[523]. A prohibition on commencing an action does not amount to a withdrawal of jurisdiction from a court.

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[517] See, eg, *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* [1997] HCA 36; (1997) 190 CLR 410 at 463 fn.184 (Gummow J); *Patrick Stevedores Operations No.2 Pty Ltd v Maritime Union of Australia (No.3)* (1998) 195 CLR 1 at 35 [41] fn.85 (Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ).

[518] *Commissioner of Stamp Duties (NSW) v Owen (No 2)* [1953] HCA 62; (1953) 88 CLR 168.

[519] *John Robertson & Co (in Liq) v Ferguson Transformers Pty Ltd* [1973] HCA 21; (1973) 129 CLR 65 at 79 (Menzies J), 84 (Walsh J), 87 (Gibbs J), 93 (Mason J).

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

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

[522] *P v P* [1994] HCA 20; (1994) 181 CLR 583.

[523] BGNV's Submissions at [134].

Second — the *Bell Act* s.73 contention

464. A provision of State law that limits the bringing of actions in respect of class of matters X, some of which may attract federal jurisdiction, but which recognises that the Supreme Court, in exercise of federal jurisdiction, can grant leave to bring such an action does not withdraw federal jurisdiction or deprive a State Court of it. The imposition of a leave requirement is commonplace for Courts, both in the exercise of State and federal jurisdiction[524]. The imposition of a leave requirement does not direct a Court in the exercise of its power. A leave requirement *per se* is not a direction as to the outcome of jurisdiction: leave may or may not be granted. Section 73 of the *Bell Act* does not withdraw jurisdiction simply because the Supreme Court may decline to grant leave.

465. This contention should be rejected.

Third — the *Bell Act* ss.27 and 29 contention

466. The position with ss.27 and 29 of the *Bell Act* is the same as that addressed above in respect of s.25(5).

Fourth — the *Bell Act* s.22 and s.26 contentions

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

468. Since at least Mason J's judgment in *R v Humby; Ex parte Rooney*[525] it has not been doubted that, in respect of the exercise of federal judicial power, nothing in its nature limits legislative power that directly or indirectly affects rights in issue in any proceeding.

469. This is encapsulated in the observation of French CJ, Kiefel, Bell and Keane JJ in *Duncan v Independent Commission Against Corruption*[526]:

> It is now well settled that a statute which alters substantive rights does not involve an interference with judicial power contrary to Ch III of the *Constitution* even if those rights are in issue in pending litigation.

470. Sections 22 and 26 of the *Bell Act* alter substantive rights. By altering substantive rights, the Act is not inconsistent with a provision of Commonwealth law (s.39(2))

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

[525] *R v Humby; Ex parte Rooney* [1973] HCA 63; (1973) 129 CLR 231 at 250. See also *HA Bachrach Pty Ltd v The State of Queensland* [1998] HCA 54; (1998) 195 CLR 547; *BLF Case* [1986] HCA 47; (1986) 161 CLR 88 at 96–97 (Gibbs CJ, Mason, Brennan, Deane and Dawson JJ).

[526] *Duncan v Independent Commission Against Corruption* [2015] HCA 32; (2015) 324 ALR 1 at 8 [26].

that confers jurisdiction on a State court to deal with the substantively different matter.

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

471. There are four contentions put by the plaintiffs to the effect that the *Bell Act* infringes Chapter III of the Commonwealth *Constitution*. *First*, that ss.22 and 26 of the *Bell Act* "contract or interfere with the exercise of federal jurisdiction" in a manner contrary to Chapter III of the *Constitution*[527]. *Second*, requirements of the *Bell Act*, including s.73, impermissibly interfere with the exercise of "the judicial power of the Commonwealth" and are thereby repugnant to Chapter III[528]. *Third*, the *Bell Act* has extinguished the subject matter of COR 146 of 2014, currently before the Supreme Court of Western Australia and being considered by the Court in exercise of federal jurisdiction; a consequence of which is that the *Bell Act* has deprived this proceeding of the status of a matter within the meaning of ss.75 and 76 of the *Constitution*[529]. *Fourth*, the *Bell Act* has the effect of investing an exclusive judicial function, presumably a matter of federal jurisdiction, in the State executive government, which infringes Chapter III[530].

The first contention — concerning ss.22 and 26 of the *Bell Act*

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

473. The same responses apply as put above. The contention fails by reason of the line of authority (now "well settled") most recently articulated in *Duncan v Independent Commission Against Corruption*[531] stated above.

474. The articulation of this first contention by BGNV relies seemingly solely upon observations of McHugh J in *APLA Limited v Legal Services Commissioner (NSW)*[532], all of which are shorn from their context.

475. All of the passages relied upon by BGNV from McHugh J's judgment in *APLA Limited v Legal Services Commissioner (NSW)* related to his Honour's conclusion (in dissent) that a particular provision of New South Wales law prevented potential litigants from "obtaining information about their rights in respect of certain federal causes of action and about the legal practitioners who might provide appropriate advice and representation (even on a *pro bono* basis)

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[527] BGNV's Submissions at [137]–[141].
[528] BGNV's Submissions at [137], [142]–[145].
[529] BGNV's Submissions at [139]; WAG's Submissions at [128]–[129].
[530] WAG's Submissions at [76(c)].
[531] *Duncan v Independent Commission Against Corruption* [2015] HCA 32; (2015) 324 ALR 1 at 8 [26] (French CJ, Kiefel, Bell and Keane JJ).
[532] *APLA Limited v Legal Services Commissioner (NSW)* [2005] HCA 44; (2005) 224 CLR 322.

concerning those rights"[533]. This culminated in his Honour's conclusion (in dissent) that such provision impaired "the capacity of courts exercising federal jurisdiction to hear and determine "matters" that Ch III authorises and for which the Parliament has legislated in the expectation that those "matters" will be determined in federal jurisdiction"[534].

476. *APLA Limited v Legal Services Commissioner (NSW)* did not deal with alteration to substantive rights.

477. BGNV refer to the following from McHugh J's judgment in *APLA Limited v Legal Services Commissioner (NSW)*. First, the sentence; "the States [cannot] enact legislation that attempts to alter or interfere with the working of the federal judicial system set up by Ch III"[535]. Plainly McHugh J was not there seeking to over-rule *R v Humby; Ex parte Rooney*[536] nor *Bachrach*[537]. If his Honour's sentence is to be understood literally (as BGNV contend), then it would follow that s.39(2) of the *Judiciary Act* would be invalid because it recognises that federal jurisdiction is invested in State courts "within the limits of their several jurisdictions", and this can change. Is it contended that a change to State jurisdiction "alters or interferes with the working of the federal judicial system set up by Ch III"? To do so is contrary to a number of decisions which recognise that the Commonwealth takes a State court as it finds them and that States can change the limits of their jurisdiction[538].

478. The next part sentence in McHugh J's judgment in *APLA Limited v Legal Services Commissioner (NSW)* invoked by BGNV is that a State Parliament; "... simply has no power to legislate in respect of or in relation to "matters" that arise in federal courts or concern the exercise of federal jurisdiction"[539]. Again, if sought to be understood literally, such a proposition is plainly wrong. Many matters in federal jurisdiction concern claims arising under State law, diversity jurisdiction being paradigmatic.

479. Next, BGNV rely upon McHugh J's statement that implications derived from Chapter III of the Commonwealth *Constitution*, "provide a shield against any legislative forays that would harm or impair the nature, quality and effects of federal jurisdiction and the exercise of federal judicial power conferred or

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[533] *APLA Limited v Legal Services Commissioner (NSW)* [2005] HCA 44; (2005) 224 CLR 322 at 369–370 [87].
[534] *APLA Limited v Legal Services Commissioner (NSW)* [2005] HCA 44; (2005) 224 CLR 322 at 369–370 [87].
[535] *APLA Limited v Legal Services Commissioner (NSW)* [2005] HCA 44; (2005) 224 CLR 322 at 364 [78]. See BGNV's Submissions at [140].
[536] *R v Humby; Ex parte Rooney* [1973] HCA 63; (1973) 129 CLR 231.
[537] *H A Bachrach Pty Ltd v Queensland* [1998] HCA 54; (1998) 195 CLR 547.
[538] See, for example, *Commonwealth v District Court of the Metropolitan District* [1954] HCA 13; (1954) 90 CLR 13 at 22 (Dixon CJ, Kitto and Taylor JJ); *Leeth v Commonwealth* [1992] HCA 29; (1992) 174 CLR 455 at 468–469 (Mason CJ, Dawson and McHugh JJ), 498 (Gaudron J); *APLA Limited v Legal Services Commissioner of New South Wales* [2005] HCA 44; (2005) 224 CLR 322 at 406–407 [232] (Gummow J), 433 [325] (Kirby J); *Le Mesurier v Connor* [1929] HCA 41; (1929) 42 CLR 481 at 496 (Knox CJ, Rich and Dixon JJ); *Commonwealth v Dalton* [1924] HCA 3; (1924) 33 CLR 452 at 456 (Isaacs and Rich JJ).
[539] *APLA Limited v Legal Services Commissioner (NSW)* [2005] HCA 44; (2005) 224 CLR 322 at 367 [82]. See BGNV's Submissions at [140].

invested by the Constitution or laws of the Parliament of the Commonwealth"[540]. It rather depends on what his Honour meant by "harm or impair" and "nature, quality and effects of". Again, if to be understood literally, such observation is contrary to (*inter alia*) *R v Humby; Ex parte Rooney*[541], *Bachrach*[542] and *Duncan v Independent Commission Against Corruption*[543].

480. This contention should be rejected.

The second contention

481. This is that provisions of the *Bell Act*, including s.73 of the *Bell Act*, direct the exercise of judicial power by the Supreme Court exercising federal jurisdiction, in various and variously articulated ways. The first expression of this is that the Act "specifically targets" and is "directed at" COR 146 and 208 of 2014 to "fit like a glove around them"[544]. This contention should be rejected. This rhetoric overlooks the mundane fact that State Parliaments routinely legislate in a manner that affects pending proceedings being considered in federal jurisdiction. *Duncan v Independent Commission Against Corruption*[545] is the most recent obvious example, where the fact that the matter was in federal jurisdiction was irrelevant as the impugned provision was not a direction[546]. Contrary to BGNV's contention[547], such legislation is valid even if it benefits one party to the litigation[548]. What Chapter III of the Commonwealth *Constitution* precludes is a State law that seeks to direct the manner in which a court, State or otherwise, deals with a substantive matter before it. Nothing in the *Bell Act* does this.

482. Another expression of this, by BGNV, is that provisions of the *Bell Act* are repugnant to the judicial process, because they resolve controversies between parties (in favour of the State) by directing a Court as to the manner and outcome of the exercise of judicial power[549]. Again, nothing in the *Bell Act* directs the Supreme Court to do or not do anything.

483. Relevant is the observation in *Chu Kheng Lim*[550], cited with approval by Gummow, Hayne and Bell JJ (with whom French CJ, Crennan and Kiefel JJ

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[540] *APLA Limited v Legal Services Commissioner (NSW)* [2005] HCA 44; (2005) 224 CLR 322 at 363 [73]. See BGNV's Submissions at [140].
[541] *R v Humby; Ex parte Rooney* [1973] HCA 63; (1973) 129 CLR 231 at 250 (Mason J).
[542] *H A Bachrach Pty Ltd v Queensland* [1998] HCA 54; (1998) 195 CLR 547.
[543] *Duncan v Independent Commission Against Corruption* [2015] HCA 32; (2015) 324 ALR 1 at 8 [26] (French CJ, Kiefel, Bell and Keane JJ).
[544] BGNV's Submissions at [143]
[545] *Duncan v Independent Commission Against Corruption* [2015] HCA 32; (2015) 324 ALR 1.
[546] *Duncan v Independent Commission Against Corruption* [2015] HCA 32; (2015) 324 ALR 1 at 9 [30]–[31] (French CJ, Kiefel, Bell and Keane JJ).
[547] BGNV's Submissions at [143].
[548] See *BLF Case* [1986] HCA 47; (1986) 161 CLR 88 at 96–97 (Gibbs CJ, Mason, Brennan, Deane, Dawson JJ). *Duncan v Independent Commission Against Corruption* [2015] HCA 32; (2015) 324 ALR 1 is the most recent example of this.
[549] BGNV's Submissions at [144]–[145].
[550] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* [1992] HCA 64; (1992) 176 CLR 1 at 36–37 (Brennan, Deane and Dawson JJ).

agreed in this respect[551]) in *AEU*[552] and by French CJ, Kiefel, Bell and Keane JJ in *Duncan v Independent Commission Against Corruption*[553]:

> It is one thing for the Parliament, within the limits of the legislative power conferred upon it by the Constitution, to grant or withhold jurisdiction. It is a quite different thing for the Parliament to purport to direct the courts as to the manner and outcome of the exercise of their jurisdiction. The former falls within the legislative power which the Constitution, including Ch III itself, entrusts to the Parliament. The latter constitutes an impermissible intrusion into the judicial power which Ch III vests exclusively in the courts which it designates.

The third contention

484. This is that the *Bell Act* has extinguished the subject matter of COR 146 of 2014, which is before the Supreme Court of Western Australia and being considered by the Court in exercise of federal jurisdiction and has thereby denied the proceeding of the status of a matter. It is contended that this is contrary to ss.75 and 76 of the *Constitution*[554].

485. The *Bell Act* has not extinguished the subject matter of COR 146 or 208 of 2014. For example, in COR 208 of 2014 questions as to the interpretation of trust deeds may still be relevant if the Authority were to make a recommendation that funds be distributed to ICWA or LDTC as trustee under the TBGL Trust Deed and the BGF Trust Deed and if it were argued that those funds are subject to the subordination and turnover trust provision of the trust deeds[555].

486. Even if the *Bell Act* has extinguished the subject matter of COR 146 or 208 of 2014, there is nothing in this that deprives an action before a Court the status of "matter". *Duncan v Independent Commission Against Corruption*[556] is a complete answer to this proposition, as is the *BLF Case*[557].

The fourth contention

487. This contention is put only by WAG and construes the *Bell Act* as investing, not only judicial power, but an exclusive judicial function, in the State executive government and thereby infringes Chapter III[558].

488. The contention rests on two basal propositions; first, that the *Bell Act* invests judicial power on the Authority and the Governor and, second, that the State cannot confer judicial power other than on a Court.

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[551] *Australian Education Union v General Manager of Fair Work Australia* [2012] HCA 19; (2012) 246 CLR 117 at 141 [50].
[552] *Australian Education Union v General Manager of Fair Work Australia* [2012] HCA 19; (2012) 246 CLR 117 at 150 [78].
[553] *Duncan v Independent Commission Against Corruption* [2015] HCA 32; (2015) 324 ALR 1 at 8 [24].
[554] BGNV's Submissions at [137]–[145]; WAG's Submissions at [128]–[129].
[555] See prayers for relief 6 to 13 in Special Case in S248 of 2015 (SCB at 316–319).
[556] *Duncan v Independent Commission Against Corruption* [2015] HCA 32; (2015) 324 ALR 1 at 8 [24] (French CJ, Kiefel, Bell and Keane JJ).
[557] *BLF Case* [1986] HCA 47; (1986) 161 CLR 88 at 96–97 (Gibbs CJ, Mason, Brennan, Deane and Dawson JJ).
[558] WAG's Submissions at [76(c)], [138]–[139].

489. It is trite that nothing in Western Australian constitutional instruments or the Commonwealth *Constitution* imposes or requires a separation of powers in Western Australia[559]. Subject to the principles deriving from *Kable*[560] and *Kirk*[561] State courts can exercise non-judicial powers and judicial power can be conferred on State executive bodies. Indeed, *Kirk* is premised upon State Supreme Courts exercising power over "the exercise of State executive and judicial power by persons and bodies other than the Supreme Court"[562].

490. Both of the principles deriving from *Kable*[563] and *Kirk*[564] emerge from the words of the Commonwealth *Constitution*. In respect of *Kable* it is the imperative words as to the existence of State Supreme Courts[565] found in the words of s.77(iii) and perhaps s.73(ii). The doctrinal underpinning, or basis for implication, of *Kable* derives from the express words of s.77(iii), which require that State courts be capable of being invested with federal jurisdiction or suitable repositories for it[566]. In respect of *Kirk* it is ss.73 and 71[567].

491. So the plaintiffs' proposition must be understood to be that judicial power in respect of a matter in federal jurisdiction can only be exercised by a Chapter III

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[559] See, eg, *North Australian Aboriginal Justice Agency Limited v Northern Territory of Australia* [2015] HCA 41; (2015) 326 ALR 16 at 59 [168] (Keane J); *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372 at 401 (Kirby P).

[560] *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24; (1996) 189 CLR 51 at 94, 98 (Toohey J), 104 (Gaudron J), 115–116 (McHugh J).

[561] *Kirk v Industrial Court of New South Wales* [2010] HCA 1; (2010) 239 CLR 531 at 581 [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[562] *Kirk v Industrial Court of New South Wales* [2010] HCA 1; (2010) 239 CLR 531 at 581 [98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ):

> The supervisory jurisdiction of the Supreme Courts was at federation, and remains, the mechanism for the determination and the enforcement of the limits on the exercise of State executive and judicial power by persons and bodies other than the Supreme Court. That supervisory role of the Supreme Courts exercised through the grant of prohibition, certiorari and mandamus (and habeas corpus) was, and is, a defining characteristic of those courts. And because, "with such exceptions and subject to such regulations as the Parliament prescribes", s 73 of the Constitution gives this Court appellate jurisdiction to hear and determine appeals from all judgments, decrees, orders and sentences of the Supreme Courts, the exercise of that supervisory jurisdiction is ultimately subject to the superintendence of this Court as the "Federal Supreme Court" in which s 71 of the Constitution vests the judicial power of the Commonwealth.

[563] *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24; (1996) 189 CLR 51 at 94, 98 (Toohey J), 104 (Gaudron J), 115–116 (McHugh J).

[564] *Kirk v Industrial Court of New South Wales* [2010] HCA 1; (2010) 239 CLR 531 at 581 [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[565] Recognised in *Kable* [1996] HCA 24; (1996) 189 CLR 51 at 111 (McHugh J), 139 (Gummow J); *Forge v Australian Securities and Investments Commission* [2006] HCA 44; (2006) 228 CLR 45 at 76 [63] (Gummow, Hayne and Crennan JJ); and confirmed in *Kirk v Industrial Court of New South Wales* [2010] HCA 1; (2010) 239 CLR 531 at 566 [55], 580 [96] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[566] See the recent application of the *Kable* principle by this Court in *Pollentine v Bleijie* [2014] HCA 30; (2014) 253 CLR 629 at 648–649 [42] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ). Gageler J in his separate judgment at 655 [68] phrased the question in similar terms; whether the impugned legislation was "incompatible with the status of the District Court as a court capable of being invested with federal jurisdiction".

[567] *Kirk v Industrial Court of New South Wales* [2010] HCA 1; (2010) 239 CLR 531 at 580-581 [97]–[98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

Court. Though not stated, it must be assumed that such a proposition derives from the words of s.71 and perhaps s.77(iii) of the *Constitution*. Again, though not stated, it is likely that this proposition derives from *The Wheat Case*[568].

492. The response to this is that the powers exercisable by the Authority and the Governor under the *Bell Act* are not judicial, or exclusively, judicial powers.

493. The definition of judicial power is notoriously opaque[569]. Oftentimes Kitto J's statement in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd*[570] is called in aid[571]:

> Thus a judicial power involves, as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons. In other words, the process to be followed must generally be an inquiry concerning the law as it is and the facts as they are, followed by an application of the law as determined to the facts as determined.

494. Equally relevant is his Honour's observation[572]:

> The uncertainties ... arise, generally if not always, from the fact that there is a "borderland in which judicial and administrative functions overlap" (*Labour Relations Board of Saskatchewan v. John East Iron Works Ltd.* (1949) AC 134, at p 148), so that for reasons depending upon general reasoning, analogy or history, some powers which may appropriately be treated as administrative when conferred on an administrative functionary may just as appropriately be seen in a judicial aspect and be validly conferred upon a federal court.

495. Illustrative is the observation of Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ in *Attorney-General (Cth) v Breckler*[573]:

> In *Federal Commissioner of Taxation v Munro*, Isaacs J gave as examples of functions which are appropriate exclusively to judicial action not only the determination of criminal guilt but also actions in contract and tort. These examples indicate a view of what, at least by reference to history and tradition, are basic rights and interests necessarily protected and enforced by the judicial branch of government. To those examples there may readily be added suits to obtain remedies to enforce compliance

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[568] *New South Wales v Commonwealth (The Wheat Case)* [1915] HCA 17; (1915) 20 CLR 54 at 62 (Griffith CJ).
[569] *Gould v Brown* [1998] HCA 6; (1998) 193 CLR 346 at 403–404 [66] (Gaudron J).
[570] *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* [1970] HCA 8; (1970) 123 CLR 361 at 374.
[571] See also *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* [2015] HCA 7; (2015) 317 ALR 279 at 292–294 [51]–[59] (French CJ, Hayne, Kiefel, Bell and Keane JJ); *Duncan v New South Wales* [2015] HCA 13; (2015) 318 ALR 375 at 386–389 [41]–[51] (French CJ, Hayne, Kiefel, Bell, Gageler, Keane and Nettle JJ); *Attorney-General (Cth) v Breckler* [1999] HCA 28; 197 CLR 83 at 109-111 [40]–[43] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Brandy v Human Rights and Equal Opportunity Commission* [1995] HCA 10; (1995) 183 CLR 245 at 256–258 (Mason CJ, Brennan and Toohey JJ), 267–269 (Deane, Dawson, Gaudron and McHugh JJ).
[572] *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* [1970] HCA 8; (1970) 123 CLR 361 at 373.
[573] *Attorney-General (Cth) v Breckler* [1999] HCA 28; 197 CLR 83 at 109 [40].

> by a trustee with the terms of the trust in question. The institution of the trust had its genesis in curial enforcement of the trust and confidence reposed by the settlor in the holder of the legal estate. (footnotes omitted)

496. The powers exercised by the Authority and the Governor pursuant to the *Bell Act* are not judicial. The Authority does not determine existing rights under agreements (which are now terminated by force of s.26 of the *Bell Act*). It determines new *sui generis* statutory rights. Similar in effect was the matter considered in *Precision Data Holdings*[574] involving the Corporations and Securities Panel's power under s.733 of the *Corporations Law (Victoria)* to make a declaration about past events or conduct and its power to make orders. Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ noted, in upholding the validity of the Panel's jurisdiction[575]:

> the object of the Panel's inquiry and determination is to create a new set of rights and obligations, that is, rights and obligations arising from such orders as the Panel may make in a particular case, being the rights and obligations which did not exist antecedently and independently of the making of the orders.

497. It matters not that the creation of new rights and obligations arises over disputes over past events[576]. In exercising its power under s.39 of the *Bell Act* the Authority does not inquire into or apply "the law". If the Authority forms views about the various creditors' existing rights and liabilities, that is not an exercise of judicial power. Exercises of administrative power commonly involve determination of existing rights and duties[577], and even as to whether a crime has been committed[578]. Any opinion formed as to existing rights and liabilities is simply a step in arriving at the ultimate conclusions as to the amount to be paid, or property to be transferred or vested in each creditor under the new rights created by the *Bell Act*[579]. The decisions of the Authority and the Governor are to be made in their absolute discretion. That considerations as to policy may play a role in decisions as to amounts to be paid is an indicia contrary to its characterisation as judicial power[580].

498. This power is no different to that of the Conciliation and Arbitration Commission considered in *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated*

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[574] *Precision Data Holdings Ltd v Wills* [1991] HCA 58; (1991) 171 CLR 167.
[575] *Precision Data Holdings Ltd v Wills* [1991] HCA 58; (1991) 171 CLR 167 at 190.
[576] *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia* [1987] HCA 63; (1987) 163 CLR 656 at 663 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).
[577] *Nicholas v The Queen* [1998] HCA 9; (1998) 193 CLR 173 at 219 [109] (McHugh J).
[578] *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* [2015] HCA 7; (2015) 317 ALR 279 at 288 [32]–[34] (French CJ, Hayne, Kiefel, Bell and Keane JJ).
[579] It is open for an administrative body to form an opinion as to legal rights as a step to the ultimate determination of that body: *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* [2015] HCA 7; (2015) 317 ALR 279 at 293 [55] (French CJ, Hayne, Kiefel, Bell and Keane JJ). See also, *Re Cram; Ex parte Newcastle Wallsend Coal Co Pty Ltd* [1987] HCA 29; (1987) 163 CLR 140 at 149 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).
[580] *Precision Data Holdings Ltd v Wills* [1991] HCA 58; (1991) 173 CLR 167 at 189–191 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Attorney-General (Cth) v Alinta Ltd* [2008] HCA 2; (2008) 233 CLR 542 at 597 [168]–[169] (Crennan and Kiefel JJ).

Miscellaneous Workers' Union of Australia[581], where the Commission's resolution of a dispute did not involve exercise of judicial power, but arbitral power. That was so, even though in the exercise of that arbitral power, the Commission undertook similar inquiries and determined similar questions of fact as would have been made and determined in proceedings brought for the enforcement of an award before a court. Similarly here. That the Authority's or the Governor's determination may relate to the same subject matter as that which might otherwise have been considered by a court does not constitute such determinations of the processes preceding them as exercises of judicial power.

10 **THE QUESTIONS**

Questions Reserved in S248 of 2015 (SCB at 192) (the BGNV action)

499. The following questions are reserved for the consideration of the Full Court:

Question 1

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

Answer — no.

Question 1A

20 Does any justiciable controversy arise in respect of the alleged invalidity of Parts 3 and 4 of the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Act 2015* (WA) on the grounds alleged in paragraphs 56.1 and 56.2 of the statement of claim insofar as the grounds rely on former s.215 of the *ITAA 1936* (and alternatively, s.260-45 of Schedule 1 to the *TAA*)?

Answer — no.

Question 2

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

Answer — no.

30 Question 3

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

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[581] [1987] HCA 63; (1987) 163 CLR 656, see particularly at 664 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

Answer — no.

Question 4

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

Answer — does not arise.

Question 5

Who should pay the costs of the special case?

Answer — the plaintiffs.

Questions Reserved in P63 of 2015 (SCB 137–138) (the WAG action)

500. The following questions are reserved for the consideration of the Full Court:

Question 1

Do the plaintiffs have standing to seek relief in respect of the alleged invalidity of Parts 3 and 4 of the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Act 2015* (WA) (Bell Act) on the grounds alleged in paragraph 56 to 58 of the statement of claim?

Answer — no.

Question 2

Does any justiciable controversy arise in respect of the alleged invalidity of Parts 3 and 4 of the Bell Act on the grounds alleged in paragraphs 56.1 and 56.2 of the statement of claim insofar as the grounds rely on former s.215 of the *ITAA 1936* (and alternatively, s.260-45 of Schedule 1 to the *TAA*)?

Answer — no.

Question 3

Are any of the provisions of Parts 3 and 4 and any of ss.51, 52 and 73 of the Bell Act invalid (and, if so, to what extent):

(a) by operation of s.109 of the Commonwealth *Constitution* by reason of:

(i) inconsistency between that provision (as a law of the State of Western Australia) and:

1) the *Income Tax Assessment Act 1936* (Cth), the *Income Tax Assessment Act 1997* (Cth) or the *Taxation Administration Act 1953* (Cth), on the grounds alleged in paragraphs 56 to 58 of the statement of claim; further or alternatively

2) the *Corporations Act 2001* (Cth), on the grounds alleged in paragraphs 72 to 88 of the statement of claim; further or alternatively

3) s.39(2) of the *Judiciary Act 1903* (Cth), on the grounds alleged in paragraphs 59 to 68 of the statement of claim?; further or alternatively

(b) because it infringes Chapter III of the *Constitution*, on the grounds alleged in paragraphs 59 to 68 of the statement of claim?

Answer — no.

Question 4

If any provisions of the Bell Act are invalid, are they severable from the rest of the Act (and, if so, to what extent); or is the Bell Act invalid in its entirety?

Answer — does not arise.

Question 5

Is the Bell Act invalid in its entirety because it infringes Chapter III of the *Constitution* on the grounds alleged in paragraphs 69 and 71 of the statement of claim?

Answer — no.

Question 6

Who should pay the costs of the special case?

Answer — the plaintiff.

Questions Reserved in P4 of 2016 (SCB 130–131)

501. The following questions are reserved for the consideration of the Full Court:

Question 1

Do the plaintiffs have standing to seek relief in respect of the alleged invalidity of Parts 3 and 4 of the Bell Act on the grounds alleged in:

(a) paragraph 56.1 of the SOC, in so far as the grounds rely upon ss.215 of the *ITAA 1936* (and alternatively, s.260-45 of Schedule 1 to the *TAA*) and 254(1)(h) of the ITAA 1936; and

(b) paragraphs 56.2, 56.3 and 56.4 of the SOC?

Answer — 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*, but otherwise no.

Question 2

Does any justiciable controversy arise in respect of the alleged invalidity of Parts 3 and 4 of the Bell Act on the grounds alleged in paragraphs 56.1 and 56.2 of the SOC insofar as the grounds rely on ss.215 of the *ITAA 1936* (alternatively, s.260-45 of Schedule 1 to the *TAA*) and 254(1)(h) of the ITAA 1936?

Answer — no.

Question 3

Are any of ss. 9, 10, 22, 25, 27, 28, 29, 30, 33, 35, 37, 38, 39, 40, 41, 42, 43, 44, 45, 47, 54, 55, 56, 68, 69, 71, 72, or 73 of the Bell Act invalid, and if so, which and to what extent, by operation of s.109 of the Commonwealth Constitution by reason of inconsistency between that provision (as a law of Western Australia) and:

(a) the *Income Tax Assessment Act 1936* (Cth), the *Income Tax Assessment Act 1997* (Cth) or the *Taxation Administration Act 1953* (Cth), on the grounds alleged in paragraphs 40 to 56 and 91A of the statement of claim; further or alternatively;

(b) the *Corporations Act 2001* (Cth), on the grounds alleged in paragraphs 59 to 91 and 91B of the statement of claim?

Answer — no

Question 4

If any provisions of the Bell Act are invalid, are they severable from the rest of the Act (and, if so, to what extent); or is the Bell Act invalid in its entirety?

Answer — does not arise

Question 5

Who should pay the costs of the special case?

Answer — the plaintiffs

PART VII: LENGTH OF ORAL ARGUMENT

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

Dated: 23 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)	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

and (6)	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.