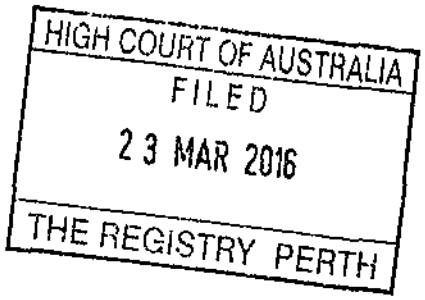
IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY **No. P63 of 2015**
BETWEEN:

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



AND

10 **STATE OF WESTERN AUSTRALIA**
Defendant

ANNOTATED WRITTEN SUBMISSIONS OF THE DEFENDANT

PART I: SUITABILITY FOR PUBLICATION

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

20 ### 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).

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.

Date of Document: 23 March 2016

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PART VI: SUBMISSIONS

The submissions in this matter are to be read with the State's submissions in S248 of 2015 and P4 of 2016.

The first inconsistency — the Authority determining liabilities

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

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

The second alleged inconsistency — the extinguishment of liabilities upon dissolution

174. This contention is that s.30 of the *Bell Act*, that provides that a WA Bell Company may be dissolved, means that the liabilities of a WA Bell Company (including of the Commissioner) would be extinguished upon dissolution and this is inconsistent with s.177 of the *ITAA 1936*[220].

175. Such liability is not extinguished. It remains a liability to be dealt with in accordance with Part 4, Division 2 of the *Bell Act*.

The third alleged inconsistency — ss.42 to 44 of the *Bell Act* and the release, discharge and extinguishment of liabilities

176. This contention is that ss.42, 43 and 44 of the *Bell Act* provide for the release, discharge and extinguishment of liabilities of a WA Bell Company, which is contended to be inconsistent with s.177 of the *ITAA 1936*[221]. The release, discharge and extinguishment of liabilities of an insolvent company at the expiration of its winding up is not inconsistent with any right of the Commissioner. The process for releasing and discharging liabilities to creditors provided for in the *Bell Act* is in substance the same as that under the *Corporations Act 2001*. Upon the distribution of a final dividend to creditors, ASIC would deregister the company and the liabilities of the company are extinguished[222].

177. The only circumstance of material difference is where, at the date of dissolution or deregistration, assets remain. At common law, the Crown would take as *bona vacantia*[223]. This has been modified by statute to provide for the vesting of such

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[220] BGNV's Submissions at [62].
[221] BGNV's Submissions at [62].
[222] *Taylor v Sanders* [1937] VLR 62 at 65 (Mann CJ, Lowe and Duffy JJ); *Holli Managed Investments Pty Ltd v Australian Securities Commission* (1998) 90 FCR 341at 348 (Finkelstein J).
[223] *Holli Managed Investments Pty Ltd v Australian Securities Commission* [1998] FCA 1657; (1998) 90 FCR 341 at 348–349 (Finkelstein J).

property of a dissolved company in an officer the Crown or a statutory corporation, most recently, ASIC[224].

178. Finkelstein J explained in Holli Managed Investments Pty Ltd v Australian Securities Commission that[225]:

> ... speaking generally, although the outstanding property of a dissolved corporation will vest in the ASIC, neither the ASIC nor the Commonwealth will be liable for the debts of the corporation. Usually those debts will be extinguished as in the case of a dissolved corporation that has no assets as at the date of its dissolution. Accordingly, if it is discovered that property has vested in the ASIC which ought to be distributed amongst the unsecured creditors of the dissolved corporation it would be necessary to make a reinstatement order to enable that distribution to occur. However, where property that has vested in the ASIC is subject to a charge, claim or liability, that charge etc will continue to subsist and must be satisfied out of the property of the dissolved company.

179. This is relevant to provisions of the *Bell Act* which contemplate an amount may remain in the Fund after all distributions have been made in accordance with a determination of the Governor[226]. This would be credited to the Consolidated Account[227]. Further, any property of a WA Bell Company accruing, payable or vesting after closure of the Fund vests in the State[228].

180. The *Corporations Law* in force prior to 23 June 1993 (relevant to the pre-1993 WA Bell Companies) provided in s.578:

> Property vested in the Commission by operation of this Division is liable and subject to all charges, claims and liabilities imposed on or affecting that property by reason of any law as to rates, taxes, charges or any other matter or thing to which the property would have been liable or subject had the property continued in the possession, ownership or occupation of the company, but there shall not be imposed, on the Commission or the Crown in any right any duty, obligation or liability whatsoever to do or suffer any act or thing required by any such law to be done or suffered by the owner or occupier other than the satisfaction or payment of any such charges, claims or liabilities out of the property of the company so far as it is, in the opinion of the Commission, properly available for and applicable to such a payment.

181. The *Corporations Law* was amended by the *Company Law Review Act 1998* (Cth). Section s.578 was repealed and replaced with 601AD and 601AE[229]. Relevant are the following:

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[224] *Holli Managed Investments Pty Ltd v Australian Securities Commission* [1998] FCA 1657; (1998) 90 FCR 341 at 349 (Finkelstein J).

[225] *Holli Managed Investments Pty Ltd v Australian Securities Commission* [1998] FCA 1657; (1998) 90 FCR 341 at 250.

[226] See s.43(2) of the *Bell Act*.

[227] See s.46(2) of the *Bell Act*.

[228] See s.48(1).of the *Bell Act*.

[229] Section 578, as part of Division 8 of Part 5.6 of the *Corporations Law*, was repealed by item 393, Pt.6, Sch.2 to the *Company Law Review Act*. Sections 601AD and 601AE, as part of Ch.5A, were inserted by item 9, Sch.1 to the *Company Law Review Act*.

SECT 601AD Effect of deregistration

(2) On deregistration, all the company's property vests in the ASC. ...

(3) Under subsection (2), the ASC takes only the same property rights that the company itself held. If the company held particular property subject to a security or other interest or claim, the ASC takes the property subject to that interest or claim.

SECT 601AE What the ASC does with the property

(3) The property remains subject to all liabilities imposed on the property under a law and does not have the benefit of any exemption that the property might otherwise have because it is vested in the ASC. These liabilities include a liability that:

(a) is a charge or claim on the property; and

(b) arises under a law that imposes rates, taxes or other charges.

182. Sections 601AD and 601AE were replicated in the *Corporations Act 2001* and remained in substantially the same form until the enactment of the *Governance Review Implementation (Treasury Portfolio Agencies) Act 2007* (Cth). The Explanatory Memorandum for that Bill explains that, as part of its response to the Uhrig Review[230], the Australian Government agreed the *Financial Management and Accountability Act 1997* (Cth), should be applied to statutory authorities including ASIC[231]. Accordingly, it was necessary to amend the *Corporations Act 2001*, in particular Part 5A.1, to reflect that ASIC would not hold property on trust in its own name, but on behalf of the Commonwealth[232]. In respect of s.601AD, subsection (1A) was inserted to provide that on deregistration, all property that a company held on trust immediately before deregistration vests in the Commonwealth. In respect of s.601AE, subsection (2A) was inserted in the following terms:

(2A) For the purposes of subsection (3), if any liability is imposed on property under a law of the Commonwealth immediately before the property vests in the Commonwealth under subsection 601AD(1A), then:
(a) immediately after that time, the liability applies to the Commonwealth as if the Commonwealth were a body corporate; and
(b) the Commonwealth is liable to make notional payments to discharge that liability.

183. The Explanatory Memorandum states that the liabilities in s.601AE(2A) refer to Commonwealth taxes[233]. Though this is stated in the Explanatory Memorandum, it makes no sense. If there are surplus assets of the company in liquidation after all of its debts and liabilities have been paid out of the assets of the company, necessarily there are no tax debts.

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[230] John Uhrig, *Review of the Corporate Governance of Statutory Authorities and Office Holders* (2003).
[231] Explanatory Memorandum, Governance Review Implementation (Treasury Portfolio Agencies) Bill 2007 (Cth) at 2–3.
[232] Explanatory Memorandum, Governance Review Implementation (Treasury Portfolio Agencies) Bill 2007 (Cth) at 12 [4.45]. See in particular, items 19 and 26 in Pt.1, Sch.1 to the *Governance Review Implementation (Treasury Portfolio Agencies) Act*.
[233] Explanatory Memorandum, Governance Review Implementation (Treasury Portfolio Agencies) Bill 2007 (Cth) at 13 [4.53]. See also LexisNexis Australia, *Ford, Austin & Ramsay's Principles of Corporations Law* (December 2015) at [27.710.12].

184. It may be that there is a further issue in this. Section 43(2) of the *Bell Act* contemplates that there may be an amount in the Fund after all distributions have been made and this sum, by s.46(2), does not vest in ASIC, as it might otherwise do by reason of provisions of the *Corporations Act 2001*, but is credited to the Consolidated Account[234].

185. None of this gives rise to an inconsistency between these provisions of the *Bell Act* and any provision of Commonwealth taxation legislation. Any inconsistency is between the *Bell Act* and the *Corporations Act 2001*. Any such inconsistency is resolved by ss.5F and 5G(11) of the *Corporations Act 2001* and ss.51 and 52 of the *Bell Act* (discussed below).

186. There is one further contention (unpleaded) made by BGNV in relation to inconsistency with the Commonwealth taxation legislation. That is; the *Bell Act* prevents TBGL from utilising carry forward losses of each of the TBGL consolidated group members in the manner permitted by the *ITAA 1997*, which is a right conferred on TBGL by force of Commonwealth law. This contention is based on an assertion that TBGL's right to utilise those tax losses is "property" within the meaning of s.3 which is transferred to the Authority by force of s.22 of the *Bell Act*[235].

187. A tax loss is "utilised" including to the extent that it is deducted from an amount of assessable income[236]. TBGL and Mr Woodings as liquidator of TBGL have objected to the post liquidation notices of assessment issued in August 2015 including on the ground that TBGL had available tax losses in excess of the assessable income derived by TBGL.[237] Section 22(6) of the *Bell Act* excludes from the transfer of property effected by s.22(1) or (2) a right to make a taxation objection, or a right or capacity to seek the review of, or appeal against, a decision of the Commissioner in relation to a taxation objection. Contrary to BGNV's submission[238], the purpose of that subsection includes "to clarify that such a right to object or to seek review or repeal [sic] is not property for the purposes of the [Bell Act]"[239] [emphasis added]. Consequently, any right of TBGL to utilise the tax losses has not been transferred to the Authority.

READING DOWN — *ITAA* INCONSISTENCY

188. Section 7 of the *Interpretation Act* 1984 (WA) is in a common form[240]. As stated by Gummow, Crennan and Bell JJ in *Pape*[241], having cited *Victoria v*

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[234] See s.46(2) of the *Bell Act*.
[235] BGNV's Submissions at [63].
[236] *ITAA 1997* s.960-20(2).
[237] See Amended Special Case in S248 of 2015 at [73], [80] (SCB at 188–190).
[238] BGNV's Submissions at [63] and fn.94.
[239] Western Australia, *Parliamentary Debates*, Legislative Council, 17 November 2015 at 8265a-8291a (Michael Mischin, Attorney General).
[240] "Every written law shall be construed subject to the limits of the legislative power of the State and so as not to exceed that power to the intent that where any enactment thereof, but for this section, would be construed as being in excess of that power, it shall nevertheless be valid to the extent to which it is not in excess of that power."
[241] *Pape v Commissioner of Taxation* [2009] HCA 23; (2009) 238 CLR 1 at 93 [248].

Commonwealth[242]; an Act can be read down to preserve validity unless "it was designed to operate fully and completely according to its terms or not at all".

189. Certain provisions of the *Bell Act* can be readily read down without affecting the Act's purpose or requiring a strained or unnatural meaning or effect. No reading down here requires that the Court "perform a feat which is in essence legislative and not judicial"[243] or seeks to depart from or undermine the legislative purpose of any provision[244].

Reading down and s.215 and s.254 of the *ITAA*

190. In respect of ss.215(3) and 254 of the *ITAA*, if, contrary to the primary submissions advanced, provisions of the *Bell Act* are inconsistent with the requirement of s.215(3)(a) and s.254(1)(d), provisions of the *Bell Act* can be read down.

191. All readings down are premised on the Authority being equated to a liquidator and the administration under the *Bell Act* equated to the winding up of the WA Bell Companies.

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

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

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

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

Reading down and s.177 of the *ITAA*

194. As noted above, it is accepted that the *Bell Act* is to be read down in light of s.177 of the *ITAA*.

195. Section 25(1) of the *Bell Act* is to be understood to provide as follows, with the reading down underlined:

> If, immediately before the transfer day, a liability of a WA Bell Company was admissible to proof against the company in the winding up of the company under the *Corporations Act* Part 5.6, <u>or a notice of assessment to which s.177 of the *ITAA 1936* applies had been received by a liquidator of a WA Bell Company that notice is</u>

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[242] *Victoria v Commonwealth* [1996] HCA 56; (1996) 187 CLR 416 at 502–503 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).
[243] *Pidoto v Victoria* [1943] HCA 37; (1943) 68 CLR 87 at 109 (Latham CJ).
[244] *Victoria v Commonwealth* [1996] HCA 56; (1996) 187 CLR 416 at 502 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ). See also *Pidoto v Victoria* [1943] HCA 37; (1943) 68 CLR 87 at 108 (Latham CJ); *Re Dingjan; Ex parte Wagner* [1995] HCA 16; (1995) 183 CLR 323 at 348 (Dawson J).

conclusive evidence of the making of the assessment and, except in proceedings under Part IVC of the TAA on a review or appeal relating to the assessment, the amount and all particulars of the assessment are correct, that liability may be proved in accordance with Part 4 Division 2 of this Act.

196. Section 34(1) of the *Bell Act* is to be understood to provide as follows, with the reading down underlined:

> The Authority must give to each person whom it reasonably believes to have been a creditor of a WA Bell Company immediately before the transfer day a notice requiring the person to give to the Authority, within 30 days after the date of that notice, full particulars of all liabilities of the company in relation to the person, but that if, immediately before the transfer day, a notice of assessment to which s.177 of the *ITAA 1936* applies had been received by a liquidator of a WA Bell Company the Commissioner [of the Commissioner] need not provide such notice.

197. Section 35 of the *Bell Act* is to be understood to provide as follows, with the reading down underlined:

> The role of the Authority under this Division is to — (a) determine the property and liabilities of each WA Bell Company, and report to the Minister on that, under sections 37 and 38; and (b) make recommendations to the Minister under sections 39 and 40; but that if immediately before the transfer day, a notice of assessment to which s.177 of the *ITAA 1936* applies had been received by a liquidator of a WA Bell Company that notice is conclusive evidence of the making of the assessment and, except in proceedings under Part IVC of the TAA on a review or appeal relating to the assessment, the amount and all particulars of the assessment are correct and that the amount is a liability of the WA Bell Company or WA Bell Companies to which it relates.

198. Section 37(1) of the *Bell Act* is to be understood to provide as follows, with the reading down underlined:

> The Authority must determine the property and liabilities of each WA Bell Company but that if immediately before the transfer day, a notice of assessment to which s.177 of the *ITAA 1936* applies had been received by a liquidator of a WA Bell Company that notice is conclusive evidence of the making of the assessment and, except in proceedings under Part IVC of the TAA on a review or appeal relating to the assessment, the amount and all particulars of the assessment are correct and that the amount is a liability of the WA Bell Company or WA Bell Companies to which it relates.

199. Section 37(3) of the *Bell Act* is to be understood to provide as follows, with the reading down underlined:

> The Authority has an absolute discretion in determining the property and liabilities of each WA Bell Company but that if immediately before the transfer day, a notice of assessment to which s.177 of the *ITAA 1936* applies had been received by a liquidator of a WA Bell Company that notice is conclusive evidence of the making of the assessment and, except in proceedings under Part IVC of the TAA on a review or appeal relating to the assessment, the amount and all particulars of the assessment are correct and that the amount is a liability of the WA Bell Company or WA Bell Companies to which it relates.

200. Section 39(6) of the *Bell Act* is to be understood to provide as follows, with the reading down underlined:

> The Authority has an absolute discretion as to — (a) the quantification of any liability; and (b) the amount recommended to be paid to a person or the property recommended to be transferred to, or vested in, a person; and (c) the priority to give to that payment, transfer or vesting; but that if immediately before the transfer day, a notice of assessment to which s.177 of the *ITAA 1936* applies had been received by a liquidator of a WA Bell Company that notice is conclusive evidence of the making of the assessment and, except in proceedings under Part IVC of the TAA on a review or appeal relating to the assessment, the amount and all particulars of the assessment are correct and that the amount is a liability of the WA Bell Company or WA Bell Companies to which it relates.

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

201. This contention is advanced only by BGNV. It emerges from the untidy transitional arrangements in the *Corporations Act 2001* (Cth) and by reason of s.25(1) of the *Bell Act*.

202. Section 25(1) of the *Bell Act* provides that:

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

203. The contention arises principally from the underlined words in s.25(1). BGNV contends that immediately before the transfer day, liabilities of certain WA Bell Companies were admissible to proof but not under the *Corporations Act 2001* Part 5.6. Rather, the liabilities of these WA Bell Companies were admissible to proof under s.1401[245] or s.1408 of the *Corporations Act 2001*[246]. An alternative argument is also advanced that they were admissible to proof under s.7(1) of the *Corporations (Ancillary Provisions) Act 2001* (WA) and s.8(c) of the *Acts Interpretation Act 1901* (Cth)[247].

204. BGNV contend that certain consequences flow from this.

205. *First*, that s.25 of the *Bell Act* alters, impairs or detracts from the rights created by Commonwealth taxation laws because the Commonwealth is unable to enforce tax related liabilities created under those laws by pursuing the proofs of debts, including by lodging a proof of debt with the Authority in respect of tax related liabilities of these WA Bell Companies[248]. This argument relates specifically to the right of the Commonwealth as a creditor of those WA Bell Companies in respect of tax related liabilities. If the contention is that s.25(1) of the *Bell Act* is

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[245] BGNV's Submissions at [23].
[246] BGNV's Submissions at [24]–[26].
[247] While the alternative argument is not pleaded (see BGNV's Amended Statement of Claim at [56.3] (SCB at 34–36), it is addressed in BGNV's Submissions at [30]–[32].
[248] BGNV's Submissions at [27], [60]; BGNV's Amended Statement of Claim at [56.3] (SCB at 34–36).

inconsistent with ss.208 and 209 (or s.255-5 of Schedule 1 of the *TAA*), 215 (or 260-45 of Schedule 1 of the *TAA*) or 254 of the *ITAA 1936* then the submissions made above in respect of these provisions apply equally. Nothing more needs to be said of this.

206. The other arguments do not rely upon Commonwealth tax debts and are really parts of a single contention.

207. So; *second* — it is argued that s.25(1) of the *Bell Act* is inconsistent with the *Corporations Act 2001* because BGNV (amongst other creditors) is unable to lodge a proof of debt with the Authority in respect of liabilities owing to it by these WA Bell Companies. Because s.25(1) of the *Bell Act* allegedly prevents creditors of WA Bell Companies from lodging proofs of debt in respect of liabilities of such WA Bell Companies, the *Bell Act* is not a law of "winding up" for the purpose of s.5G(8) of the *Corporations Act 2001*[249]. Because it is not a law of "winding up", the asserted consequence is that the *Bell Act* does not invoke the operation of s.5G(8); so does not displace Chapter 5 of the *Corporations Act 2001*; and because it does not, it is inconsistent with various provisions of the *Corporations Act*. If the *Bell Act* is a law of "winding up" (or "external administration") for the purpose of s.5G(8) of the *Corporations Act 2001*, then the argument falls away. Again, submissions in respect of this are put elsewhere and nothing more needs to be said of this.

208. *Third*, BGNV puts a related contention; even if the *Bell Act* is a law of "winding up" for the purpose of s.5G(8) of the *Corporations Act 2001*, s.5G(8) only displaces "Chapter 5" of the *Corporations Act 2001*. It does not displace s.1408 or other provisions of the *Corporation Act 2001* that are not in Chapter 5. The consequence of this is said to be that the *Bell Act* is inconsistent with these non-Chapter 5 provisions[250].

209. The issues which this contention raise also involve an issue of construction of s.25(1) of the *Bell Act*. The underlined words above entitle a creditor of a WA Bell Company to prove its debt if, before the transfer day, it was admissible to proof in the winding up of the company under the *Corporations Act 2001* Part 5.6. The contention is that if the winding up of the WA Bell Company prior to the transfer day was not being conducted under the *Corporations Act* Part 5.6, but pursuant to something else, then the *Bell Act* precludes the creditor from proving under the *Bell Act*. In this event s.25(1) is inconsistent with that something else.

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

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

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[249] BGNV's Submissions at [27].
[250] BGNV's Submissions at [111], [125].

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

212. If the answer to all of this is not this simple, there is a further answer. Properly construed, the underlined words in s.25(1) include Part 5.6 of the *Corporations Law* as in force immediately before 23 June 1993. This is because the provision of Part 5.6 of the *Corporations Law* creating the right to prove, being s.533, was, in effect, incorporated into the *Corporations Act 2001* by s.1401 of the *Corporations Act 2001*. Alternatively, the *Bell Act* is to be read as including s.533 of the *Corporations Law* pursuant to s.11(5) of the *Corporations (Ancillary Provisions) Act 2001* (WA), or, on its proper construction, s.25(1) had that effect in any event.

213. All of this requires a deal of explanation.

214. The BGNV contention applies to a particular group of WA Bell Companies only. This contention requires a division of the WA Bell Companies into two categories: the WA Bell Companies ordered to be wound up prior to 23 June 1993[251] (call them the "pre-1993 WA Bell Companies") and those WA Bell Companies ordered to be wound up after 23 June 1993[252] (the "post-1993 WA Bell Companies").

215. The importance of this requires some further understanding.

216. In 1990 the Commonwealth Parliament amended the *Corporations Act 1989* (Cth). Its effect was to apply the *Corporations Law*, set out in s 82 of the *Corporations Act 1989* (Cth), as a law of the Australian Capital Territory. Western Australia then enacted the *Corporations (Western Australia) Act* 1990 (WA) (it assists to refer to this as the *Corporations WA Act*). All other States and the Northern Territory did the same. By s.7 of the *Corporations WA Act* the *Corporations Law* was applied as a law of Western Australia[253]. The *Corporations Law* so adopted was State law[254].

217. The *Corporate Law Reform Act 1992* (Cth) (again it assists to refer to this as the *1992 Reform Act*) commenced on 23 June 1993. It amended and repealed substantial parts of the *Corporations Law*. In particular, Parts 5.4 to 5.6 (relating to the winding up of companies) were repealed and replaced by new Parts 5.4 to 5.7B. Section 185 of the *1992 Reform Act* inserted transitional provisions into the *Corporations Law*, including ss.1382 and 1383. Section 1382 effectively

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

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

[253] Each State did likewise.

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

provided that (subject to, relevantly, s.1383) provisions including Parts 5.4 to 5.6 as in force after 23 June 1993 applied, according to their tenor, in relation to acts done, omissions made, events occurring, and matters and things arising, whether before, at or after 23 June 1993. Section 1383(2), to which s.1382 was subject, provided for the "old winding up law" (Parts 5.4 to 5.6 as in force immediately before 23 June 1993) "to continue to apply for the purposes of the winding up" of a company ordered to be wound up under the *Corporations Law* prior to 23 June 1993. Where the "old winding up law" continued to apply pursuant to s.1383, s.1383(7)(f) provided that the "old winding up law" continued to apply as if certain sections of the *1992 Reform Act* that made changes to Part 5.4 to 5.6 and inserted Part 5.7B into the *Corporations Law* "had not been enacted".

218. The effect of this was that certain provisions of the *Corporations Law* including, relevantly, Parts 5.4 to 5.6 that were in force immediately before 23 June 1993 continued to apply to the winding up of companies ordered to be wound up prior to 23 June 1993[255].

219. This was the position until the 2001 changes to corporations legislation. The *Corporations Act 1989* (Cth) was repealed with effect from 15 July 2001[256]. On the same date, consequential changes were made to State legislation and the *Corporations (Ancillary Provisions) Act 2001* (WA) commenced. The *Corporations Act 2001* (Cth) also commenced on that date. It does not contain specific transitional provisions preserving the application of the *Corporations Law* that applied after 23 June 1993 to companies wound up between 23 June 1993 and 15 July 2001. This circumstance is dealt with in Part 10.1 of the *Corporations Act 2001*.

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

221. The effect of s.1408(1) of the *Corporations Act 2001* is that s.1383 of the *Corporations Law* continued to have the same force and effect that it had while the *Corporations Law* was in force. This force and effect was, though, created by the *Corporations Act 2001*. So, the windings up of the pre-1993 WA Bell

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

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

Companies are governed (in substance) by the relevant provisions of Parts 5.4 to 5.6 of the *Corporations Law* as in force before 23 June 1993[257].

222. A further consequence of all of this is that, in the absence of any specific "carve out", such as provided for in ss.1383(2) and (7) of the *Corporations Law*, the law as in force from time-to-time applied according to its terms and with effect from the date of commencement. As a result, the *Corporations Act 2001*, being the applicable 'Corporations legislation' in force from time to time, applied in relation to the post-1993 WA Bell Companies[258].

223. Section 1408(5) of the *Corporations Act* is a nightmare. It means that nothing in ss.1408(1) or (2) is taken to "produce a result" that a right or liability in fact exists — that relates to things that occurred before 15 July 2001 — under a transitional provision of the *Corporations Law*, even though the transitional provision continues by reason of ss.1408(1) or (2).

224. The note to s.1408(5) 'clarifies' by stating that equivalent rights and liabilities to those that were continued by the transitional provision of the *Corporations Law* (in effect between 1993 and 2001) were "created by" ss.1400 and 1401 of the *Corporations Act 2001*.

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

226. Sections 1401(1) and (3) of the *Corporations Act 2001* provide that on commencement of the *Corporations Act 2001*, a person who had a "right" or "liability" that was acquired, accrued or incurred under a provision of the (old) *Corporations Law* and which existed immediately before the commencement of

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

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

the *Corporations Act 2001* (the "pre-commencement right or liability") acquires, accrues or incurs a right or liability (the "substituted right or liability"). Section 1401(2) provides the *Corporations Act 2001* is taken to include that provision of the (old) *Corporations Law* (for the purposes of s.1401(3) and (4))[259]. The substituted right or liability is acquired, accrued or incurred under that provision[260]. The substituted right or liability is equivalent to the pre-commencement right or liability under the (old) *Corporations Law*. A procedure, proceeding or remedy in respect of the substituted right or liability may be instituted after the commencement under the provisions taken to be included in the *Corporations Act 2001* by s.1401(2)[261].

227. Section 1371 defines necessary things for these sections, such as "carried over provision"[262], "liability", "right" and "corresponds". Sections 1400 and 1401 of the *Corporations Act 2001* are essentially equivalent. Section 1400 deals with the creation of equivalent rights and liabilities to those that existed under carried over provisions of the *Corporations Law*. Section 1401 deals with the creation of equivalent rights and liabilities to those that existed under repealed provisions of the *Corporations Law*[263]. Relevantly, s.1401 applies in respect of rights and liabilities under the *Corporations Law* in force before 23 June 1993 as applied by s.1383 of the *Corporations Law*[264].

228. In *Forge v Australian Securities and Investments Commission* Gummow, Hayne and Crennan JJ explained, in respect of s.1401, that[265]:

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

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

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

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

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

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

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

[265] [2006] HCA 44; (2006) 228 CLR 45 at 92 [114]. See also BGNV's Submissions at [20].

229. Expressed another way, the effect of s.1401(2) is to incorporate into the *Corporations Act 2001* a "substituted, carbon copy" of the provisions of the *Corporations Law* that had given rise to rights or liabilities in existence immediately before the commencement of the *Corporations Act 2001*[266].

230. To finish this off, it is necessary to note the *Corporations (Ancillary Provisions) Act 2001* (WA).

231. At the same time as the *Corporations Act 1989* (Cth) was repealed, the *Corporations (Ancillary Provisions) Act 2001* (WA) commenced. It amended s.7 of the *Corporations WA Act* to provide that the *Corporations Law* set out in s.82 of the *Corporations Act 1989* (Cth) that was in force immediately before the repeal of that section applies as a law of Western Australia[267]. Section 6 of the *Corporations (Ancillary Provisions) Act 2001* (WA) provides however that the *Corporations Law* is only to operate in relation to matters arising before 15 July 2001 (and matters arising, directly or indirectly, out of such matters) in so far as those matters are not dealt with by (*inter alia*) the *Corporations Act 2001*. Other than pursuant to this provision of the *Corporations (Ancillary Provisions) Act 2001* (WA), the *Corporations Law* has no operation of its own force after the commencement of the *Corporations Act 2001*.

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

233. In Director of Public Prosecutions (WA) v Mansfield[268], McLure JA described the operation of ss.6 and 7 of the Corporations (Ancillary Provisions) Act 2001 as follows[269]:

> (1) if a matter falls within s 6(1)(a) or (b) and is not dealt with by the Corporations Act then the 1990 Act and the Corporations Law (WA) operate of their own force in relation to that matter;
>
> (2) otherwise, the 1990 Act and the Corporations Law (WA) have no operation of their own force at and from 15 July 2001;

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

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

[268] [2008] WASCA 5; (2008) 35 WAR 431.

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

(3) in the event the national scheme laws cease to operate of their own force under s 6(2), s 8 of the Acts Interpretation Act applies unless (4) below applies;

(4) if a person acquires, accrues or incurs a substituted right or liability under Ch 10 of the Corporations Act, the pre-commencement right or liability is cancelled and ceases to be a right or liability under State law.

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

235. For the windings up of pre-1993 Bell Companies, the relevant law is to be found in the text of Parts 5.4 to 5.6 of the *Corporations Law* that was in force prior to 23 June 1993. That law continues to apply, as if those Parts were incorporated into the *Corporations Act 2001*. Pre-existing rights and liabilities ceased and were replaced by substituted rights and liabilities acquired, accrued or incurred under those provisions of the *Corporations Law* taken to be included in the *Corporations Act 2001*. This follows both from the operation of s.1408 and 1401[270].

The application of this to the *Bell Act*

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

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

238. *First*, it is accepted that, upon a pre-1993 WA Bell Company being ordered to be wound up, a person to whom the company was indebted acquired a right under the version of s.533 of the old winding up law (i.e. pre 23 June 1993 *Corporations Law*) to prove in the winding up. *Second*, it is accepted that for such pre-1993 WA Bell Companies, s.1401 of the *Corporations Act 2001* operates in respect of that right. *Third*, the right does not exist under s.1383 of the *Corporations Law* as that section has effect because of s.1408(1) of the *Corporations Act 2001*. *Fourth*, that a substituted right is acquired or accrues as a consequence of the operation of s.1401.

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

239. The above four propositions are put by BGNV[271]. What is disputed is BGNV's contention regarding the conclusions that follow from this and the operation of ss.1401 and 1408 of the *Corporations Act 2001.*

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

241. BGNV contend that it follows from this — for the purpose of s.25(1) of the *Bell Act* — that a liability of a pre-1993 WA Bell company is not admissible to proof against the company in the winding up "under" the *Corporations Act 2001* Part 5.6. BGNV contends that the "source" of the relevant right to prove was a right in the winding up under s.1401 of the *Corporations Act 2001*, applying the text of the pre-23 June 1993 version of s.553 of the *Corporations Law* as a provision of the *Corporations Act 2001.* So, BGNV contend, for the purpose of s.25(1) of the *Bell Act,* a person's substituted right to prove was "given to them" under s.1401 and 1408 of the *Corporations Act 2001* and not "given to them" under Part 5.6 of that Act[272].

242. This contention should not be accepted. It proceeds on an incorrect understanding of the operation of s.1401. The substituted right to prove is acquired or accrued under the copy of s.553 of the *Corporations Law* that is read into and incorporated into the *Corporations Act 2001*[273]. The person with the right may institute a procedure in respect of the substituted right under the copied in provisions of the *Corporations Act 2001.*

243. The effect of s.1401 — by which the text of the provision of the *Corporations Law* are copied into the *Corporations Act* — is that the provision is then treated as being part of the *Corporations Act.*

244. Moreover, it is to be treated as being part of the part of the *Corporations Act 2001* that corresponds most obviously to the part of the corresponding *Corporations Law* part from which it was taken.

245. This accords with established principles of interpretation dealing with the effect of incorporating one Act into another. This is to transpose the earlier into the later (or write every provision of the earlier into the later) as if they had been actually

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[271] BGNV's Submissions at [16], [20], [26].
[272] BGNV's Submissions at [21], [29].
[273] *Director of Public Prosecutions (WA) v Mansfield* [2008] WASCA 5; (2008) 35 WAR 431 at 453–454 [101] (McLure JA, Buss JA agreeing).

printed into it[274]. The expression "moulding the two Acts into one"[275] is often used.

246. This results in the provisions of Parts 5.4 to 5.6 of the *Corporations Law* being "printed into" Parts 5.4 to 5.6 of the *Corporations Act 2001* and a reference to those Parts including those 'read in' provisions[276].

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

248. There is another way of reaching the same (correct) result. If the rights and liabilities of the pre-1993 WA Bell Companies are properly to be understood as arising under Parts 5.4 to 5.6 of the *Corporations Law*, s.25(1) still applies to them. This is because the reference to Part 5.6 of the *Corporations Act 2001* is taken to include a reference to Part 5.6 of the *Corporations Law* by reason of s.11(5) of the *Corporations (Ancillary Provisions) Act 2001* (WA). That section provides that an express reference in an Act to an Act, or a provision or group of provisions of an Act, forming part of the "new corporations legislation" is taken, in relation to events circumstances or things that happened or arose before 15 July 2001, to include (unless the contrary intention appears or the context of the references otherwise requires) a reference to the corresponding provisions of the "old corporations legislation"[277].

249. Part 5.6 of the *Corporations Act* is substantially the same as Part 5.6 of the *Corporations Law* (including as that Part was in force prior to 23 June 1993)[278].

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

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

[276] A similar principle is generally applied when an Act is to be read as one with, read and construed with, or to be incorporated with, another Act. Expressions such as "under this Act" appearing in the one Act should be given an extended application so as to cover things done under the other Act — see *Georgoussis v Medical Board of Victoria* [1957] VR 671 at 675 (Smith J). While the case law indicates some difference in approach depending on whether the reference to "under this Act" is in the incorporated Act or the incorporating Act (see *Amalgamated Television Services Pty Ltd v Australian Broadcasting Tribunal* [1984] FCA 144; (1984) 1 FCR 409 at 413 (Lockhart J); *Director of Public Prosecutions (NSW) v Alderman* (1998) 45 NSWLR 526 at 532–3 (Sheller JA)), Pearce & Geddes observes that it should not matter in which Act the incorporation provision appears and the reference to "under this Act" should be read as referring to the Acts as amalgamated — Dennis C Pearce and Robert S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) at [7.32].

[277] *Corporations (Ancillary Provisions) Act 2001* (WA) s.11(5). See s. 4 for definitions of relevant terms such as "corresponds", "relevant time", "new corporations legislation" and "old corporations legislation" are contained in s.4(1) of the *Corporations (Ancillary Provisions) Act 2001* (WA).

[278] The Explanatory Memorandum to the *1992 Reform Act* states that Part 5.5 and 5.6 of the Corporations Law are "generally unamended" by the *1992 Reform Act*: Explanatory Memorandum, *Corporate Law Reform Bill 1992* (Cth), [662]. WAG and Maranoa acknowledge that there is little material difference between the winding up provisions of the Corporations Law and the Corporations Act: WAG's submissions [19]; Maranoa's submissions, [38].

This is accepted by BGNV[279]. Those parts therefore correspond for the purpose of s.11(5) above.

250. BGNV contend in response to this that s.11(5) of the *Corporations (Ancillary Provisions) Act 2001* (WA) does not apply. This is because, it is contended, s.25(1) of the *Bell Act* is directed to the right of a person to lodge a proof in a winding up as at 26 November 2015[280]. That is wrong. Section 25(1) of the *Bell Act* has as its subject the liabilities of the WA Bell Companies admissible to proof in the winding up, which are events, circumstances or things that happened or arose before 15 July 2001. Section 25(1) is to the effect that a liability of a pre-1993 WA Bell Company may be proved under the *Bell Act* if it was admissible to proof under Part 5.6 of the *Corporations Law*.

251. In any event, any doubt as to the proper construction of s.25(1) and whether it extends to Parts 5.4 to 5.6 of the *Corporations Law* as incorporated, ought be resolved to give effect to the evident purpose of the provision and of the *Bell Act*.

252. The construction advanced by BGNV is inconsistent with the plain and obvious purposes of s.25(1) and the *Bell Act* more generally. It also gives rise to absurd consequences. The essential purpose of the *Bell Act* is to provide an alternative process for external administration by winding up the WA Bell Companies and making reasonable provision for the satisfaction of liabilities owed to creditors[281]. BGNV's contention has the absurd consequence that creditors of the pre-1993 WA Bell Judgment Creditors[282] could not prove under the *Bell Act*, while creditors of post-1993 WA Bell Judgment Creditors could. Further to this, this is the effect of BGNV's contention notwithstanding that the property of the companies of which they are all creditors has transferred to and vested in the Authority as part of the winding up of those WA Bell Companies.

253. BGNV's alternative contention[283] can be shortly disposed of. It relies on an argument that the liabilities of WA Bell Companies were not admissible to proof under Part 5.6 of the *Corporations Act* but under s.7(1) of the *Corporations (Ancillary Provisions) Act 2001* (WA) and s.8(c) of the *Acts Interpretation Act 1901* (Cth).

254. As stated above, s.7(1) of the *Corporations (Ancillary Provisions) Act 2001* (WA) provides that the *Corporations Law*, ceasing operation of its own force because of s.6 of the Act, has the same effect as if the *Acts Interpretation Act 1901* (Cth) as in force on 1 November 2000 applied.

255. Section 8(c) of the *Acts Interpretation Act 1901* (Cth) as in force on 1 November 2000 provides that where an Act repeals in whole or in part a former Act[284], then

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[279] BGNV's Amended Statement of Claim at [72] (SCB at 46). See also WAG's Amended Statement of Claim at [73] (SCB at 44–45); Maranoa's Statement of Claim at [72] (SCB at 40).
[280] BGNV's Submissions at [34].
[281] *Bell Act* s.4(f). See also *Interpretation Act 1984* (WA) s.18.
[282] In respect of whose admitted proofs of debts in two of those companies, TBGL and BGF, exceed $0.5 billion — see Amended Special Case in P4 of 2016 at Attachments B and C (SCB at 139–142).
[283] BGNV's Submissions at [30]–[33].
[284] Section 8A of the *Acts Interpretation Act 1901* (Cth) as in force on 1 November 2000 provides that "repeal" of an Act or part of an Act includes a repeal effected by implication, the abrogation or limitation

unless the contrary intention appears the repeal shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under any Act so repealed.

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

257. Even if it did not, s.7(1) of the *Corporations (Ancillary Provisions) Act 2001* (WA) and s.8(c) of the *Acts Interpretation Act 1901* (Cth) provide for the effect on rights and liabilities resulting from (*inter alia*) the *Corporations Law* ceasing to operate. That effect does not alter the character of rights in relation to proofs of debt from being rights arising under the *Corporations Law* to being rights arising under those provisions (or any other law). This is particularly so in circumstances where those provisions (as opposed to ss.1401 and 1408 of the *Corporations Act 2001*) do seek to incorporate or give force or effect to the existing provisions under which the rights and liabilities arose.

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

258. The plaintiffs contend that numerous sections of the *Bell Act* are inconsistent with Parts 5.4B and 5.6 of the *Corporations Act*. Those arguments are dealt with elsewhere. The plaintiffs contend that those sections of the *Bell Act* are inconsistent with Parts 5.4 and 5.6 of the pre-23 June 1993 *Corporations Law* for the same reasons stated in relation to the corresponding provisions in Part 5.4B and 5.6 of the *Corporations Act 2001*. Section 1408 of the *Corporations Act 2001* has the effect that, with respect to the pre-1993 WA Bell Companies, the *Corporations Act 2001* is taken to include the provisions of Parts 5.4 and 5.6 of the pre-23 June 1993 *Corporations Law*. Consequently, it is contended, the relevant provisions of the *Bell Act* are inconsistent with s.1408[285]. This is the same argument as addressed above. In any event, if the *Bell Act* is not inconsistent with the operation of Parts 5.4B and 5.6 of the *Corporations Act*, by extension, it is not inconsistent with the corresponding provisions in Parts 5.4 and 5.6 of the pre-23 July 1993 *Corporations Law* as applied by s.1408, such that no relevant inconsistency between the *Bell Act* and s.1408 arises.

259. BGNV advances a further contention; that s.5G(8) of the *Corporations Act 2001* is ineffective to avoid invalidity between the *Bell Act* and s.1408 because s.1408 is not contained "in Chapter 5 of the *Corporations Act*"[286]. As dealt with in detail elsewhere, where it operates, s.5G(8) disapplies "the provisions of Chapter 5 of this Act".

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of the effect of the Act or part and the exclusion of the application of the Act or part to any person, subject-matter or circumstance.

[285] See BGNV's Amended Statement of Claim at [72] (SCB at 46–47); BGNV's Submissions at [89]; WAG's Amended Statement of Claim at [73] (SCB at 44–45); Maranoa's Statement of Claim at [72] (SCB at 40).

[286] BGNV's Submissions at [125].

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

261. There is a longer answer.

262. By reason of s.1408(1) of the *Corporations Act 2001*, that Act "has the same effect" as it would have if s.1383(2) of the (old) *Corporations Law*, "had been part of" the *Corporations Act 2001*, and those transitional provisions "produced the same results or effects (to the greatest extent possible)" for the purposes of the *Corporations Act 2001* as they produced for the purposes of the (old) *Corporations Law*.

263. Sections 1382(2) and (7)(f) produced the following results or effects for the purposes of the (old) *Corporations Law*. Parts 5.4 to 5.6 of the *Corporations Law*, as in force immediately before 23 June 1993, continued to apply for the purposes of the winding up of a company ordered to be wound up under the *Corporations Law* prior to 23 June 1993. That "old winding up law" applied as if certain sections of the *1992 Reform Act*, that made changes to Part 5.4 to 5.6 and inserted Part 5.7B into the *Corporations Law*, had not been enacted.

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

265. The objects of Pt.10.1 of the *Corporations Law* are similar to the above directive, and a directive is also given that in resolving any ambiguity as to the meaning of any of the other provisions of Part 10.1 "an interpretation that is consistent with the object of this Part is to be preferred to an interpretation that is not consistent with that object"[287].

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

266. If BGNV's construction were correct, references to Chapter 5 (or in fact, any reference to a section, part, division or chapter) in the *Corporations Act 2001* would also not accommodate reference to the corresponding provisions of the *Corporations Law* taken to be included in the *Corporations Act 2001* by reason of ss.1401(2)[288]. So, it would create the precise circumstance that was intended to be avoided.

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

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

269. Alternatively, if that is not correct, and Parts 5.4 to 5.6 of the pre 23 June 1993 *Corporations Law* are not to be treated as being part of *Corporations Act 2001*, in particular Chapter 5, s.1405(1) provides a similar outcome. That section is expressed in similar terms to s.11(5) of the *Corporations (Ancillary Provisions) Act 2001* (WA) referred to above in relation to the operation of s.25(1) of the Bell Act. In other words, it operates such that that references in the *Corporations Act* to, relevantly, a group of provisions of the *Corporations Act*, is taken in relation to events, circumstance or things that happened before the commencement of the *Corporations Act 2001* on 15 July 2001 to include a reference to the corresponding provisions of the *Corporations Law*.

270. BGNV accepts that the provisions of Part 5.4 and 5.6 of the *Corporations Law* in force prior to 23 June 1993 are substantially the same as the provisions in Part 5.4B and 5.6 of the *Corporations Act 2001*[289]. Consequently, at least to the extent of that similarity, Chapter 5 of the *Corporations Law* corresponds with Chapter 5 of the *Corporations Act 2001* for the purpose of s.1405[290].

271. Each of the following are events circumstances or things that happened or arose before 15 July 2001: the winding up of the WA Bell Companies ordered to be wound up before 23 June 1993; all liabilities of those WA Bell Companies incurred prior to 15 July 2001 and all transactions and agreements of those WA Bell Companies which were effected or entered into by the company or its

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

[289] See BGNV's Amended Statement of Claim at [72] (SCB at 46). See also WAG's Amended Statement of Claim at [73] (SCB at 44–45); Maranoa's Statement of Claim at [72] (SCB at 40). In addition, as noted above, the Explanatory Memorandum to the *1992 Reform Act* states that Part 5.5 and 5.6 of the Corporations Law are "generally unamended" by the *1992 Reform Act* — Explanatory Memorandum, Corporate Law Reform Bill 1992 (Cth) at [662].

[290] See *Corporations Act 2001* (Cth) ss.1371(2), (3).

liquidator, or related to the period, prior to 15 July 2001 (including things done in respect of those transactions, whenever those things may have occurred).

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

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

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

274. Section 51 of the *Bell Act* invokes s.5F of the *Corporations Act 2001* (Cth) and s.52 of the *Bell Act* invokes s.5G of the *Corporations Act 2001*. All plaintiffs contend that ss.5F and 5G, as invoked, do not operate so as to 'save' the *Bell Act* or provisions of it that are inconsistent with provisions of the *Corporations Act 2001*[291].

275. The scope and operation of ss.5F and 5G are to be understood having regard to their purposes. These purposes emerge, principally, from an understanding of the function of Part 1.1A of the *Corporations Act 2001* (in which ss.5F and 5G appear) and the operation of the provisions of the *Corporations Law* that preceded Part 1.1A of the *Corporations Act 2001*. The particular relevance of the latter is informed by the truth that Part 1.1A of the *Corporations Act 2001* seeks, in effect and essential operation, to replicate the operation of cognate provisions of the *Corporations Law* that preceded it, even though the context of each is different.

276. The *Corporations Act 2001* arose from the enactment by each State of a *Corporations (Commonwealth Powers) Act 2001*. Each was a request Act for the purpose of s.51(xxxvii) of the *Constitution*. In terms of s.4 of the *Corporations Act 2001*, Western Australia is a referring State. The reference is limited in time and can be terminated. This much is clear from ss.4(1), (6) and (7) of the *Corporations Act 2001*[292] and from the terms of the *Corporations (Commonwealth Powers) Act 2001* (WA)[293].

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[291] See BGNV's Submissions at [91]–[125]; WAG's Submissions at [29]–[60]; Maranoa's Submissions at [67]–[97].

[292] Both the initial reference and the amendment reference can be terminated. Section 4(1) of the *Corporations Act 2001* (Cth), which defines the term "referring State", is expressed to apply subject to subsections (6) and (7). Under s.4(6), "[a] State ceases to be a *referring State* if the State's initial reference terminates." Under s.4(7), "[a] State ceases to be a *referring State* if: (a) the State's amendment reference terminates; and (b) subsection (8) does not apply to the termination." Section 4(8) provides for the specific situation where a State does not cease to be a referring State if the amendment reference is terminated by every State on the same day.

[293] Under s.4(5) of the *Corporations (Commonwealth Powers) Act 2001* (WA), a reference has effect for a period beginning at the commencement day and ending on the day on which it terminates as set out in s.5. Section 5(1) provides that the references terminate 5 years after the commencement day. The Governor may extend the date of both the initial reference and amendment reference by proclamation under ss.5(1) and 6. The references have been extended by the Governor of Western Australia to 15 July 2016 — Western Australia, *Government Gazette*, No.66, 19 April 2011, 1451. The Governor may also terminate

277. Plainly enough, Part 1.1A is an integral basis upon which the States referred power, empowering the Commonwealth Parliament to enact the *Corporations Act 2001*, and its operation is central to States remaining referring States.

278. It is apparent from the text and context of Part 1.1A that its underlying purposes included preserving a referring State's ability to withdraw specified matters from the operation of Commonwealth Corporations legislation, including the *Corporations Act*, and to legislate in a manner which may otherwise be inconsistent with such Commonwealth Corporations legislation[294], without withdrawing completely as a referring State. This purpose was given effect in different ways.

279. *First*, s.5E(1) of the *Corporations Act* provides that the Corporations legislation is not intended to exclude or limit the concurrent operation of State and Territory laws. So the *Corporations Act* does not cover a field[295].

280. *Second*, s.5F facilitates a State or Territory excluding certain matters from the operation of the Commonwealth Corporations legislation (in whole or in part). No inconsistency arises because the Commonwealth legislation simply does not apply to the excluded matter.

281. *Third*, s.5G provides an alternative mechanism to s.5F which operates (relevantly here) on State "post-commencement provisions". Section 5G provides for a number of particular consequences in the interaction of these State post-commencement provisions with particular provisions of and things provided for in the Commonwealth Corporations legislation. As with s.5F, the essential means of s.5G is to state that Commonwealth legislation, that might otherwise apply to the same thing as the State post-commencement provision, does not.

282. Section 5I is in effect a mirror of s.5F. It empowers the Commonwealth to modify by regulation the operation of the Commonwealth Corporations legislation to exclude itself from matters dealt with by specified State or Territory laws.

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both references on an earlier date than the prescribed termination day by proclamation under ss.5(2) and 7. In addition, the Governor may terminate the amendment reference alone by proclamation under ss.5(3) and 7. Equivalent provisions exist in the equivalent Acts of the other States — see *Corporations (Commonwealth Powers) Act 2001* (NSW) ss.5–7; *Corporations (Commonwealth Powers) Act 2001* (Vic) ss.5–7; *Corporations (Commonwealth Powers) Act 2001* (Qld) ss.5–7; *Corporations (Commonwealth Powers) Act 2001* (Tas) ss.6–8. The reference by the South Australian Parliament lasts for 15 years, and there is no express power on the Governor to extend the reference, although the Governor may by proclamation terminate both references or only the amendment reference on an earlier date — see *Corporations (Commonwealth Powers) Act 2001* (SA) ss.5–6.

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

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

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

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

284. As explained in detail elsewhere, the *Corporations Act 2001* was preceded by the national scheme by which the States and the Northern Territory adopted, as a law of each State and the Northern Territory, the model *Corporations Law*[296]. This was effected by *Corporations ([State or Territory]) Acts 1990* of each State and the Northern Territory[297].

285. A purpose of the *Corporations ([State or Territory]) Act 1990* of each State and Territory was to deal, by express provision, with future amendment to the adopted *Corporations Law* by States. An aspect of this was a concern that a State might "inadvertently pass a law implicitly repealing a provision of the Corporations law"[298]. This concern was met by the manner and form provision in s.5(2) of the *Corporations ([State or Territory]) Act 1990*[299]. Section 6 provided that State laws inconsistent with, but which preceded, the *Corporations Law*, continued to apply.

286. Other provisions of the *Corporations ([State or Territory]) Act 1990* dealt with different issues of State legislative power; in particular ss.7, 12, 13, 15 and 16. A number of things are notable about these provisions. None seek to limit the surrogate *Corporations Law* of each State and Territory to the territory of the State or Territory. So, s.7 applies the *Corporations Law* "as a law of [Western Australia]", not to the territory of Western Australia. Section 12(2) did not confine the territorial reach of the *Corporations Law* of any State. Section 13 is premised upon the possibility of (say) the *Corporations Law* (WA) having effect beyond the territory of Western Australia. Each State was, by s.13, seeking to ensure that if it were necessary "for the purposes of the laws of Western Australia" that the *Corporations Law* (WA) or the (say) *Corporations Law* (NSW) had an extra-territorial effect, that this was recognized. Sections 15 and 16 recognise that the *Corporations Law* of each State and Territory could operate extra-territorially.

287. Another feature of the *Corporations Law* scheme was that such laws operated to the extent of the legislative power of each State and Territory. Section 8 of the

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

[297] In respect of the ACT, the relevant legislation was the *Corporations Act 1989 (Cth)*.

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

[299] As the provision is not entrenched, cases have instead tended to describe s.5 as a rule of statutory interpretation — see *Director of Public Prosecutions v Mansfield* [2008] WASCA 5; (2008) 35 WAR 431 at 450 [79] (McLure JA, Buss JA agreeing); *Loo v Director of Public Prosecutions (Vic)* [2005] VSCA 161; (2005) 12 VR 665 at 669 [5] (Winneke P, Charles JA agreeing); *Re Summit Design & Construction Pty Ltd* [1999] NSWSC 1136 at [26] (Austin J). A counterpart to s.5 of the *Corporations ([State or Territory]) Act 1990* was included in s.9 of the *Corporations Act 1989 (Cth)* in respect of later Commonwealth laws. Section 11 of the *Corporations Act 1989 (Cth)* was similar in effect to s.6 of the *Corporations ([State or Territory]) Act 1990* in relation to particular ACT legislation.

Corporations Law did not impact upon this. The prospect of there being a conflict of such statutory *Corporations Laws* was slight because substantively each statutory law started off as identical, and inadvertent change 'protected' by s.5 of the *Corporations ([State or Territory]) Act 1990*. But, the existence of the mechanism in s.5 for a particular State to change the *Corporations Law* of that State illustrates that conflicts could have arisen, and such real conflicts were recognised and accommodated by s.5(2) and s.6. Sections 5(1) and (2) of the *Corporations ([State or Territory]) Act 1990* related only to alteration to the Act or the applicable provisions (in effect the *Corporations Law, ASC Law* and regulations). The applicable provisions of (say) Western Australia did not (for example) include the *Corporations Law* (NSW). If the New South Wales Parliament amended the *Corporations Law* (NSW) to have had an effect (say) in Western Australia, there was no limit on the power of the Western Australian Parliament to legislate to 'deal with' such NSW legislation. Nothing in s.5 limited the Western Australian Parliament from legislating to directly 'counteract' the (hypothetical) amended *Corporations Law* (NSW), to the extent of Western Australian legislative power. If this gave rise to a real conflict between the *Corporations Law* (WA) and the *Corporations Law* (NSW) then this conflict would be resolved in accordance with law. As has been recognised on many occasions, such conflict resolving laws in Australia — dealing with conflicting State statutes — are protean or at least undeveloped[300]. The expectation of Professor Kelly in 1974[301] that such conflicts would be resolved by developing rules of statutory localisation has proved to be misplaced (or premature), though it can be said that s.118 of the Commonwealth *Constitution* assists little in this[302]. But, simply because conflict resolving laws relating to conflicting State statutes are inchoate, or developing, does not connote a gap or suggest that such laws do not exist. Much has been written about them[303], much of it evolving from Dr Morris' seminal article[304]. United States literature, involving (*inter alia*) "governmental interest analysis" is considerable[305]. As confirmed in *Sweedman v Transport Accident Commission*[306], such rules or interpretative techniques exist.

288. A State law invoking s.5 of the *Corporations ([State or Territory]) Act 1990* was not limited by that section, or anything else, to amendment having effect only

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[300] See, for instance, *Sweedman v Transport Accident Commission* [2006] HCA 8; (2006) 226 CLR 362 at 402 [31], 406 [48] (Gleeson CJ, Gummow, Kirby and Hayne JJ).

[301] David St Leger Kelly, *Localising Rules in the Conflict of Laws* (Woodley Press, 1974).

[302] *Sweedman v Transport Accident Commission* [2006] HCA 8, (2006) 226 CLR 362 at 407 [49] (Gleeson CJ, Gummow, Kirby and Hayne JJ).

[303] In addition to Professor Kelly, see Stephen Gageler SC, 'Private intra-national law: Choice or conflict, common law or constitution?' (2003) 23 *Australian Bar Review* 184 and Graeme Hill, 'Resolving a True Conflict between State Laws: A Minimalist Approach' (2005) 29(1) *Melbourne University Law Review* 39. These matters are discussed in Mark Leeming, *Resolving Conflicts of Laws* (Federation Press, 2011) at Chapter 6.

[304] J H C Morris, 'The Choice of Law Clause in Statutes' (1946) 62 *Law Quarterly Review* 170. The recent chapter of Dicey Morris and Collins dealing with this issue refers to the substantial body of later academic consideration of this — see Lord Collins (ed), *Dicey, Morris & Collins on the Conflict of Laws* (Sweet & Maxwell, 15th ed, 2012) vol.1 at ch.1.

[305] Much this was first synthesised by Professor Currie, and much of this is in the various chapters of Brainerd Currie (ed), *Selected Essays on the Conflict of Laws* (Duke University Press, 1963).

[306] *Sweedman v Transport Accident Commission* [2006] HCA 8; (2006) 226 CLR 362 at 407 [52] (Gleeson CJ, Gummow, Kirby and Hayne JJ).

within the territory of a particular State or Territory. Nor was the maintenance of the operation of pre-existing provisions under s.6 so limited. The limitation was on legislative power not territory.

289. This can be seen from the nature of certain of the legislation that invoked s.5 of the Corporations ([State or Territory]) Act 1990. For example, the Australian Mutual Provident Society (Demutualisation and Reconstruction) Act 1997 (NSW)[307] excluded Corporations Law provisions that would have restricted transfers to the share premium account of the new entity. This was not territorially limited. The Building Societies Fund Act 1993 (Qld) by s.13(1) applied the Corporations Law to the winding up of Combined Bowkett and Building Society Limited ('CBBS'). Section 13(2) provided that despite anything in the Corporations Law, "after all liabilities of CBBS had been satisfied, the property of CBBS — (a) must not be distributed to any person, and (b) must be paid into the Building Societies Fund... and (c) used for the purposes for which the Fund is established". Plainly enough, there could have been property of CBBS beyond the territory of Queensland. Section 11 of the Government Insurance Office (Privatisation) Act 1991 (NSW), expressed to have effect despite anything in the Corporations Law, deemed the name of the new privatised entity to be GIO Australia Holdings Limited and then provided that neither that entity nor any subsidiary could "use in connection with its business the name "Government Insurance Office" or any other name (apart from "GIO") which suggests that it is associated with the State of New South Wales"[308]. Obviously enough this provision was intended to have an operation beyond New South Wales. The Royal Institute for Deaf and Blind Children Act 1998 (NSW), by s.18(1), applied Part 5.7 of the Corporations Law to the winding up of the Institute, but s.18(2) provided that, notwithstanding the Corporations Law, members of the Institute were not required to contribute to the payment of a debt or liability of the Institute on the winding up. There is nothing in the Act to suggest that members of the Institute could only live in New South Wales. Section 21 of the Snowy Hydro Corporatisation Act 1997 (Vic)[309], along with the similar legislation of New South Wales[310] and the Commonwealth[311], excluded the operation of s.205 of the Corporations Law[312] and Part 3.2A of the Corporations Law[313] in respect of any debt or liability of the new entity to (inter alia) the Commonwealth or to the acquisition of initial shares in the new entity by the Commonwealth or New South Wales or Victoria. No doubt this exemption in the Victorian Act was intended to apply outside of Victoria, even though the

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[307] *Australian Mutual Provident Society (Demutualisation and Reconstruction) Act 1997* (NSW) s.13(2).

[308] A similar provision applies to the change of name of the Axiom Funds Management Corporation to "Axiom Funds Management Limited", and TAB to "TAB Limited" — see *Superannuation (Axiom Funds Management Corporation) Act 1996* (NSW) s.46 and *Totalizator Agency Board Privatisation Act 1997* (NSW) s.13 respectively.

[309] Cited in *Loo v Director of Public Prosecutions (Vic)* [2005] VSCA 161; (2005) 12 VR 665, 669 [5] fn.4 (Winneke P, Charles JA agreeing). Reference to the *Snowy Hydro Corporatisation Act 1997* (Vic) is reference to the Act as passed.

[310] *Snowy Hydro Corporatisation Act 1997* (NSW) s.47 (as passed).

[311] *Snowy Hydro Corporatisation Act 1997* (Cth) s.50 (as passed).

[312] Section 205 dealt with financing dealings in one's own shares.

[313] Part 3.2A of the *Corporations Law* required that financial benefits to related parties that could diminish or endanger the resources of a company available to pay the company's creditors, be disclosed and approved by a general meeting before they are given.

equivalent provisions of the Commonwealth and New South Wales Acts also operated.

290. So, ss.5 and 6 of the *Corporations ([State or Territory]) Act 1990* did not limit the legislative power of States to amend, or disapply, the *Corporations Law* only within the territory of a particular State.

291. In this matter the plaintiffs contend that the States, in referring power to enable the Commonwealth to enact the *Corporations Act 2001*, including s.5F, did this.

292. Sections 5F(2) and (4) and 5G(11) of the *Corporations Act 2001* effect a means of dis-applying Commonwealth law and facilitating States and Territories to legislate inconsistently with the Commonwealth Corporations legislation. The principal issue in this matter is whether those provisions, as well as effecting those means, effect a wholly different function of localising a State or Territory law invoking those provisions to the territory of the invoking State or Territory. Such a meaning of ss.5F and 5G(11) was arrived at by Barrett J in *HIH Casualty and General Insurance Ltd v Building Insurers' Guarantee Corporation*[314]. For the reasons canvassed below, his Honour's reasoning should not be accepted[315].

Section 8 of the *Corporations (Ancillary Provisions) Act 2001* (WA)

293. Section 8 of the *Corporations (Ancillary Provisions) Act 2001* (WA) was enacted to complement the *Corporations Act 2001* and is part of the overall legislative package. In this sense the provision is relevant to interpretation of *Corporations Act 2001* provisions. All referring States have similar provisions[316]. Section 8 of the *Corporations (Ancillary Provisions) Act 2001* (WA) provides in substance that any Western Australian law that was inconsistent with the *Corporations Law*[317] but did not invoke s.5 of the *Corporations ([State or Territory]) Act 1990*, and any Western Australian law that did invoke s.5 of the *Corporations ([State or Territory]) Act 1990*, is valid. By reason of this provision and s.5F(4) of the *Corporations Act 2001*, any Western Australian laws existing at the commencement of the *Corporations Act 2001*, that were inconsistent with the new *Corporations Act 2001* (or any "Corporations legislation" in the meaning in s.5F) were valid, even if they had not complied with s.5 of the *Corporations (Western Australia) Act 1990.*

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[314] *HIH Casualty and General Insurance Ltd v Building Insurers' Guarantee Corporation* [2003] NSWSC 1083; (2003) 188 FLR 153.

[315] Nor should be judgment of Member McCabe in *Re Queensland Power Trading Corporation and ASIC* [2005] AATA 945; (2005) 89 ALD 346 at 350–351 [25] be accepted. He concluded that s.5F(2) included a territorial limitation and that therefore s. 7(6) of the *Government Owned Corporations Act 1993* (Qld) which provided that in the case of a statutory government owned corporation, the Corporations Act does not apply, exempted the operation of such a corporation in Queensland but not outside of Queensland notwithstanding that s 11 of the GOC Act purported to extend the operation of the Act outside Queensland and s 149 enabled the statutory corporation to exercise its powers outside the state.

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

[317] Or the *Corporations (Western Australia) Act 1990* (WA) or the *ASC Law* (WA) — see s.3 (definition of "national scheme law"), which adopts the definition in s.3 of the *Corporations (Western Australia) Act 1990* (WA).

294. Obviously enough, this would apply to such inconsistent Western Australian laws, and those of all of the referring States, existing at the commencement of the *Corporations Act 2001*, even if such laws operated beyond the territory of the particular State.

Section 5F of the *Corporations Act 2001*

295. This consideration of s.8 of the *Corporations (Ancillary Provisions) Act 2001* (WA) exposes an essential aspect of the plaintiffs' contention about s.5F of the *Corporations Act 2001*. Even though the States enacted s.8 of the *Corporations (Ancillary Provisions) Act 2001* (by which State laws that operated beyond the territory of the particular State that were inconsistent with the *Corporations Act 2001* and other Corporations legislation — within the meaning of that term in s.5F of the *Corporations Act 2001* — were valid), because of the words "in the State or Territory" in s.5F(4) of the *Corporations Act 2001* such laws were invalid, or invalid to the extent that they operated not "in the State or Territory".

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

297. Each plaintiff relies centrally on the reasoning of Barrett J in *HIH Casualty and General Insurance Ltd v Building Insurers' Guarantee Corporation*[318]. Barrett J's reasoning as to s.5F is encompassed in the following[319]:

> The concept is thus a dual concept of restriction of territorial application and restriction of application to subject matter. The effect of both s.5F(2) and s.5F(4) is to single out a particular "matter", being the "matter" identified by the State or Territory enactment, and to cause the territorial operation of the *Corporations Act* to be modified and restricted so that such application as it would otherwise have had "in" the relevant State or Territory "to" (or "in relation to") the particular "matter" is negated. As a corollary, such application as the *Corporations Act* has to or in relation to the particular matter that cannot be classified as application "in" the State or Territory is not negated.

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

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[318] *HIH Casualty and General Insurance Ltd v Building Insurers' Guarantee Corporation* [2003] NSWSC 1083; (2003) 188 FLR 153. See, especially, BGNV's Submissions at [94]–[96], [127]; WAG's Submissions at [44]–[45], [60]; Maranoa's Submissions at [72]–[76], [86].

[319] *HIH Casualty and General Insurance Ltd v Building Insurers' Guarantee Corporation* [2003] NSWSC 1083; (2003) 188 FLR 153 at 193 [88].

299. The words "in the State or Territory" in s.5F(2) refer to the State or Territory where the matter is or the States and Territories where the matter is. This properly emphasises the importance of the word "the" in "in the State or Territory". The singular "State or Territory" includes the plural[320].

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

301. Such an understanding is consistent with the breadth of the defined term "matter" in s.5F(6), none of the meanings of which suggest or are logically consistent with, any geographical limitation. A "thing" is not necessarily territorially limited — say, the internet. Many "matters" extend beyond the territory of a single State — say, a bank account.

302. On this understanding, Part 1.1A simply preserves, as it was intended, the regime for State and Territory opt out of Corporations legislation that existed prior to the *Corporations Act 2001*. On the scenario of the Western Australian Corporation X legislation operating in New South Wales, the New South Wales Parliament can legislate 'in response' if it wishes and if there is then a conflict between statutes of New South Wales and Western Australia, such conflict will be resolved by conflict resolving laws relating to conflicting State statutes.

303. This understanding is also enhanced by the existence of s.5F(3). The Commonwealth has a residual power to disapply (or reverse) State disapplication.

304. This understanding also provides a certain and clear meaning to s.5G(11). In respect of a post-commencement provision, being (say) a Western Australian Act that applies in Western Australia and New South Wales, the provisions of the Corporations legislation inconsistent with the Western Australian Act do not apply in Western Australia or New South Wales. Again, if the New South Wales Parliament wishes to legislate in respect of the area in which the Corporations

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

legislation no longer applies in New South Wales, it plainly can, and any conflict with the Western Australian Act will be resolved by conflict resolving laws relating to conflicting State statutes.

305. This understanding also overcomes the principal and obvious difficulty with the reasoning and conclusion of Barrett J in *HIH Casualty and General Insurance Ltd*. If correct, Barrett J's reasoning leaves no real scope for s.5F to operate. The first limb of his Honour's reasoning — that only territorially limited provisions of the *Corporations Act 2001* can be disapplied by s.5F[321] — in reality means that s.5F has no effective operation; because few if any provisions of the *Corporations Act* are so confined. His Honour gave the example of s.5F allowing a New South Wales law enabling a particular resident of New South Wales to carry on a financial services business in New South Wales even though unlicensed, contrary to s.911A of the *Corporations Act 2001*[322]. Apart from this example, however, it is difficult to see how any of the provisions of the *Corporations Act 2001* deal with "matters having clear territorial attributes"[323]. Even in respect of that example — what if the business had a bank account in Victoria? Contrary to Barrett J's reasoning, a concept of restriction of territorial operation is not meaningful in relation to the *Corporations Act 2001*. A corporation, when incorporated, is incorporated throughout "this jurisdiction"[324], defined as the whole of Australia[325]. Each provision of the *Corporations Act 2001* applies in "this jurisdiction"[326], again, the whole of Australia. It is extremely problematic to divide the *Corporations Act 2001* into provisions that are capable of clear territorial operation and those that are not.

306. In respect of Barrett J's conclusion that s.5F only permits the operation of State legislation that applies territorially in the declaring State, it is instructive to have regard to actual invocations of s.5F. In Western Australia this includes, the *Associations Incorporation Act 1987* (WA) s.3A; the *Bank of Western Australia Act 1995* (WA) ss.25, 27, 42T; the *Co-operatives Act 2009* (WA) ss.9, 368; the *Duties Act 2008* (WA) s.284; the *Electricity Industry Act 2004* (WA) s.134; the *Electricity Industry (Wholesale Electricity Market) Regulations 2004* (WA) reg.18A; the *Employers' Indemnity Supplementation Fund Act 1980* (WA) s.37; the *Gas Corporation (Business Disposal) Act 1999* (WA) s.12A; the *Legal Profession Act 2008* (WA) s.129; the *Stamp Act 1921* (WA) s.121; the *Strata Titles Act 1985* (WA) s.32; and the *Water Services Act 2012* (WA) s.222.

307. Section 5F was invoked in s.4B(4) of the *Grain Marketing Act 1991* (NSW). The "principal object" of the Act was to increase returns to NSW producers by "having a single, more powerful, entity marketing their product both in domestic and

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[321] *HIH Casualty and General Insurance Ltd v Building Insurers' Guarantee Corporation* [2003] NSWSC 1083; (2003) 188 FLR 153 at 193 [89].
[322] *HIH Casualty and General Insurance Ltd v Building Insurers' Guarantee Corporation* [2003] NSWSC 1083; (2003) 188 FLR 153 at 193 [89].
[323] *HIH Casualty and General Insurance Ltd v Building Insurers' Guarantee Corporation* [2003] NSWSC 1083; (2003) 188 FLR 153 at 193 [89].
[324] *Corporations Act 2001* (Cth) s.119A(1).
[325] *Corporations Act 2001* (Cth) ss.5(2), 9.
[326] *Corporations Act 2001* (Cth) s.5(3).

international markets"[327]. The Board "operate[d] in the export market via a number of selling options, including selling direct to end-users on both an FOB and C&F basis, and to agents and traders"[328]. The Board had a head office in Sydney supported by five offices throughout regional NSW and southern Queensland[329]. Section 34(2) of the Act provided that the Board "may arrange with a producer of a primary product produced or to be produced outside New South Wales (being a product that, if produced in New South Wales, would answer the description of the commodity) for the delivery of any of the product during such period and on such terms and conditions as the Board thinks fit." Section 41(1) provided that "[t]he Board may act as agent for any person for the purpose of marketing (a) any of the commodity which that person is entitled to sell... whether or not it was produced within New South Wales, and may do all acts, matters and things necessary or expedient to carry out that purpose." Section 43(1)(a) empowered the Board to "make such arrangements as it considers necessary with regard to sales of the commodity or any other product with which the Board is associated for export or for consignment to other countries or other parts of Australia". Section 43(9) provides that the Board "may exercise any of its functions under this Act, whether or not the function is exercised in, or the thing in respect of which the function is exercised is in or of or produced in, New South Wales". As can be seen, this invocation of s.5F clearly operated in a context envisaging the invocation having potential extra-territorial effect.

308. The *Co-operatives Act 1997* (SA)[330] provided in s.9(1) that "[a] co-operative is declared to be an excluded matter for the purposes of section 5F of the Corporations Act in relation to the whole of the Corporations legislation other than to the extent specified in subsection (2)." Section 40(1) provided that a "co-operative has, both within and outside the State, the legal capacity of a natural person", and s.40(2) provided that a co-operative has, "both within and outside the State", numerous specific powers. Part 11 Div.1 (restrictions on share and voting interests) was stated by s.283 to apply (a) "to all natural persons, whether resident in South Australia or in Australia or not and whether Australian citizens or not, and to all bodies corporate or unincorporated, whether incorporated or carrying on business in the State or in Australia or not" and (b) "extends to acts done or omitted to be done outside the State, whether in Australia or not". Section 361 provided that the Governor may "by proclamation, declare a law of a State other than South Australia to be a co-operatives law for the purposes of this Part if satisfied that the law (a) substantially corresponds to the provisions of this Act; and (b) contains provisions that are referred to in this Part as provisions of a co-operatives law that correspond to specified provisions of this Act". Part 14 contained provisions regulating "foreign co-operatives", including providing for registration of a foreign co-operative (s.364). Further, the prescribed provisions of the Act and regulations "apply, with all necessary modifications and any

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[327] NSW Government Review Group, *Review of the NSW Grain Marketing Act 1991 Final Report* (1999) viii [20].
[328] NSW Government Review Group, *Review of the NSW Grain Marketing Act 1991 Final Report* (1999) 8 [2.16].
[329] NSW Government Review Group, *Review of the NSW Grain Marketing Act 1991 Final Report* (1999) 1 [1.7].
[330] Since repealed by the *Co-operatives National Law (South Australia) Act 2013* (SA).

prescribed modifications, to a foreign co-operative which is registered under this Part as if the foreign co-operative were a co-operative" (s.369).

309. The *Associations Incorporation Reform Act 2012* (Vic), through s.144(1), declares an "incorporated association" to be an "excluded matter" in relation to the whole of the Corporations legislation, other than to the extent in s.144(2). An incorporated association may do and suffer all acts and things that a body corporate may by law do and suffer (s.29(2)(e)). As long as the incorporated association acts within its rules, there is nothing to suggest that the incorporated association may only operate within the State. The exclusion of the Corporations legislation, therefore, assumes that such exclusion would have effect beyond the State. To similar effect is the *Associations Incorporation Act 1964* (Tas) ss.3(1), (2).

310. The *Central Coast Water Corporation Act 2006* (NSW), in s.11(1), declares the Central Coast Water Corporation to be an "excluded matter" in relation to the whole of the Corporations legislation, except to the extent specified by the regulations which may be made under s.11(2). Section 28(1) confers all the powers of a natural person on the Corporation, and such powers may be exercised "within or outside the State" (s.28(3)), and "outside Australia" (s.28(4)).

311. The *Health Services Act 1988* (Vic), by s.43, declares "a public hospital" and "a denominational hospital, other than a denominational hospital that is a company within the meaning of the Corporations Act" to be "excluded matters" in relation to the whole of the Corporations legislation. Under s.41(1), the powers of such a hospital "include all such powers as are necessary to enable the hospital to carry out its objects and do all things it is required or permitted to do", including to exploit commercially any research or intellectual property rights of the hospital.

312. The *NSW Self Insurance Corporation Act 2004* (NSW), in s.8(4), declares "entering into insurance or other agreements or arrangements (including the provision of indemnities) to cover the liabilities to which a Government managed fund scheme applies" to be an "excluded matter" in relation to Ch.7 of the *Corporations Act 2001*.

313. The *Public Trustee Act 1978* (Qld) by s.8(1) continues the corporation sole constituted by the public trustee under the name The Public Trustee of Queensland. Section 8(9) declares the corporation sole to be an "excluded matter" in relation to the whole of the Corporations legislation, and by s.8(7) the corporation "may exercise its powers inside and outside Queensland", and under s.8(8), the powers may be exercised "outside Australia". Further, s.28(1) permits the Minister to direct the Public Trustee to purchase, accept, hold or take "any moveable or immoveable property within or outside Queensland, which is wholly or partly used or held, or which it is proposed shall be wholly or partly used or held, by the Government of the State for governmental, administrative or departmental purposes" to be held on trust for the State. Section 55(3) permits the Public Trustee to appoint a person to act as agent or attorney "in relation to an estate in any place outside the State". Section 81(3) extends the powers of the Public Trustee to "property or any rights of a property nature of the incapacitated person outside the State", including the power to "receive and give a valid

discharge for any legacy or other interest in an estate in which the incapacitated person is interested in any place outside the State".

314. The *State Owned Corporation Act 1989* (NSW) in s.10A(14) declares any "act, matter or thing done or omitted to be done by a Minister while acting for or on behalf of a voting shareholder" under s.10A to be an "excluded matter" in relation to the whole of the Corporations legislation. Section 20G(1) declares a "statutory State Owned Corporation" to be an "excluded matter" in relation to the whole of the Corporations legislation other than s.1101I of the *Corporations Act 2001* (Cth) and to the extent specified by the regulations. A statutory State Owned Corporation may exercise its powers, which are those of a natural person (s.20ZB(1)), "within or outside the State" (s.20ZB(3)) or "outside Australia" (s.20ZB(4)).

Section 5G of the *Corporations Act 2001*

315. If s.5F(2) does not provide a complete answer to the alleged inconsistency with the Corporations legislation, s.5G does[331]. Section 5G applies to the interaction between a State or Territory provision and a Commonwealth provision provided that one of the conditions set out in the table in s.5G(3) applies[332]. It is common ground that s.5G has been invoked by the *Bell Act* by its declaration in s.52(2) that Parts 3, 4 and 5 (i.e. ss.22 to 49) and ss.55 and 56(3) of the Act are Corporations legislation displacement provisions in relation to the Corporations legislation[333]. By operation of the specific excepting provisions in ss.5G(4), (5) and (8) and the general excepting provision in s.5G(11), any remaining alleged inconsistency is, in any event, avoided.

Section 5G(11)

316. If any inconsistency between one of the above displacement provisions of the *Bell Act* is not avoided through the operation of an earlier subsection of s.5G, it, in any event, is avoided by operation of s.5G(11). By reason of s.5G(11), a provision of the Corporations legislation does not operate in a State or Territory to the extent necessary to ensure that no inconsistency arises between the provision of the Corporations legislation and an inconsistent post-commencement provision.

317. The reference in s.5G(3)(b) to a provision of "a law of the State or Territory" is a reference to a provision of the law of the State or Territory that enacted the law. The term "in a State or Territory" means any State or Territory in which the law

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

[332] Under s.5G(3) Item 3, the relevant condition, which is satisfied in this case, is that the State provision is declared by a law of the State to be a Corporations legislation displacement provision for the purposes of s.5G (either generally or specifically in relation to the Commonwealth provision).

[333] By s.50 of the *Bell Act*, in Part 6 of that Act, "Corporations legislation" is defined to mean "the Corporations legislation to which the Corporations Act Part 1.1A applies".

operates. For the reasons explained above this need not be State or Territory that enacted the law.

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

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

Section 5G(8)

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

321. The plaintiffs' essential contention concerning s.5G(8) is that it does not dis-apply Chapter 5 of the *Corporations Act 2001* because s.5G(8) only dis-applies the *Corporations Act 2001* if the State law is one that that effects a winding up or administration[334], and the *Bell Act* does neither[335]. This contention proceeds on an erroneous, and far too restricted, construction of the provision.

322. The section is alleged to work as follows. The disapplication is of all of the provisions of Chapter 5 of the *Corporations Act 2001*. The disapplication occurs in respect of, or applies to, an external administration of a company (carried out under State law), whether it be characterised as a scheme of arrangement, receivership, winding up or other form of external administration. The disapplication of Chapter 5 is to the extent that the external administration (whether a scheme of arrangement, receivership, winding up or other external administration) is being carried out in accordance with the provision of a law of the State.

323. Another way of conveying the same thing is that Chapter 5 does not apply to; a scheme of arrangement (of a company), to the extent to which it is carried out in accordance with State law; a receivership (of a company), to the extent to which it is carried out in accordance with State law; a winding up (of a company), to the extent to which it is carried out in accordance with State law; or an other external administration of a company, to the extent to which it is carried out in accordance with State law.

324. The construction of each of the plaintiffs emphasises the word "the" in s.5G(8) — to contend that Chapter 5 provisions do not apply to "a" winding up only to the extent to which "the" winding up is carried out in accordance with a provision of

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[334] BGNV's Submissions at [110]–[111]; WAG's Submissions at [35], [59]; Maranoa's Submissions at [90], [92].

[335] BGNV's Submissions at [108], [115]–[123]; WAG's Submissions at [55]–[59]; Maranoa's Submissions at [95]–[97].

law of a State or Territory[336]. So, a State law can only displace Chapter 5 to the extent that the State replaces the Commonwealth's regime with an identical or near identical[337] regime. This is illustrated by BGNV's contention that a State could not displace the winding up provisions of Chapter 5 by providing for a receivership under a State Act[338].

325. Such a construction denies s.5G(8) of any sensible operation. Why would a State ever displace in such a circumstance? If all that a State could do would be to replicate Chapter 5, why would it?

326. Maranoa's contention that "key features" of winding up cannot be displaced[339] gives rise to greater difficulty. There would be an inquiry in every case of whether any change was to a key or non-key feature.

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

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

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

329. In denying this, the plaintiffs rely upon McPherson SPJ's statement in *Crust 'n' Crumb*. However, the core of what MacPherson SPJ referred to is entirely apposite[340]:

> Winding up is a process that consists of collecting the assets, realising and reducing them to money, dealing with proofs of creditors by admitting them or rejecting them and distributing the net proceeds after providing for costs and expenses, to the persons entitled.

330. All those features are present in the form of external administration carried out under the *Bell Act*. That external administration is carried by the Administrator who collects and realises the assets. This is effected by the transfer of property — the getting in (Part 3 Division 1). There is a process for gathering information (s.33) to facilitate dealing with proofs of creditors by admitting or rejecting. There is a process for "creditors" of the companies (given an extended definition to include liabilities) to lodge proofs (s.34). There is a process of considering proofs and determining assets and liabilities (Part 4 Divisions 3 and 4); and a process for payment of expenses and distribution of net proceeds (Part 4 Division 5).

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[336] BGNV's Submissions at [109]–[110]; WAG's Submissions at [59]; Maranoa's Submissions at [90], [92].
[337] Maranoa says that the State may modify the winding up regime or provide for another regime that incorporates the key features of the winding up — Maranoa's Submissions at [94].
[338] BGNV's Submissions at [110]. See also Maranoa's Submissions at [94].
[339] Maranoa's Submissions at [94].
[340] *Re Crust 'n' Crumb Bakers (Wholesale) Pty Ltd* [1991] QSC 185; [1992] 2 Qd R 76 at 78.

331. The nature of these activities is immediately recognisable as a 'winding up'. If a label is to be given to it, what suits better than 'winding up'?

The plaintiffs' asserted 'necessity' of judicial supervision of windings up

332. It is erroneous to contend that a process that consists of getting in assets, realising and reducing them to money, admitting or rejecting claims of creditors and distributing the net proceeds after providing for costs and expenses, to the persons entitled, does not attract the description of winding up because it is not subject to judicial supervision[341]. Voluntary winding up from the first did not involve court supervision[342]. Further, countless corporations[343], in particular statutory corporations, have been 'wound up' without court 'supervision' in the sense contended for by the plaintiffs. For example, States have legislated to dissolve companies previously incorporated under companies legislation. In Western Australia, this includes companies dissolved by the *City Club Act 1965* (WA), *Collie Club Act 1953* (WA), *Fremantle Buffalo Club (Incorporated) Act 1964* (WA), *Goldfields Tattersalls Club (Inc.) Act 1986* (WA), *Kalgoorlie Country Club (Inc) Act 1982* (WA), *Perth and Tattersall's Bowling and Recreation Club (Inc.) Act 1979* (WA), *West Australian Club Act 1948* (WA) and *The Westralian Buffalo Club Act 1949* (WA). None were conducted via judicial supervision. In the United Kingdom, dissolution by statute without court supervision has been common. For example, the East India Company was dissolved by the *East India Stock Dividend Redemption Act 1873* (UK)[344], and different railway companies were dissolved through the *Madras Railway Annuities Act 1908* (UK)[345], the *Bombay Baroda and Central India Railway Act 1942* (UK)[346] and the *Ceylon Railway Company's Dissolution Act 1862* (UK)[347].

333. Contrary to BGNV and Maranoa's submissions, the history of windings up includes administrative windings up without curial direction. This is discussed

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[341] BGNV's Submissions at [116]; Maranoa's Submissions at [41]. WAG does not expressly make this contention.

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

[343] In the sense explained in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* [2015] HCA 11; (2015) 318 ALR 1.

[344] See, in particular, s.36 which provided that on 1 June 1874, on payment by the East India Company of all unclaimed dividends on East India Stock to various accounts as directed, the East India Company shall be dissolved.

[345] See, in particular, s.73 which provided for its dissolution of the company by virtue of the Act, once the distribution of surplus closing profits to stockholders had been made or by 30 June 1909, whichever was earlier. This Act also terminated the company's contracts with the State, vested certain property and funds in the Secretary of State, authorised the realisation and distribution of the company's assets and formally dissolved the company. The only involvement of the Court was to allow applications to be made in respect of undistributed money (see s.12).

[346] See, in particular s.13 which dissolved the company upon the distribution of the property and the affairs of the company were declared by the directors to be wound up and notices were published. This Act terminated the company's contracts with the State, vested the property in the Secretary of State, authorised the realisation and distribution of the company's assets and formally dissolved the company. The only involvement of the Court was to allow applications to be made in respect of undistributed money (see s.12). The only involvement of the Court was to allow applications to be made in respect of undistributed money (see s.66).

[347] See, in particular, s.3, which provided for its dissolution upon payment of moneys into court.

below in respect of the collapse of the Albert Life Assurance Company. Again, as is discussed below, the possibility of a non-judicially supervised winding up is also expressly recognised by this Court in *R v Davison*[348] and Gaudron J in *Gould v Brown*[349]. As Professor Lester has explained (and as dealt with in more detail below) at the foundation of companies legislation the UK Parliament earnestly considered vesting the whole of the jurisdiction for the winding-up of insolvent companies to the existing bankruptcy commissioners, with neither the Bankruptcy Court of Chancery having any role[350]. This policy was not adopted but not because of a notion that inherent in corporate winding up was curial supervision.

10 334. The plaintiffs' reliance[351] upon *Gould v Brown*[352] and *Saraceni v Jones*[353] is misplaced. Neither case is authority for the proposition that all forms of external administration require judicial supervision. In *Gould v Brown*, the Court was considering a winding up by the Federal Court, and so was necessarily considering a winding up in the exercise of judicial power. Indeed as noted above Gaudron J stated that powers exercised in a winding up are not necessarily inherently judicial in character, but are only so when conferred on courts[354]. The passages from *Saraceni v Jones* relied upon by BGNV for this proposition simply recites that the legislative intention evinced by Chapter 5 was that the winding up be subject to curial direction, supervision and control[355].

20 335. Winding up is and has always been a statutory process[356]. There is not common law company law or winding up[357]. The process does not inhere to judicial control.

336. That a court-appointed liquidator is an officer of the court and acts with the court's authority adds little. It is simply an incident of the legislative scheme for court-ordered windings up. In *Hall v Poolman*[358], Spigelman CJ, Hodgson JA and Austin J observed that in voluntary winding up, "the liquidator is not an officer of the court carrying out tasks on the court's behalf"[359]. While liquidators, voluntary or court-appointed, are subject to the court's supervision, this is (currently) because of s.536 of the *Corporations Act*[360]. Prior to 2001 it was because of

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[348] [1954] HCA 46; (1954) 90 CLR 353 at 384 (Kitto J), 390 (Taylor J). Of course, these comments were made in respect of analogous proceedings in a bankruptcy administration..

[349] [1998] HCA 6; (1998) 193 CLR 346 at 404–405 [68].

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

[351] BGNV's Submissions at [116]–[117]; Maranoa's Submissions at [41].

[352] [1998] HCA 6; (1998) 193 CLR 346.

[353] [2012] WASCA 59; (2012) 42 WAR 518.

[354] *Gould v Brown* [1998] HCA 6; (1998) 193 CLR 346, 404–405 [68] (Gaudron J). See also Brennan CJ and Toohey J's discussion at 388–389 [33]–[34].

[355] [2012] WASCA 59; (2012) 42 WAR 518 at 531 [55] (Martin CJ).

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

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

[358] [2009] NSWCA 64; (2009) 75 NSWLR 99.

[359] *Hall v Poolman* [2009] NSWCA 64; (2009) 75 NSWLR 99 at 121 [62]–[63].

[360] *Hall v Poolman* [2009] NSWCA 64; (2009) 75 NSWLR 99 at 122 [64] (Spigelman CJ, Hodgson JA and Austin J). See, similarly, Thomson Reuters, *McPherson's Law of Company Liquidation* (at April 2015) at [8.410]: "much of the above [re court-appointed liquidators] can be applied to liquidators

provisions equivalent to s.536, not because of any status as an essential characteristic of winding up.

BGNV's and Maranoa's asserted 'necessity' of *pari passu* distribution in windings up

337. *Pari passu* distribution is not inherent to a winding up as the plaintiffs contend[361]. The cases cited by BGNV[362] all speak of the distribution under particular statutory regimes that provided for *pari passu* distribution. But, again, there is nothing immutable or intrinsic in this.

338. As Gummow J observed in *Sons of Gwalia Ltd*[363]:

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

339. The *pari passu* principle is not only not immutable; but rare. The following proposition surely is correct: "it remains as a theoretical doctrine only, with scarcely any application in real life"[364]. Statutory priorities can be and have been changed according to legislative policy over time[365]. Something that is "seldom, if ever, attained"[366] and "a theoretical doctrine only, with scarcely any application in real life"[367], cannot be an essential characteristic of a winding up. Again, prescient is Gummow J's observation in *Sons of Gwalia Ltd* that, "legislative schemes may vary in the allocation of risk between investors and creditors and the priorities between them upon insolvency"[368]. There is no limit on the legislatures' power to vary the *pari passu* principle in a particular statutory winding up regime.

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

340. It appears that BGNV contends that conducting the administration for the benefit of persons other than the creditors means that the administration is not a winding

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in voluntary liquidations because s 536, which states that courts may supervise liquidators, applies to all liquidators." See also LexisNexis Butterworths, *Ford, Austin and Ramsay's Principles of Corporations Law* (at December 2015) at [27.610].

[361] BGNV's Submissions at [74], [118]–[119]; Maranoa's Submissions at [97].

[362] In footnote 99, BGNV cites *Re Oak Pits Colliery Company* (1882) 21 Ch D 322 at 329 (Lindley LJ); *Re International Pulp and Paper Co* (1876) 3 Ch D 594 at 598 (Jessel MR); *Ince Hall Rolling Mills Co Ltd v Douglas Forge Co* (1882) 8 QBD 179 at 184 (Watkin Williams J). In footnote 131, BGNV cites *Attorney-General (Ontario) v Attorney-General (Canada)* [1894] AC 189 at 200 (Herschell LC, Watson, MacNaghten and Shand LJJ and Sir Richard Couch).

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

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

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

[366] Review Committee, Parliament of the United Kingdom, *Report of the Review Committee on Insolvency Law and Practice* (1982) at 317 [1396].

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

[368] *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1; (2007) 231 CLR 160 at 187 [39].

up. In particular, BGNV contends[369] that the *Bell Act* "provides for payments to be made to persons who would not be entitled to receive such a payment in a winding up". This derives from the definition of "creditor" in s.3 of the *Bell Act* to include a beneficiary of any trust, something which is said to "turn... established principle on its head"[370].

341. There is no inherent or mandatory definition of "creditor" in a winding up regime.

342. The observation of McPherson SPJ's in *Crust 'n' Crumb* is, with respect, correct[371]. The process consists of steps leading to "distributing the net proceeds after providing for costs and expenses, to the persons entitled". Assume that an amendment to s.556(1) of the *Corporations Act 2001* provided that, in a winding up, proceeds were to be paid to the spouse of an employee rather than to the creditor employee, if the creditor employee had failed to pay child support. The spouse is not a creditor. Is such a process not a winding up? As a further example, in the *Albert Life Assurance Arbitration Act 1871*[372] a creditor included the "assigns of a creditor"[373].

343. Further, to this, under the *Corporations Act 2001* surpluses are vested in ASIC[374]. ASIC is not a creditor.

344. It may be that there is a further aspect to this contention, that the *Bell Act* process is not a winding up because it is for the benefit of persons other than the creditors. This is that because the *Bell Act* provides for pooling of the property in a single fund, a person who is not a creditor of a Company A may receive a distribution from that fund which does not comprising part of the property of Company A. This does not strip such process from being understood as a winding up. As discussed in detail below in respect of the collapse of the Albert Life Assurance Company, part of the reason for this winding up being dealt with in the way that is was derived from the interlocking nature of creditors and subsidiaries and the need, because of such complexity, for a single means of dealing with the liabilities of all to all.

PART VII: LENGTH OF ORAL ARGUMENT

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

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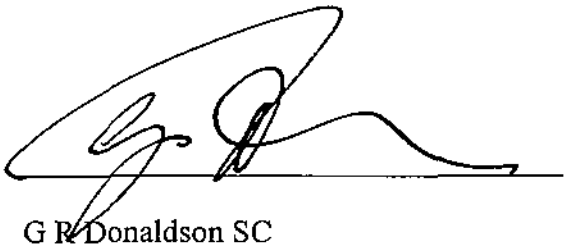
[369] BGNV's Submissions at [122].
[370] BGNV's Submissions at [122].
[371] *Re Crust 'n' Crumb Bakers (Wholesale) Pty Ltd* [1991] QSC 185; [1992] 2 Qd R 76 at 78.
[372] 34 Vict. c.31.
[373] Section 2 (definition of "creditor").
[374] *Corporations Act 2001* (Cth) s.544.

Dated: 23 March 2016



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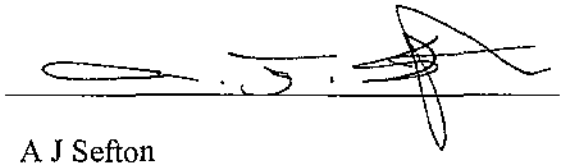

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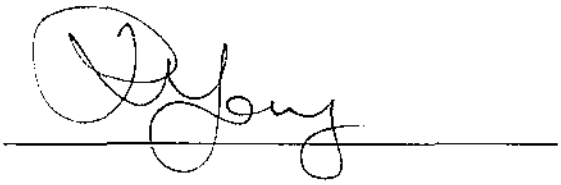

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