IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No. S248 of 2015**
BETWEEN:

BELL GROUP N.V. (IN LIQUIDATION) ARBN 073 576 502
First Plaintiff

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

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AND

STATE OF WESTERN AUSTRALIA
Defendant

ANNOTATED WRITTEN SUBMISSIONS OF THE DEFENDANT

PART I: SUITABILITY FOR PUBLICATION

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

PART II: ISSUES

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

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

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

PART IV: MATERIAL FACTS

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

PART V: RELEVANT CONSTITUTIONAL PROVISIONS AND LEGISLATION

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

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Filed on behalf of the State of Western Australia by:

State Solicitor for Western Australia
Level 16, Westralia Square
141 St Georges Terrace
PERTH WA 6000
Solicitor for the Attorney General For Western Australia

Tel: (08) 9264 1898
Fax: (08) 9321 1385
Ref: 2982-15
Email: d.vannellestijn@sso.wa.gov.au
Email: r.young@sso.wa.gov.au

PART VI: SUBMISSIONS

6. The submissions in this matter are to be read with the State's submissions in P63 of 2015 and P4 of 2016.

7. The questions in each of the three actions are different, though substantially overlap. The contentions of invalidity of the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Act 2015* (WA) vary between the three actions. They fall within the following.

Inconsistency with the *ITAA 1936* — the section 215 contentions

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

9. *Second*, that provisions of the *Bell Act* are directly inconsistent with s.215(3)(b) of the *ITAA 1936*[3], or otherwise alter, impair or detract from s.215(3)(b)[4].

Inconsistency with the *ITAA 1936* — the section 254 contentions

10. *Third*, that the *Bell Act* in its entirety is, or parts of it are, inconsistent with the scheme of s.254 of the *ITAA 1936* (Cth)[5] in that the *Bell Act* alters, impairs or detracts from such scheme[6].

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[1] Former s.215 of the *ITAA 1936* has been replaced by s.260-45 in Pt.4-15, Sch.1 to the *Taxation Administration Act 1953* (Cth). Part 4-15 was inserted into the *TAA 1953* by item 1, Sch.2 of the *A New Tax System (Tax Administration) Act 1999* (Cth) with effect from 22 December 1999. Former s.215 of the *ITAA 1936* continues to apply to the liquidator of a company that was being wound up if it applied to the liquidator "just before" its repeal in 2006: see item 12, Pt.3, Sch.6 to the *Tax Laws Amendment (Repeal of Inoperative Provisions) Act 2006* (Cth). As noted by Wigney J in *Bell Group Limited (in liq) v Deputy Commissioner of Taxation* [2015] FCA 1056 at [24], s.215 of the *ITAA 1936* and s.260-45 of the *TAA 1953* operate in relevantly the same way. The Plaintiffs in each matter accept that former s.215 continues to apply in respect of all of the WA Bell Companies except for Albany Broadcasters Ltd, in respect of which s.260-45 applies; and that nothing turns on this distinction: see the Plaintiffs' Submissions in S248 of 2015 at [46] ('BGNV's Submissions'); the Plaintiffs' Submissions in P63 of 2015 at [66], [68] ('WAG's Submissions); the Plaintiffs' Submissions in P4 of 2016 at [107]–[108] (Maranoa's Submissions).

[2] See BGNV's Amended Statement of Claim at [56.1]–[56.2] (SCB at 33–34); Special Case in S248 of 2015 at questions 2–3 (SCB at 192); WAG's Amended Statement of Claim at [56.1], [57]–[58] (SCB at 30–31, 35–36); Special Case in P63 of 2015 at question 3(i)(a)(1) (SCB at 137–138); Maranoa's Statement of Claim at [56.1]–[56.2] (SCB 29–30); Special Case in P4 of 2016 at question 3(a) (SCB 130–131).

[3] WAG's Submissions at [66]–[68], [69].

[4] See BGNV's Amended Statement of Claim at [56.2] (SCB at 33); Special Case in S248 of 2015 at questions 2–3 (SCB at 192); WAG's Amended Statement of Claim at [56.1.1] (SCB at 30–31); Special Case in P63 of 2015 at question 3(i)(a)(1) (SCB at 137–138); Maranoa's Statement of Claim at [56.1] (SCB at 29); Special Case in P4 of 2016 at question 3(a) (SCB at 130–131).

[5] As to post-liquidation tax liabilities, the Plaintiffs accept that s.254 of the *ITAA 1936* is and has always been the relevant source of a liquidator's obligations. See BGNV's Submissions at [46]; WAG's Submissions at [67]; Maranoa's Submissions at [107], [111].

[6] See BGNV's Amended Statement of Claim at [56.1]–[56.2] (SCB at 33); Special Case in S248 of 2015 at questions 2–3 (SCB at 192); WAG's Amended Statement of Claim at [56.1.1] (SCB at 30–31); Special

11. *Fourth*, provisions of the *Bell Act* are directly inconsistent with s.254(1)(d) and s.254(1)(e) of the *ITAA 1936*[7], or otherwise alter, impair or detract from them[8].

Inconsistency with the *ITAA 1936* — the sections 177, 208 and 209 contentions

12. *Fifth*, provisions of the *Bell Act* are directly inconsistent with ss.177, 208 and 209 of the *ITAA 1936*, or otherwise alter, impair or detract from them[9].

Inconsistency with section 1408 of the *Corporations Act 2001*

13. *Sixth*, that provisions of the *Bell Act* are inconsistent with s.1408 of the *Corporations Act 2001*[10].

The effect of sections 5F and 5G of the *Corporations Act 2001*

10 14. *Seventh*, s.51 of *Bell Act* invokes s.5F of the *Corporations Act 2001*, but such invocation does not operate to avoid any inconsistency that would otherwise arise between the *Bell Act* and the *Corporations Act 2001*[11].

15. *Eighth*, s.52 of *Bell Act* invokes s.5G of the *Corporations Act 2001*, but none of ss.5G(4), 5G(8) or 5G(11) operate to avoid any inconsistency that would otherwise arise between the *Bell Act* and the *Corporations Act 2001*[12].

Inconsistency with the *Corporations Act 2001*

16. *Ninth*, further to the issues concerning s. 5G(8) of the *Corporations Act*, that numerous provisions of the *Bell Act* that are not displaced by s.5G(8) are directly

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Case in P63 of 2015 at question 3(i)(a)(1) (SCB at 137–138); Maranoa's Statement of Claim at [56.1] (SCB at 29); Special Case in P4 of 2016 at question 3(a) (SCB at 130–131).

[7] WAG's Submissions at [67]–[69].

[8] This is the contention in BGNV's Amended Statement of Claim at [56.1(b)]–[56.2] (SCB at 33–34); WAG's Amended Statement of Claim at [56.1.2]–[56.2] (SCB at 30–32); Maranoa's Statement of Claim at [56.1(b)]–[56.2] (SCB at 29–30).

[9] This is the contention by BGNV as part of its Questions 2 and 3. See Amended Special Case in S248 of 2015 at [85] (SCB at 192). See BGNV's Amended Statement of Claim at [56.3]–[56.4] (SCB at 34–36); Special Case in S248 of 2015 at questions 2–3 (SCB at 192); WAG's Amended Statement of Claim at [56.3]–[56.4] (SCB at 32-35); Special Case in P63 of 2015 at question 3(i)(a)(1) (SCB at 137–138); Maranoa Statement of Claim at [56.3]–[56.4] (SCB at 31–32); Special Case in P4 of 2016 at question 3(a) (SCB at 130–131).

[10] See BGNV's Amended Statement of Claim at [72] (SCB at 46); Special Case in S248 of 2015 at questions 2–3 (SCB at 192); WAG's Amended Statement of Claim at [73] (SCB at 44); Special Case in P63 of 2015 at question 3(i)(a)(2) (SCB at 137–138); Maranoa Statement of Claim at [72] (SCB at 40); Special Case in P4 of 2016 at question 3(b) (SCB at 130–131).

[11] See BGNV's Amended Statement of Claim at [77] (SCB at 49–50); Special Case in S248 of 2015 at questions 2–3 (SCB at 192); WAG's Amended Statement of Claim at [74]–[78] (SCB at 45–46); Special Case in P63 of 2015 at question 3(i)(a)(2) (SCB at 137–138); Maranoa's Statement of Claim at [77]–[82] (SCB at 40–44); Special Case in P4 of 2016 at question 3(b) (SCB at 130–131).

[12] See BGNV's Amended Statement of Claim at [78] (SCB at 50–52); Special Case in S248 of 2015 at questions 2–3 (SCB at 192); WAG's Amended Statement of Claim at [79]–[88] (SCB at 46–47); Special Case in P63 of 2015 at question 3(i)(a)(2) (SCB at 137–138); Maranoa's Statement of Claim at [83]–[91] (SCB at 40–45); Special Case in P4 of 2016 at question 3(b) (SCB at 130–131).

inconsistent with, or otherwise alter, impair or detract from provisions of the *Corporations Act* not and are thereby invalid[13].

Inconsistency with section 39(2) of the *Judiciary Act 1903* (Cth)

17. *Tenth*, that ss.22, 25(5), 26, 27, 29 and 73 of the *Bell Act* are inconsistent with s.39(2) of the *Judiciary Act* in various ways[14].

Infringement of Chapter III of the *Constitution* by legislative interference with judicial power

18. *Eleventh,* that various provisions of the *Bell Act* are incompatible with requirements of Chapter III of the *Constitution* in various ways and are thereby invalid[15].

Standing and justiciable controversy

19. *Twelfth*, whether the plaintiffs have standing and whether a justiciable controversy exists in relation to all matters ventilated by the plaintiffs[16].

STANDING AND THE JUSTICIABLE CONTROVERSY

Standing

20. The State denies that BGNV and WAG have standing in respect of the alleged invalidity of Parts 3 and 4 of the *Bell Act* on the grounds of the alleged inconsistency with the Commonwealth taxation regime[17]. Further, the State denies that the Maranoa plaintiffs have standing in respect of the alleged inconsistency of the *Bell Act* with the Commonwealth taxation regime, except to the extent that they allege that the *Bell Act* undermines the liquidator's obligation to retain money to meet the taxation liabilities of the company under s.254(1)(d) of the *ITAA 1936*[18].

21. BGNV and WAG have foreshadowed that they will address issues of standing in reply[19], though WAG says that as a creditor of BGF its rights are prejudiced by

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[13] See BGNV's Amended Statement of Claim at [88] (SCB at 51); Special Case in S248 of 2015 at questions 2–3 (SCB at 192); WAG's Amended Statement of Claim at [81] (SCB at 46); Special Case in P63 of 2015 at question 3(i)(a)(2) (SCB at 137–138); Maranoa's Statement of Claim at [88] (SCB at 45); Special Case in P4 of 2016 at question 3(b) (SCB at 130-131).

[14] See BGNV's Amended Statement of Claim at [57]–[58] (SCB at 37–38); Special Case in S248 of 2015 at questions 2–3 (SCB at 192); WAG's Amended Statement of Claim at [59]–[68] (SCB at 36–38); Special Case in P63 of 2015 at question 3(i)(a)(3) (SCB at 137–138).

[15] See BGNV's Amended Statement of Claim at [57]–[58] (SCB at 37–38); Special Case in S248 of 2015 at questions 2–3 (SCB at 192); WAG's Amended Statement of Claim at [59]–[71] (SCB at 36–38); Special Case in P63 of 2015 at question 3(i)(b) (SCB at 137–138).

[16] See State's Amended Defence in S248 of 2015 at [56] (SCB at 157); Special Case in S248 of 2015 at questions 1–1A (SCB at 192); State's Amended Defence in P63 of 2015 at [56] (SCB at 84); Special Case in P63 of 2015 at question 1–2 (SCB at 137); State's Amended Defence in P4 of 2015 at [56] (SCB at 99–100); Special Case in P4 of 2016 at questions 1–2 (SCB at 130).

[17] See State's Amended Defence in S248 of 2015 at [56] (SCB at 157); State's Amended Defence in P63 of 2015 at [56] (SCB at 84).

[18] See State's Amended Defence in P4 of 2016 at [56] (SCB at 99).

[19] BGNV's Submissions at [65]; WAG's Submissions at [10].

the *Bell Act*[20]. The Maranoa plaintiffs assert that Mr Woodings has standing because he remains or potentially remains subject to the duties and personal liabilities imposed by former s.215 and s.254 of the *ITAA 1936*[21].

22. A person that seeks a declaration that a law is invalid must have sufficient interest in having his or her legal position clarified[22] or show that he or she is a person who now or in the immediate future probably will be affected, whether in his or her person or his or her property, by the impugned law[23]. A sense of grievance with a law, however strong, is not sufficient to give standing[24].

23. BGNV and WAG have no interest in whether or not Mr Woodings, as liquidator of WA Bell Companies (where BGNV and WAG are not WA Bell Companies), should set aside amounts under former s.215 and s.254(1)(d) of the *ITAA 1936* and whether or not he will be held personally liable if he fails to do so. Similarly, they have no interest in whether the Commonwealth's rights as creditor of certain WA Bell Companies and its use of conclusive evidence provisions are affected. They are not likely to gain any advantage by the outcomes of those arguments in the sense described by Gibbs J in *Australian Conservation Foundation*[25]. In respect of such taxation arguments, BGNV and WAG are not seeking clarification as to their rights, but the rights of unrelated parties; Mr Woodings and the Commonwealth. They therefore lack standing on those issues.

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

25. The State does not concede that if others have standing to agitate issues concerning rights of the Commissioner, that the Commissioner then has standing to intervene. The foreshadowed submissions of the Commissioner do not add to those of the plaintiffs, such that the Commissioner's involvement is unlikely to add to the submissions to be presented to the Court[26].

26. The State accepts the Maranoa plaintiffs have standing to contend that the *Bell Act* undermines Mr Woodings' obligation to retain money to meet the taxation liabilities of the relevant company under s.254(1)(d) of the *ITAA 1936*[27].

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[20] WAG's Submissions at [10].
[21] Maranoa's Submissions at [124]–[126].
[22] *Kuczborski v Queensland* [2014] HCA 46; (2014) 254 CLR 51 at 106 [175] (Crennan, Kiefel, Gageler and Keane JJ).
[23] *Kuczborski v Queensland* [2014] HCA 46; (2014) 254 CLR 51 at 87 [99] (Hayne J).
[24] *Australian Conservation Foundation v Commonwealth* [1980] HCA 53; (1980) 146 CLR 493 at 530 (Gibbs J).
[25] *Australian Conservation Foundation v Commonwealth* [1980] HCA 53; (1980) 146 CLR 493 at 530.
[26] *Roadshow Films Pty Ltd v iiNet Ltd (No 1)* [2011] HCA 54; (2011) 248 CLR 37 at 39 [3] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).
[27] See the State's Amended Defence in P4 of 2016 at [56.1.1] (SCB at 99).

Consistent with *Williams v Commonwealth*[28], because of this, the Court does not need to determine whether BGNV and WAG have standing in respect of s.254(1)(d) issues. Similarly, if and to the extent that this Court concludes that a Maranoa plaintiff or the Commissioner of Taxation has standing to raise any grounds in which standing is in dispute, then the Court does not need to determine whether in respect of that same issue BGNV and WAG have standing.

Justiciable controversy

27. There is a question as to whether there is a justiciable controversy for this Court to determine in respect of former s.215 of the *ITAA 1936* or s.260-45 of Schedule 1 to the *TAA 1953*[29] in circumstances where it is not alleged by Mr Woodings that he has at any material time received a notification in accordance with former s.215 or s.260-45 of Schedule 1 to the *TAA 1953*[30]. The State denies that any such notice has issued and therefore any liabilities arising under former s.215 and s.260-45 are merely hypothetical questions.

28. Contrary to BGNV's submissions[31], the proofs of debt do not constitute notice under s.215 of the *ITAA 1936*. The Commissioner's proposed submissions, and those of the WAG and the Maranoa plaintiffs, do not take a position on whether such notice has been issued. Whether a proof of debt could constitute a notice for s.215 or s.260-45 has never been conclusively determined. There is dicta to the effect that lodging a proof of debt may be sufficient notice under s.215 and its equivalents[32], but contrary dicta also[33]. The approach of the Commissioner appears to be that lodging a proof of debt is distinct from the s.215 notice[34]. Lodgement of a proof of debt does not do this. A proof of debt is prepared and lodged by a creditor with a liquidator pursuant to, and for the purpose of fulfilling Part 5.6 of the *Corporations Act* or r.5.6.49 of the *Corporations Regulations* with the object of a creditor notifying a liquidator of a debt or claim. If the creditor intends for a proof of debt to have a purpose collateral to its main function, that should be made plain on the face of the proof of debt.

29. Given the legislative purpose of s.215, the notice should at least put the liquidator properly on notice of the tax liability and inform the liquidator of the courses open to him or her[35]. Lodgement of a proof of debt does not do this.

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[28] *Williams v Commonwealth* [2012] HCA 23; (2012) 248 CLR 156 at 181 [9] (French CJ), 223 [112] (Gummow and Bell JJ), 240 [168] (Hayne J), 341 [475] (Crennan J), 361 [557] (Kiefel J).

[29] Question 1A in the Amended Special Case in S248 of 2015 (SCB at 192); Question 2 in the Amended Special Case in P63 of 2015 (SCB at 137); Question 1 in the Amended Special Case in P4 of 2016 (SCB at 130).

[30] State's Amended Defence in P4 of 2016 at [56.2.2] (SCB at 100).

[31] BGNV's Submissions at [55].

[32] *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd* [1940] HCA 13; (1940) 63 CLR 278 at 311 (Dixon J) (*'Farley'*); *Pace v Antlers Pty Ltd (in liq)* [1998] FCA 2; (1998) 80 FCR 485 at 504 (Lindgren J).

[33] *Commonwealth v Duncan* [1981] VR 879 at 885 (Lush J).

[34] See in *Re Autolook Pty Ltd* (1983) 14 ATR 658 at 659 where the proof of debt appeared to be separate to the s.215 notice; *Bettina House of Fashion Pty Ltd v FCT* (1989) 20 ATR 495 at 497–498 in which the s.215 notice was separate from the assessment notice.

[35] See, by analogy, *Deputy Commissioner of Taxation v Woodhams* [2000] HCA 10; (2000) 199 CLR 370 at 384 [33]–[38] (Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ) which dealt with the liability

30. In any event, whether or not a proof of debt constitutes notice for s.215 may not need to be determined here because the original proofs of debt were issued prior to Mr Woodings becoming the liquidator of those companies[36], and the replacement proofs of debt issued after Mr Woodings became the liquidator were all under the cover of a letter stating that "this advice should ***not*** be taken as notification pursuant to section 215(2) of the" *ITAA 1936*[37].

31. Curiously, BGNV submit that the post-liquidation assessments and demand for payment of the post-liquidation tax made on 26 November 2015 also constituted such notice for the purposes of s.215 *ITAA 1936*[38]. This is plainly wrong. As discussed below, former s.215 of the *ITAA 1936* and s.260-45 of Schedule 1 to the *TAA 1953* relate only to pre-liquidation tax liabilities and s.254 of the *ITAA 1936* applies to post-liquidation tax liabilities.

32. Because no notice was given to Mr Woodings enlivening the obligation to set aside money, he had no such obligation and any liability under s.215(3)(b)–(c) is hypothetical. There is no justiciable controversy because no immediate question of right, interest or liability arises. While this Court has accepted a party has standing if he or she will "in the immediate future probably" be affected by the impugned law[39], there is nothing to suggest imminence here.

GENERAL SUBMISSION IN RELATION TO INCONSISTENCY

33. Most of the inconsistency contentions are that the *Bell Act* 'alters, impairs or detracts from' various Commonwealth laws. These words are not statutory, nor is the principle that they embody clarified much by synonyms. That much said, as observed in *Jemena Asset Management (3) Pty Ltd v Coinvest Limited*[40], the words "altering", "impairing" or "detracting from" encapsulate a notion or idea of "undermining". The notion of undermining focuses attention on that which is contended to be undermined. The most common form of undermining is contradiction; but contradiction requires close attention to what is actually required by and precluded by State and Commonwealth laws. Any consideration of whether laws are contradictory, or whether one undermines another, involves evaluative judgment[41]. Such matters do not invite a search for contradiction or incongruence but proceed on an understanding that often Commonwealth statutes

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under s.222AOC of the *ITAA 1936* of a director to pay the Commissioner of Taxation the unpaid amount of the company's unpaid liability.

[36] See Amended Special Case in S248 of 2015 at [71B] (SCB at 185–186); Amended Special Case in P63 of 2015 at [71B] (SCB at 127–128); Amended Special Case in P4 of 2016 at [71B] (SCB at 122–123).

[37] See Amended Special Case in S248 of 2015 at [71D] (SCB at 186–187), Annexure 12 (SCB at 411–472); Amended Special Case in P63 of 2015 at [71F] (SCB at 130); Amended Special Case in P4 of 2016 at [71D] (SCB at 123–124), Annexure 3 (SCB at 237–298).

[38] BGNV's Submissions at [55].

[39] *Kuczborski v Queensland* [2014] HCA 46; (2014) 254 CLR 51 at 87 [99] (Hayne J).

[40] *Jemena Asset Management (3) Pty Ltd v Coinvest Limited* [2011] HCA 33; (2011) 244 CLR 508 at 525 [41] (French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ): "[t]he crucial notions of "altering", "impairing" or "detracting from" the operation of a law of the Commonwealth have in common the idea that a State law conflicts with a Commonwealth law if the State law undermines the Commonwealth law. Therefore any alteration or impairment of, or detraction from, a Commonwealth law must be significant and not trivial".

[41] See, *APLA Limited v Legal Services Commissioner* [2005] HCA 44; (2005) 224 CLR 322 at 425 [302] (Kirby J).

assume the operation of the common law or long standing State statutory law, with which Commonwealth law has co-existed and which provides the context of or "setting for" Commonwealth law. As observed in *Attorney General (Vic) v Andrews*[42], in such circumstances it is right to conceive of the Commonwealth statute as; "... operat[ing] within the setting of other laws so that it is supplementary to, or cumulative upon, the State law in question".

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

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

35. The plaintiffs in each action contend that provisions of the *Bell Act* are inconsistent with ss.215 and 254 of the *ITAA 1936*[43] in two ways. *First*; that there is a direct inconsistency between these provisions, or parts of them, and certain provisions of the *Bell Act*. *Second*; that the *Bell Act* "alters, impairs or detracts from"[44] ss.215 and 254 (or parts of each) of the *ITAA 1936*. By reason at least of the latter, the plaintiffs contend that the *Bell Act* is invalid in its entirety.

36. Both contentions require a clear understanding of the operation of ss.215 and 254 of the *ITAA 1936*. Although both provisions are not limited in their operation to liquidators and windings up, it is their operation in this context that is relevant. The operation of the provisions in this context requires understanding of how, over time, the provisions have interacted with the winding up provisions of relevant corporations legislation. Of principal relevance is an understanding of the manner in which this interaction, over time, has been considered by this Court. Decisions of this Court compel the conclusions that, properly understood, neither ss.215 nor 254 of the *ITAA 1936* are undermined by the *Bell Act*.

37. Neither s.215 nor s.254 of the *ITAA 1936* creates a right in the Commonwealth to receive any sum. Neither provision assures that the Commonwealth will receive anything in a winding up. Indeed, for much of the time that the provisions have operated, the Commonwealth would, in a winding up, receive less than the sum of

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[42] *Attorney General (Vic) v Andrews* [2007] HCA 9; (2007) 230 CLR 369 at 401–402 [54] (Gummow, Hayne, Heydon and Crennan JJ).

[43] Former s.215 of the *ITAA 1936* applies in respect of the "pre-liquidation income" of each of the WA Bell Companies save for Albany Broadcasters, to which the current provision, s.260-45 in Sch.1 to the *TAA 1953* applies. The reason for this is that the application of s.215 to Mr Woodings as liquidator of each of the WA Bell Companies (except for Albany Broadcasters) as it applied "just before" its repeal on 14 September 2006, is continued by item 12(a), Pt.3, Sch.6 to the *Tax Laws Amendment (Repeal of Inoperative Provisions) Act 2006* (Cth). Section 215 does not so apply to Mr Woodings as liquidator of Albany Broadcasters because he was appointed on 11 December 2013 — see s.215(7)(a) of the *ITAA 1936* and Attachment A to Amended Special Case in S248 of 2015 (SCB at 198); in P63 of 2015 (SCB at 145); in P4 of 2016 (SCB at 136). In respect of the "post-liquidation income" of all of the WA Bell Companies, the current provision, which is s.254 of the *ITAA 1936*, applies. In respect of both s.215 and s.254, see Amended Special Case in S248 of 2015 at [81], [82] (SCB at 190, 191); Amended Special Case in at [81], [82] (SCB 133, 134); Amended Special Case in P4 of 2016 at [81], [82] (SCB at 127, 128).

[44] Invoking the formulation of Dixon J, first uttered in *Victoria v Commonwealth* [1937] HCA 82; (1937) 58 CLR 618 at 630.

monies the subject of the operation of each provision. Properly understood neither provision is inconsistent with a law that provides for the distribution of funds available to creditors or others entitled to a distribution from insolvent companies (or former companies).

38. Section 215 of the *ITAA 1936*, from its first iteration in 1918 up to 2001, and s.254 (and its precedents), from its enactment in the first Commonwealth income tax Act in 1915 until 2001, operated as part of a legal regime by which the amounts that the Commonwealth would receive in a winding up in respect of Commonwealth tax liabilities were determined by State law. The validity of such regimes has been confirmed by this Court on at least three occasions.

The text of ss.215 and 254 of the *ITAA 1936*

39. Section 215 of the *ITAA 1936*[45] applies in respect of pre-liquidation liabilities and requires the following. *First*, that a liquidator give notice to the Commissioner within fourteen days of his appointment (s.215(1)(a)). In this matter this occurred[46]. There is nothing in the *Bell Act* that is inconsistent with this.

40. *Second*, the Commissioner is then required to notify the liquidator of the amount sufficient to provide for tax (s.215(2)). In this matter it appears that the Commissioner did not, in fact, do this[47]. Even so, had this occurred, there is no inconsistency between any provision of the *Bell Act* and this provision. By force of s.22(1) of the *Bell Act* on the transfer day all property vested in or held on behalf of a WA Bell Company, including all property held by a liquidator of a WA Bell Company, vested in the Authority. By s.33(8)(d) of the *Bell Act* the liquidator of all WA Bell Companies is to give a report, if requested, as to the liabilities of WA Bell Companies. Any such report will inevitably include details of the liability for any tax payable by any WA Bell Company the subject of a notification under s.215(2) of the *ITAA 1936*. By s.25(1) and (3) of the *Bell Act* the Commissioner can seek to prove the liability for any tax payable by any WA Bell Company the subject of a notification under s.215(2) of the *ITAA 1936*. Section 34 of the *Bell Act* facilitates the Commissioner advising of the liability for any tax payable by any WA Bell Company the subject of a notification under s.215(2) of the *ITAA 1936*. So, the holder of the funds that are available for distribution to the creditors of the WA Bell Companies will necessarily have notice, prior to distribution, of the amount which the Commissioner claims for the pre-liquidation tax liabilities of the WA Bell Companies.

41. *Third*, the liquidator of a WA Bell Company is not to part with assets of a WA Bell Company without the leave of the Commissioner until he is notified of the amount sufficient to provide for tax (s.215(3)(a)) and is to "set aside" an amount provided for in s.215(3)(b) of the *ITAA 1936*; in essence a sum reflecting the

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

[46] See Amended Special Case in S248 of 2015 at [71C] (SCB at 186); Amended Special Case in P63 of 2015 at [71C] (SCB at 128); Amended Special Case in P4 of 2016 at [71C] (SCB at 123).

[47] See Amended Special Case in P63 of 2015 at [71G.2] (SCB at 130); Amended Special Case in P4 of 2016 at [71G.2] (SCB at 125).

proportion which the amount notified under s.215(2) bears (excluding the notified amount) to the aggregate of other (unsecured) debts. There is no inconsistency between any provision of the *Bell Act* and this provision, and nothing in the *Bell Act* undermines its operation. This is because the Authority has the assets and property transferred to it pursuant to s.22 of the *Bell Act*. So long as the Authority has the same assets available for distribution to creditors of WA Bell Companies, pursuant to the *Bell Act*, as did the liquidator, then the Commissioner, by reason of s.215(3)(a) and (b) of the *ITAA 1936*, is in precisely the same position in respect of the *Bell Act* as it would be under the legislation that would otherwise (that is, but for the *Bell Act*) be applicable. To the extent that the Commissioner has notified the liquidator of the amount sufficient to provide for tax in terms of s.215(2) of the *ITAA 1936*, and assuming that all the proofs of debt submitted, including those submitted prior to Mr Woodings becoming the liquidator, constitute notice for s.215(2), this amount is approximately $167,706,491[48]. The sum held by the Authority immediately following the transfer day is in excess of $1.7 billion[49]. So any set aside amount is actually held by the Authority, in the same way that it was putatively held (or but for the *Bell Act* would putatively have been held) by a liquidator.

42. There is little authority on what is meant or comprehended by the notion of "setting aside". Plainly it does not mean quarantining or placing in a separate account or holding in a separate place. Such a meaning would defy logic and be meaningless in current times. Setting aside can only mean maintaining or having available. So, because the *Bell Act* Authority has the same assets available for distribution as did the liquidator, then the Commissioner is in precisely the same position in relation to the assets. Any inconsistency is not real[50].

43. *Fourth*, the liquidator of a WA Bell Company is, by reason of ss.215(3)(c) and (4) of the *ITAA 1936*, liable to the Commissioner to pay the set aside amount. As will be seen, this liability is, in fact, not real. This is because the liquidator does not have a personal liability under ss.215(3)(c) or (4) so long as a process exists by which distributions to the Commissioner, in respect of liability for tax to which s.215(2) of the *ITAA 1936* relates, can be made. This process is effected by the *Bell Act*. If it is contended that ss.215(3)(c) and (4) of the *ITAA 1936* are aspects of a scheme to "ensure" that the set aside amount is available to distribute to the Commissioner, and provisions of the *Bell Act* alter, impair or detract from this, such a contention should be rejected, for the following reasons. *First*, as will be explained, nothing in s.215 of the *ITAA 1936* "ensures" that the set aside amount is distributed to the Commissioner. *Second*, the statutory purpose of s.215(3)(c) has been fulfilled if the liquidator in fact sets aside the amount. The incentive to do so that is provided by s.215(3)(c) has been effected. *Third*, any such

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[48] See Amended Special Case in S248 of 2015 at [21] (SCB at 169–170); Amended Special Case in P63 of 2015 at [21] (SCB at 92–93); Amended Special Case in P4 of 2016 at [21] (SCB at 107–108).

[49] The bank accounts holding the trust property immediately before the transfer day held $1,038,359,017.21 and the bank accounts holding the uncontested amount immediately before the transfer day held $689,300,429.72 — see Amended Special Case in S248 of 2015 at [40] (SCB at 176–177), Attachment F (SCB at 209–210); Amended Special Case in P63 of 2015 at [40] (SCB at 102); Amended Special Case in P4 of 2016 at [40] (SCB at 115–116), Attachment F (SCB at 148–149).

[50] In the sense that there is "no real conflict between the State law and the Commonwealth law" — *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* [2011] HCA 33; (2011) 244 CLR 508 at 529 [60].

inconsistency is not real. Here there is no reason to think that, if the liquidator had been notified by the Commissioner in terms of s.215(2), that he did not set aside the relevant amount, in the manner explained above. This set aside sum is now held by the *Bell Act* Authority. The total sum held by the Authority is greater than any notional set aside amount. This total sum is available to the Authority to distribute according to law. Again, any theoretical inconsistency is not real.

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

45. *First*, that the liquidator is authorized and required to retain a sum sufficient to pay tax which is or will become due on such income (s.254(1)(d)), and is personally liable for the tax payable to the extent of any amount retained, or that should have been retained. In respect of the retention obligation, it is the same as the setting aside and not parting with obligations of s.215(3)(a) and (b) of the *ITAA 1936*. For the same reasons as stated above, in respect of these provisions, there is no inconsistency between any provision of the *Bell Act* and s.254(1)(d). The Authority has the assets and property transferred to it pursuant to s.22 of the *Bell Act*. They are the same assets available for distribution to the creditors of the WA Bell Companies, pursuant to the *Bell Act*, as would have been available to a liquidator for distribution. As such, the Commissioner is in precisely the same position in respect of the *Bell Act* as it would have been but for the *Bell Act*. To the extent that the liquidator, prior to the transfer day, retained an amount sufficient to provide for tax in terms of s.254 of the *ITAA 1936*, this amount is $298,190,348.70[51]. The sum held by the Authority immediately following the transfer day is $1.7 billion[52]. So, an amount at least equivalent to the retained amount is held by the Authority and available for distribution according to law.

46. *Second*; the liquidator of a WA Bell Company is, by reason of s.254(1)(e), liable to the Commissioner to pay the retained amount, or an amount that should have been retained. Like the equivalent obligation under ss.215(3)(c) and (4) of the *ITAA 1936*, this liability is illusory, because, for so long as a process exists by which distributions to the Commissioner, in respect of liability for tax to which s.254 of the *ITAA 1936* relates, can be made, there is no liability; and the *Bell Act* effects such a process. As with ss.215(3)(c) and (4) of the *ITAA 1936*, to the extent that it is contended that s.254(1)(e) is part of a scheme to "ensure" that the retained amount is available to distribute to the Commissioner, and provisions of the *Bell Act* are contended to alter, impair or detract from this[53], the same responses apply. As with s.215, s.254 does not "ensure" that the retained amount will be paid to the Commissioner. Indeed the purpose of s.254 is not to ensure this. As with the set aside amount for the purpose of s.215 (if it has been invoked) the s.254 retained amount is now held by the *Bell Act* Authority. The total sum

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[51] See Amended Special Case in S248 of 2015 at [73] (SCB at 188); Amended Special Case in P63 of 2015 at [73A] (SCB at 131); Amended Special Case in P4 of 2016 at [73] (SCB at 125).

[52] The bank accounts holding the trust property immediately before the transfer day held $1,038,359,017.21 and the bank accounts holding the uncontested amount immediately before the transfer day held $689,300,429.72 — see Amended Special Case in S248 of 2015 at [40] (SCB at 176–177), Attachment F (SCB at 209–210); Amended Special Case in P63 of 2015 at [40] (SCB at 102); Amended Special Case in P4 of 2016 at [40] (SCB at 115–116), Attachment F (SCB at 148–149).

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

held by the Authority is greater than any notional retained amount. This total sum is available to the Authority to distribute according to law.

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

What follows

48. There is a little more to these matters than simple textual analysis. This little more, requires an understanding of how, over time, the various iterations of the *ITAA* provisions have interacted with the winding up provisions of relevant companies legislation. This clarifies the interaction of the *Bell Act* and ss.215 and 254 of the *ITAA 1936*. It is instructive to consider the sections separately[54].

Section 215 of the *ITAA*

49. Unlike s.254 of the *ITAA 1936*, there was no equivalent provision to s.215 in the first Commonwealth income tax Act. The first antecedent of s.215 was s.45A of the *ITAA 1915–1918*[55]. Section 45A was repealed and replaced by s.59 of the *ITAA 1922*[56]. Section 59 replicated s.45A of the *ITAA 1915*[57]. Section 59 was amended in 1924to provide, in subsections (1) and (2) for any income tax that "then is or will thereafter become" payable[58]. Section 59 was amended in 1927 to add sub-sections (3) and (4)[59]. The new s.59(3) was repealed a year later[60]. Thereafter, the provision remained unchanged until its enactment as s.215 in the *ITAA 1936*[61].

50. The manner in which this provision operated with the various corporate insolvency provisions of certain State Acts prior to the (relatively) uniform States' *Companies Act 1961* will be seen in the consideration below of *Farley*[62], *Uther*[63] and *Cigamatic*[64]. Before doing so, it is instructive to illustrate the operation of s.215 of the *ITAA 1936*, having regard to the winding up provisions of the *Companies Act 1961*.

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[54] Wigney J observed in *Bell Group Limited (in liq) v Deputy Commissioner of Taxation* [2015] FCA 1056 at [30] that "in some respects" ss.215 and 254 of the *ITAA* "operate in a similar fashion"; s.215 in respect of tax payable on income derived prior to the commencement of a winding up, and s.254 on tax payable on post-commencement income.

[55] Section 45A was inserted into the *ITAA 1915* by s.28 of the *ITAA 1918*. The text of s.45A, as it was inserted by s.28, is in the proposed Court Book.

[56] See s.2 of the *ITAA 1922*, referring to the Schedule of repealed Acts.

[57] The text of s.59, as it was first enacted in the *ITAA 1922*, is in the proposed Court Book.

[58] The text of s.13 of the *ITAA 1924*, which amended subsections (1) and (2), is in the proposed Court Book.

[59] The text of s.23 of the *ITAA 1927*, which added subsections (3) and (4), is in the proposed Court Book.

[60] The text of s.21 of the *ITAA 1928*, which repealed subsection (3), is in the proposed Court Book.

[61] The text of s.215, as it was first enacted in the *ITAA 1936*, is in the proposed Court Book.

[62] *Farley* [1940] HCA 13; (1940) 63 CLR 278.

[63] *Richard Foreman & Sons Pty Ltd, Re; Uther v Commissioner of Taxation (Cth)* [1947] HCA 45; (1947) 74 CLR 508 ('*Uther*').

[64] *Commonwealth v Cigamatic Pty Ltd (in liq)* [1962] HCA 40; (1962) 108 CLR 372 ('*Cigamatic*').

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

51. The distribution provision of the *Companies Act 1961* was s.292[65]. Section 292(1) provided that in a winding up, the fifth and last priority to all other unsecured debts was:

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

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

53. At the time that the *Companies Act 1961* commenced, s.215 was, relevantly, in the following terms[66]:

> (1) Every [liquidator] — ... shall within fourteen days after he has become liquidator,... give notice thereof to the Commissioner.
>
> (2) The Commissioner shall as soon as practicable thereafter, notify to the [liquidator] the amount which appears to the Commissioner to be sufficient to provide for any tax which then is or will thereafter become payable by the company...
>
> (3) The [liquidator] —
>
> (a) shall not without the leave of the Commissioner part with any of the assets of the company or principal until he has been so notified;
>
> (b) shall set aside out of the assets available for the payment of the tax assets to the value of the amount so notified, or the whole of the assets so available if they are of less than that value; and
>
> (c) shall, to the extent of the value of the assets which he is so required to set aside, be liable as [liquidator] to pay the tax.
>
> (4) If the [liquidator] fails to comply with any provision of this section (or fails as [liquidator] duly to pay the tax for which he is liable under the last preceding sub-section), he shall, to the extent of the value of the assets of which he has taken

[65] The text of the whole of s.292, as it was originally enacted, is in the proposed Court Book.

[66] This is taken from the consolidated reprint of the Act as at 31 December 1950. At that date, the Act was entitled the *Income Tax and Social Services Contribution Assessment Act 1936–1950* (the change in name was effected by s.1(3) of the *ITAA 1950* and remained in force until s.1(3) of the *ITAA 1965* reverted the title to the *Income Tax Assessment Act 1936–1965*). The next subsequent amendment to s.215 was in 1965; the penalty in subsection (4) (which is not set out) was amended, by s.6 (referring to the Schedule) of the *ITAA 1965*, to reflect the change to decimal currency.

possession and which were available at any time for the payment of tax, be personally liable to pay the tax, and shall be guilty of an offence...

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

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

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

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

58. This example also illustrates the operation, important in this matter, of s.215(3)(c) and s.215(4). Unless s.215 operated on the basis that the personal liability of the liquidator, imposed by s.215(3)(c) and s.215(4), required that the liquidator, on the example above, personally pay the balance to make up $100[67], then this

[67] In the example, for a total of $50 out of a total tax liability of $100.

personal liability, likewise, did not ensure that the Commissioner would receive the assessed amount, or entitle the Commissioner to it.

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

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

The operation of s.215 of the *ITAA* with State law winding up regimes over time

61. Until 1961 Australian companies legislation was (separately) that of the States and Territories, and State (and Territory) law provided for the distribution of funds in windings up. Whether provisions of State law that provided for priorities in winding up and final distributions in winding up were inconsistent with equivalent provisions to s.215 of the *ITAA 1936* was considered in *Farley*[68], *Uther*[69] and *Cigamatic*[70]. All considered s.32 of the *Sales Tax Assessment Act (No 1) 1930* (Cth) and some the identical (for Commonwealth income tax) s.59 of the *ITAA 1922*. As noted, s.59 of the *ITAA 1922* was the immediate predecessor of s.215 of the *ITAA 1936*.

62. All of *Farley*, *Uther* and *Cigamatic* were decided at times prior to the Commonwealth's statutory revocation of the Crown prerogative of priority of payment of Crown debts. So, the first issue considered in each case was the extent to which an ordering in State companies legislation of distributions in winding up affected the Commonwealth prerogative of priority. But each of *Farley*, *Uther* and *Cigamatic* also considered, as a second issue, the meaning and effect of s.32 of the *STAA (No 1) 1930* and (where it arose) s.59 of the *ITAA 1922*. This was for the purpose of determining whether those provisions provided a statutory priority for the relevant tax liabilities, attracting s.109 of the *Constitution*, to invalidate the ordering in State companies legislation. Although *Cigamatic* overruled *Farley* and *Uther* in respect of the first issue, the decision in all three cases in respect of the second was uniform.

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[68] [1940] HCA 13; (1940) 63 CLR 278.
[69] [1947] HCA 45; (1947) 74 CLR 508.
[70] [1962] HCA 40; (1962) 108 CLR 372.

63. For the plaintiffs to succeed in their contention that the *Bell Act* is inconsistent with s.215 of the *ITAA 1936*, the Court must depart from the majority reasoning on the second issue in *Farley*, *Uther* and *Cigamatic*.

Farley[71]

64. Section 59 of the *ITAA 1922*, as it was considered in *Farley*, is in the proposed Court Book[72]. Its operation was stated by Starke J[73]. Latham CJ concluded that s.59 of the *ITAA 1922* "does not deal with the subject of priorities"[74] and that it did not create a priority for relevant Commonwealth tax debts[75]. As his Honour observed; "... the statutes [s.32 of the *STAA (No 1) 1930–1935* and s.59 of the *ITAA 1922*] do not give a right to the Commonwealth to receive the sum which is set aside"[76]. That is, the Commonwealth may receive less than the sum set aside. Rich J[77] and Starke J came to the same conclusion. Starke J observed that[78]:

> The first limb of sec. 59 ... merely directs the setting aside of moneys sufficient to provide for taxation. It does not provide in terms that Commonwealth taxation shall rank for payment in priority to all other claims and such a privilege should be conferred in clear and unequivocal words and not by mere implication. ... The second limb of the section deals with the failure of the liquidator to observe the section and has no relevance to the question whether the Commonwealth has or has not priority in the moneys set aside over all other claims. In my opinion, the Commonwealth legislation is not dealing with substantive rights whether of priority or otherwise but is for the purpose of restraining the distribution of the funds of a company in liquidation in aid and protection of the revenue.

65. As Starke J indicates, the functioning of the personal liability of a liquidator is to restrain the liquidator paying out creditors, and not the Commissioner, other than pursuant to law.

66. Evatt J observed, in respect of the meaning and effect of s.32 of the *STAA (No 1) 1930–1935* and s.59 of the *ITAA 1922*, that[79]:

> Such "setting aside" seems to be quite consistent with provisional action pending the final adjustment of the rights of the creditors in due course of administration. ... the Commonwealth enactments (*a*) do not purport in terms to deal with priority at all, (*b*)

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[71] [1940] HCA 13; (1940) 63 CLR 278.
[72] It is proposed to collate the relevant legislative material in a Court Book to be filed. The legislation relevant to s.215 will be in a discrete part of the Court Book.
[73] *Farley* [1940] HCA 13; (1940) 63 CLR 278 at 295: "(1) Where a company is being wound up the liquidator of the company shall give notice to the commissioner within fourteen days after the approval of the shareholders for the winding up has been given or the order for the winding up has been made, and shall set aside such sum out of the assets of the company as appears to the commissioner to be sufficient to provide for any income tax that then is or will thereafter become payable. (2) A liquidator who fails to give notice to the commissioner within the time specified ... or fails to provide for payment of the tax as required by this section shall be personally liable for any income tax that then is or thereafter becomes payable in respect of the company".
[74] *Farley* [1940] HCA 13; (1940) 63 CLR 278 at 289.
[75] *Farley* [1940] HCA 13; (1940) 63 CLR 278 at 290.
[76] *Farley* [1940] HCA 13; (1940) 63 CLR 278 at 289.
[77] *Farley* [1940] HCA 13; (1940) 63 CLR 278 at 292.
[78] *Farley* [1940] HCA 13; (1940) 63 CLR 278 at 296–297.
[79] *Farley* [1940] HCA 13; (1940) 63 CLR 278 at 326–327.

> leave untouched any prerogative rights of the Crown, and (*c*) do not attempt to impose upon the liquidator any other duty than that of "setting aside" the money. If so, it seems right to conclude that the sections are merely administrative provisions designed to secure the setting aside of the money pending final administration, all questions of priority and preference being determined by the law to be found elsewhere than in the section.

67. The notion of administrative provisions designed to secure the setting aside of the money pending final administration also of course reflects on the notion of the personal liability of a liquidator. So long as the set aside amount is available for 'final administration' the liquidator has performed his or her duty.

68. McTiernan J concluded that the Commonwealth could legislate to provide for priority, but that neither of s.32(1) of the *STAA (No 1) 1930-1935* nor s.59 of the *ITAA 1922* did[80]. Dixon J's dissent dealt principally with the first issue of whether the priority provisions of the State companies Act affected the Commonwealth prerogative. Because of his Honour's conclusion on this (that they did not), his Honour did not have to consider the meaning and effect of the Commonwealth tax provisions to the same degree as their Honours in the majority. Detailed analysis of Dixon J's view of such provisions can be forestalled because, in his Honour's judgment in *Cigamatic*, his Honour accepted[81], "the views expressed by the majority in *Uther's Case* concerning the meaning and effect of s.32 of the *Sales Tax Assessment Act*". The majority in *Uther* in this respect is to the same effect as the majority on this issue in *Farley*.

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

70. These propositions are referable to this matter. Unless departed from or overruled, *Farley* compels the conclusion that the *Bell Act* is not inconsistent with s.215 of the *ITAA 1936*, even if it is engaged. As with the State legislation considered in *Farley*, that the *Bell Act* creates a mechanism for distribution of the assets of (what were) insolvent companies, of which the Commonwealth was a creditor, is not inconsistent with the setting aside provisions of s.215 of the *ITAA*

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[80] *Farley* [1940] HCA 13; (1940) 63 CLR 278 at 327–328.

[81] In the sense of not finding, "any compelling reason for reconsidering" those views — *Cigamatic* [1962] HCA 40; (1962) 108 CLR 372 at 379.

1936, nor the imposition (by s.215) of personal liability on a former liquidator for any set aside amount. The entitlement of the Commissioner to receive funds *qua* creditor is distinct from the obligation of a liquidator to set aside amounts required by Commonwealth law and from the personal liability of the liquidator for the payment of such amounts.

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

Between *Farley* and *Uther* — in particular, s.221 of the *ITAA 1936*

10 72. *Farley* and *Uther*[82] considered different versions of s.32 of the *STAA 1930*[83]. There was also an important legislative reform between *Farley* and *Uther*. Section 221 was inserted into the *ITAA 1936*[84].

73. Section 221 was amended in 1946[85] by omitting from sub-section (1) the words "the efficient prosecution of the present war". Inserted in their stead was; "the purposes of the Commonwealth". Sub-section (2) was repealed and so, what had been for the war, stretched beyond[86].

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[82] *Uther* [1947] HCA 45; (1947) 74 CLR 508.

[83] Section 32 was amended twice prior to its consideration in both *Farley* (in 1940) and *Uther* (in 1947). Subsection (4) was inserted by s.5 of the *STAA (No 1) 1934* and subsections (1) and (2) were amended by s.15 of the *STAA 1936*. The difference arises from the fact that *Farley* concerned claims by the Commonwealth for (*inter alia*) sales tax assessed under the *STAA (No 1) 1930–1935* for the year 1935:. This had the consequence that the version of s.32 relevant in *Farley* was that as amended by the 1934 Act, but not by the 1936 Act. Similarly, the Commonwealth's claims for income tax for the years 1928–1931 had the consequence that it was s.59 of the *ITAA 1922–1931* that was relevant in *Farley*, despite s.59 being repealed by the enactment of s.215 of the *ITAA 1936* four years prior to *Farley*. See *Farley* [1940] HCA 13; (1940) 63 CLR 278 at 279, 299–300 (Dixon J). *Uther* considered s.32 of the *STAA (No 1) 1930–1942* as amended by both the 1934 and the 1936 Acts.

[84] By s.31 of the *ITAA 1942*. It was in these terms: "(1) For the better securing to the Commonwealth of the revenue required for the efficient prosecution of the present war – notwithstanding anything contained in any other Act or State Act – ...(ii) the liquidator of company which is being wound up shall apply the assets of the company in payment of tax due under this Act (whether assessed before or after the date of the commencement of the winding up) in priority to all other unsecured debts...
(2) This section shall have operation during the present war and until the last day of the first financial year to commence after the day on which His Majesty ceases to be engaged in the present war, and no longer." This original form of s.221 was a war time measure and the subject of a joint opinion to the Attorney-General by Wilfred Fullagar KC and Professor Bailey. See Wilfred Fullagar KC and Professor Kenneth Bailey, *Opinion No 1697: 'Income tax – validity of proposed uniform federal income tax scheme; priority for income tax; collection of income tax; financial assistance to States'* (1 April 1942) Australian Government Solicitor Legal Opinions < http://legalopinions.ags.gov.au>.

[85] By s.20 of the *ITAA 1946*.

[86] See, Explanatory Memorandum, Income Tax Assessment Bill 1946 (Cth) at "clause 20"; "[t]his clause proposes an amendment to Section 221 of the Principal Act. That section gives priority of payment of Commonwealth income tax over State income tax for the duration of the war and one year thereafter. It is proposed to amend the section to give permanent effect to the Commonwealth's right of priority in the payment of income tax". The Second Reading Speech noted that, "[t]his amendment is a part of the Government's plan to make uniform income tax permanent" — see Commonwealth, *Parliamentary Debates*, House of Representatives, 20 March 1946 at 436 (Ben Chifley).

74. Section 221 was subsequently amended by s.12 of the Income Tax and Social Services Contribution Assessment Act 1954[87]; by s.23 of the Income Tax and Social Services Contribution Assessment (No 3) Act 1959[88]; by s.6 of the Income Tax Assessment Act (No 2) 1965[89]; by s.17 of the ITAA 1966 and a number of formal amendments in 1973[90]. None of these amendments are relevant here. As will be noted, s.221 was repealed in 1979[91].

75. The relevance of s.221 of the *ITAA 1936* to this matter is (at least) two fold. *First*, it is an illustration of the legislative power of the Commonwealth to provide to itself a priority in winding up, or a legislative assurance of payment in a winding up — if it wished to exercise it. *Second*, s.221 is proof that s.215 of the *ITAA 1936*, and s.254, are not provisions that provide or seek to provide either.

Uther[92]

76. Section 221 was not considered in *Uther*[93]. The section related only to income tax. At issue in *Uther* was the amended s.32 of the *Sales Tax Assessment Act (No 1) 1930–1942* (Cth), and its equivalent provision in the *Payroll Tax Assessment Act 1941–1942* (Cth) (s.30). In *Uther*, the Court again considered the first issue; of State companies legislation providing for priorities in windings up and its affect upon the Commonwealth prerogative. The Court also considered the second issue from *Farley*; the effect of the amended s.32 of the *STAA (No 1) 1930–1942*, and the equivalent s.30 of the *PTAA 1941–1942* (Cth). The decision is more "crisp" for present purposes than *Farley* in that *Farley* also considered the State prerogative in winding up and its 'competition' with that of the Commonwealth. In *Uther*, no issue arose as to the State prerogative.

77. It is notable that in *Uther*, Kitto KC, for the Commissioner for Taxation, is reported to have submitted that s.32 of the *STAA (No 1) 1930–1942* and s.30 of the *PTAA 1941–1942* "covered the field of the debts which are to be paid in priority to debts for sales tax and income tax"[94]. It is difficult to understand how any submission in respect of income tax could have been made without mentioning s.221 of the *ITAA 1936*.

78. In any event, any such submission was rejected. To the extent that any of the plaintiffs in this matter contend that either ss.215 or 254 of the *ITAA 1936* covered a field that included State winding up laws, they will have to address *Uther*.

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[87] Section 12 amended subsection (b)(i), which dealt with bankruptcy, to change "the date of the order of sequestration" to "the date on which he becomes a bankrupt".

[88] Section 23 repealed paragraph (a) of s.221, which had previously provided: (a) a taxpayer shall not pay any tax imposed by or under any State Act on the income of any-year of income in respect of which tax is imposed by or under any Act with which this Act is incorporated until he has paid that last-mentioned tax or has received from the Commissioner a certificate notifying him that the tax is no longer payable.

[89] To change the reference to "one hundred pounds" to "two hundred dollars".

[90] For example, to express numbers in figures rather than in words; see *ITAA 1973*, Sch.1, item 1.

[91] By s.5(1) of the *Taxation Debts (Abolition of Crown Priority) Act 1980* (Cth).

[92] *Uther*) [1947] HCA 45; (1947) 74 CLR 508.

[93] *Uther* [1947] HCA 45; (1947) 74 CLR 508.

[94] *Uther* [1947] HCA 45; (1947) 74 CLR 508 at 512.

79. Section 32 of the *STAA (No 1) 1930–1942*, as it stood at the time of *Uther*, is in the proposed Court Book. It was paraphrased in the judgment of Latham CJ[95]. The Court in *Uther* also considered more directly than it had in *Farley* the provision of the *STAA (No 1) 1930–1942* (s.32(4)), and its equivalent in the *PTAA 1941–1942* (s.30(6)) that provided for a specific priority, before any distribution for the respective taxes in winding up, for "all costs, charges and expenses which, in the opinion of the Commissioner, have been properly incurred by the liquidator in the winding-up of a company, including the remuneration of the liquidator"[96].

80. In considering these various provisions, Latham CJ (in the majority), as his Honour had done in *Farley*, concluded that the obligations imposed upon the liquidator by s.32 of the *STAA (No 1) 1930–1942* and s.30 of the *PTAA 1941–1942* did not relate to the distribution to be made by the liquidator, required by the State Act. His Honour concluded that the Commonwealth tax provisions were not inconsistent with the State Act[97]. This was so notwithstanding that the State Act accorded priority to a number of creditors before Commonwealth tax debts[98]. In respect of the specific priority provided for by s.32(4) of the *STAA (No 1) 1930–1942* and s.30(6) of the *PTAA 1941–1942*, s.297(1)(a) of the *Companies Act 1936* (NSW) gave (in any event) first priority to the "costs and expenses of the winding up including the remuneration of the liquidator and certain audit costs"[99]. Latham CJ did not consider whether, in substance, the obligations imposed on a liquidator by the Commonwealth taxing statutes were different from or inconsistent with that in the State companies legislation[100]. His Honour's reasoning establishes that, as it had done with s.221 of the *ITAA 1936*, the Commonwealth could legislate to provide for priority payment of its debts, but that the equivalents of s.215 of the *ITAA 1936*, in providing for setting aside and personal liability of the liquidator, did not do it.

81. Starke J is to the same effect as Latham CJ[101]. Rich J (also in the majority) observed that the Commonwealth Parliament had power to legislate to provide

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[95] *Uther* [1947] HCA 45; (1947) 74 CLR 508 at 516–517: "By sub-s. (1) of these sections the liquidator of a company is required, within a specified time, to give notice in writing to the Commissioner of his appointment as a liquidator. Sub-section (2) provides that the Commissioner shall notify to the liquidator the amount which appears to the Commissioner to be sufficient to provide for tax which then is or will thereafter become payable by the company, and sub-s. (3) of the *Pay-Roll Tax Assessment Act* (sub-s. (2A) of the *Sales Tax Assessment Act*) prevents the liquidator parting with assets of the company until he has been so notified, and requires him to set aside out of the assets "available for the payment of the tax" assets to the value of the amount notified or the whole of the assets, if necessary. It is further provided that the liquidator shall, to the extent of the value of the assets which he is so required to set aside, be liable as trustee to pay the tax".

[96] *Uther* [1947] HCA 45; (1947) 74 CLR 508 at 517 (Latham CJ).

[97] *Uther* [1947] HCA 45; (1947) 74 CLR 508 at 517–518.

[98] *Uther* [1947] HCA 45; (1947) 74 CLR 508 at 513–514.

[99] *Uther* [1947] HCA 45; (1947) 74 CLR 508 at 513–514.

[100] Latham CJ concluded, in this respect, that: "[a] liquidator will comply with these sections of the two Acts if he pays costs, charges and expenses of winding up to the extent mentioned in sub-s. (4) of the *Sales Tax Assessment Act* (sub-s. (6) of the *Pay-Roll Tax Assessment Act*)—an amount which depends upon the opinion of the Commissioner. He must then set aside and retain in his hands the assets to the extent required by sub-s. (2A) of the *Sales Tax Assessment Act* (sub-s. (3) of the *Pay-Roll Tax Assessment Act*). The assets must then be applied by the liquidator according to law—i.e., according to common law or any valid statute law."; see *Richard Foreman & Sons Pty Ltd, Re; Uther v Commissioner of Taxation* (Cth) [1947] HCA 45; (1947) 74 CLR 508 at 517.

[101] *Uther* [1947] HCA 45; (1947) 74 CLR 508 at 526.

itself with a priority but that it had not done so with either of s.32 of the *STAA (No 1) 1930–1942* or s.30 of the *PTAA 1941–1942*[102]. Williams J is to the same effect[103]. McTiernan J dissented without considering either provision. Dixon J also dissented; on the grounds that his Honour had articulated in *Farley*; as a matter of the legislative power of a State to affect the Commonwealth prerogative. As in *Farley*, his Honour was not then required to consider the meaning and effect of s.32 of the *STAA (No 1) 1930–1942* or s.30 of the *PTAA 1941–1942*[104]. Again, as regards what can be understood to be his Honour's position on inconsistency of the Commonwealth tax provisions with those of the State Act, his Honour in *Cigamatic*[105] accepted the "the views expressed by the majority in *Uther's Case* concerning the meaning and effect of s.32 of the *Sales Tax Assessment Act*". This majority in *Uther* was Latham CJ, Rich, Starke and Williams JJ[106].

82. *Uther* is authority for the same propositions as stated above as arising from *Farley*. Indeed, *Uther* is far clearer in respect of these propositions than *Farley* because s.297(1) of the *Companies Act 1936* (NSW) accorded priority to a number of creditors before Commonwealth tax debts.

Cigamatic[107]

83. *Cigamatic*[108] dealt principally with the legislative power of a State to affect the Commonwealth prerogative of priority in insolvency and reversed *Farley* and *Uther* on this issue. *Cigamatic* also considered the 'other issue' as to the effect of s.32 of the *Sales Tax Assessment Act (No 1) 1930–1953* (Cth). In respect of this, Menzies J stated[109]:

> In two earlier cases this Court [*Farley* and *Uther*] has had to consider the effects of legislation such as s.32 of the *Sales Tax Assessment Act (No. 1)* and on each occasion it has been decided that such a provision does not confer upon the Commonwealth priority for tax due in the winding up of a company under New South Wales *Companies Acts*. ... The basis of the decision [in *Farley*] was that the sections in question did not deal with priorities .... In [*Uther*] - the majority of the Court (Latham CJ, Rich, Starke and Williams JJ) held that neither s.32 of the *Sales Tax Assessment Act* nor a similar provision in the *Pay-roll Tax Assessment Act* conferred any statutory right to prior payment of taxes due. I do not think that this Court should now depart from what has twice been expressly decided upon a question which is no more than one of the construction of Commonwealth legislation. Because s.32 of the *Sales Tax Assessment Act* does not establish any priority at all, it can be altogether disregarded.

84. Dixon CJ, in respect of this question, was of the same view[110]. Kitto J agreed with Dixon CJ and Menzies J[111], and so, to the extent that there was any doubt, confirmed that Dixon CJ and Menzies J were *ad idem*. Owen J agreed with

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[102] *Uther* [1947] HCA 45; (1947) 74 CLR 508 at 523–524.
[103] *Uther* [1947] HCA 45; (1947) 74 CLR 508 at 540.
[104] *Uther* [1947] HCA 45; (1947) 74 CLR 508 at 533.
[105] *Cigamatic* [1962] HCA 40; (1962) 108 CLR 372 at 379.
[106] Only 6 Justices sat.
[107] *Cigamatic* [1962] HCA 40; (1962) 108 CLR 372.
[108] *Cigamatic* [1962] HCA 40; (1962) 108 CLR 372 at 379.
[109] *Cigamatic* [1962] HCA 40; (1962) 108 CLR 372 at 388–389.
[110] *Cigamatic* [1962] HCA 40; (1962) 108 CLR 372 at 379.
[111] *Cigamatic* [1962] HCA 40; (1962) 108 CLR 372 at 381.

Menzies J[112]. McTiernan J and Taylor J (though in dissent) are to be understood as agreeing with the construction of s.32 of the *STAA (No 1) 1930–1953* stated by Menzies J[113]. Windeyer J is to be understood as not addressing the question[114].

85. It follows that *Cigamatic*, with *Farley* and *Uther*, is authority for the propositions stated above as arising from *Farley*.

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

Following *Cigamatic*

87. As referred to in the judgments of McTiernan J and Taylor J in *Cigamatic*[115], at the time of the decision, the uniform *Companies Act 1961* had been drafted.

88. Following *Cigamatic*, the *Companies Act 1961* scheme commenced operation on 1 July 1962 on the understanding that the provisions of Commonwealth law, such as s.32 of the *STAA 1930* and s.59 of the *ITAA 1922*, were not inconsistent with what in the *Companies Act 1961* was s.292. By 1961, s.59 of the *ITAA 1922* had been replaced with s.215 of the *ITAA 1936*. Copies of these provisions at these dates are in the proposed Court Book.

89. When the *Companies Act 1961* scheme commenced Commonwealth Crown priority existed, because of *Cigamatic* and, in relation to certain tax debts, s.221 of the *ITAA 1936* — but not by reason of anything in s.215 of the *ITAA 1936*.

90. As can be seen, s.215 of the *ITAA 1936* dealt with "any tax" but maintained the substantive terms of previous provisions; that a liquidator within a specified time give notice to the Commissioner; that the Commissioner notify the liquidator of the amount "which appears to the Commissioner to be sufficient to provide for tax which then is or will thereafter become payable"; that the liquidator not "part with any of the assets of the company"[116]; that the liquidator, "set aside out of the assets available for the payment of the tax" assets to the value of the amount notified or the whole of the assets, if necessary; and that the liquidator was, to the extent of the value of the assets required to be set aside, liable to pay the tax.

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

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[112] *Cigamatic* [1962] HCA 40; (1962) 108 CLR 372 at 390.
[113] *Cigamatic* [1962] HCA 40; (1962) 108 CLR 372 at 381.
[114] *Cigamatic* [1962] HCA 40; (1962) 108 CLR 372 at 390.
[115] *Cigamatic* [1962] HCA 40; (1962) 108 CLR 372 at 381 (McTiernan J), 385 (Taylor J).
[116] This requirement did not appear in earlier versions of what became s.215 of the *ITAA*.

The *Taxation Debts (Abolition of Crown Priority) Act 1980* (Cth) and the *Crown Debts (Priority) Act 1981* (Cth)

92. The more recent operation of s.215 arises out of the abolition of the priority of Commonwealth Crown debts, and changes made to priorities in winding up following the Missen Report (1978)[117]. Changes following the Missen Report occurred shortly before the *Companies Code* regime, introduced by the Commonwealth and States in 1981.

93. The Missen Report recommended that the Crown prerogative of priority over other creditors in windings up and bankruptcy be abolished[118]. After referring to (*inter alia*) s.215[119], the Report went on to state that[120]:

> Although it is not entirely free from doubt, the correct view would appear to be that these provisions do not confer any priority in respect of the relevant taxes [cites *Farley*, *Uther*, and *Cigamatic*]. The priority arises because of the operation of the common law prerogative.
>
> If the common law prerogative were to be abrogated, however, these sections [including s.215] would take on an added significance. One can readily envisage a situation in which a difference might emerge between the Commissioner and the liquidator as to whether or not the latter was permitted to distribute assets in his hands.

94. Following the Missen Report the Commonwealth enacted the *Taxation Debts (Abolition of Crown Priority) Act 1980* (Cth). It came into effect on 1 November 1979[121]. The Act reversed the effect of *Cigamatic* and amended Commonwealth legislation as recommended in the Missen Report[122].

95. Section 5 of the *Taxation Debts (Abolition of Crown Priority) Act* repealed s.221 of the *ITAA 1936*. Section 4 of the *Taxation Debts (Abolition of Crown Priority) Act* amended s.215 of the *ITAA 1936*. The amendment is in the proposed Court Book. The only substantive change to s.215 was to reduce the amount that the liquidator was required to set aside. Section 4 introduced the proportionate obligation in s.215(3)(b) by which the set aside amount was to be in proportion to the assets available for payment of all unsecured debts.

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[117] Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, *Priority of Crown Debts* (1978).

[118] Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, *Priority of Crown Debts* (1978) at 70.

[119] The Missen Report referred to the section as providing that "the assets of a company in liquidation should not be distributed until the liquidator has been notified of the amount that appears sufficient to provide for the tax, and assets have been set aside to meet the tax" — Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, *Priority of Crown Debts* (1978) at 22.

[120] Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, *Priority of Crown Debts* (1978) at 22-23

[121] See ss.4(2) and 5(2) of the *Taxation Debts (Abolition of Crown Priority) Act*.

[122] As recommended in the Missen Report, the following Commonwealth Acts were amended in the same respect as the *ITAA 1936* was in Part II, in Parts III–VII respectively: *Pay-roll Tax (Territories) Assessment Act 1971*; *Sales Tax Assessment Act (No 1) 1930*; *Stevedoring Industry Charge Assessment Act 1947*; *Tobacco Charges Assessment Act 1955*; *Wool Tax (Administration) Act 1964*. See Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, *Priority of Crown Debts* (1978) at 22.

96. The Explanatory Memorandum that accompanied the *Taxation Debts (Abolition of Crown Priority) Act* made plain that a purpose of the Act was to rescind any priority of the Commonwealth in respect of the tax liabilities of a company being wound up[123].

97. Plainly, it would be completely contrary to the purpose and intention of the Commonwealth Parliament in enacting the *Taxation Debts (Abolition of Crown Priority) Act*, by repealing s.221 and amending s.215 of the *ITAA*, to contend that s.215 was or is relevant to the right of the Commonwealth to receive a distribution in a winding up or *qua* creditor of an insolvent company. The purpose of the amendment to s.215 was to ensure that the Commonwealth did not receive a priority.

98. The *Taxation Debts (Abolition of Crown Priority) Act* and the circumstances of its enactment confirm that s.215, prior to its amendment in 1979 and thereafter, did not give any priority to the Commissioner or any entitlement of receipt. Simply, s.215 did not "provide for, or require payment of, the company's pre-liquidation tax-related liabilities"[124].

99. As at 1 November 1979, when the *Taxation Debts (Abolition of Crown Priority) Act* came into effect, the winding up priority provision in Australian companies legislation was s.292 of the *Companies Act 1961*. Obviously the Commonwealth Parliament, in enacting the *Taxation Debts (Abolition of Crown Priority) Act* did not intend, and it was not its purpose, to alter the operation of s.292 of the *Companies Act 1961* or to (in effect) create a priority, or an entitlement to receive anything, through s.215 of the *ITAA 1936*.

100. Shortly after the enactment of the *Taxation Debts (Abolition of Crown Priority) Act* the Commonwealth Parliament enacted the *Crown Debts (Priority) Act 1981* (Cth). By s.2, the *Crown Debts (Priority) Act* commenced on the same day as the 1981 *Companies Code* regime. Section 3 provided that:

> Notwithstanding any prerogative right or privilege of the Crown in right of the Commonwealth, the Crown in right of the Commonwealth is subject to any provision of a law of a State or Territory – (a) relating to the order in which debts or liabilities of a body (whether corporate or unincorporate) are to be paid or discharged.

101. Section 3 does not create inconsistency and then resolve it. Its effect would have been the same had it simply provided that, 'any prerogative right or privilege of the Crown in right of the Commonwealth relating to the order in which debts or liabilities of a body (whether corporate or unincorporate) are to be paid or discharged is abolished'.

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[123] Explanatory Memorandum, Taxation Debts (Abolition of Crown Priority) Bill 1980 (Cth) at 1: "[t]his Bill will give effect, in relation to taxation debts, to the Government's intention, announced by the Minister for Business and Consumer Affairs on 13 September 1979, to abolish the prerogative right, and any statutory priority, of the Commonwealth to receive preferential payment in company insolvencies, other than in relation to debts for tax installment deductions and withholding tax". See also at 5: "Specifically, the section as amended will acknowledge the rights of secured and preferred creditors to be paid first. ...It is to be noted that while section 215 will continue to require the setting aside of an amount ..., that setting aside will not ultimately determine how much the Commissioner, as an ordinary creditor, will receive".

[124] *Bell Group Limited (in liq) v Deputy Commissioner of Taxation* [2015] FCA 1056 at [27] (Wigney J).

102. The priority provisions of the 1981 *Companies Code* regime were ss.440 and 441 of the *Companies Code*[125]. Although s.441(h) provided for priorities for certain State and Territory debts, no priority was accorded to the Commonwealth generally or in respect of tax liabilities.

103. It is plain that s.3 of the *Crown Debts (Priority) Act* is inconsistent with a contention that s.215 (or s.254) of the *ITAA 1936* accorded the Commonwealth priority, or that the Commonwealth is not subject to a law of a State relating to the order in which debts or liabilities of a body (whether corporate or unincorporate) are to be paid or discharged.

Specific Commonwealth legislative tax priorities

104. It is relevant to note that the Commonwealth has, in addition to s.221 of the *ITAA 1936*, legislated over time to provide priority in winding up for certain tax liabilities. So, although in 1979 the general priority that had been provided by s.221 was repealed, as at the time of the Harmer Report[126], specific priorities were provided for in ss.221P, 221YHJ, 221YHZD and 221YU of the *ITAA 1936*[127]. These specific priorities were maintained in s.4 of the *Crown Debts (Priority) Act*.

105. From this it is evident that s.215 was not inconsistent with non-discriminatory State laws that provided that the tax debts of the Commonwealth had no priority in winding up, or State laws that provided that the Commonwealth would receive less than any set aside amount. Section 215 was at this time simply silent as to receipt of any amount by the Commonwealth. The position was the same then as it had been at the time of *Farley* — the section "does not deal with the subject of priorities"[128] and "do[es] not give a right to the Commonwealth to receive the sum which is set aside"[129].

106. These provisions remained until the *Corporations Act 1989* (Cth) and the State and Territory *Corporations Laws*, which followed shortly after the Harmer Report. Such *Corporations Laws* introduced ss.555 and 556[130]. In the Explanatory Memorandum for the *Corporations Act 1989*, it is explained that[131]:

> The order of priority of payment of debts are set out in this provision. ... It is Commonwealth policy not to support Crown priorities in general. Exceptions to this policy are made in special provisions in this and other legislation.

107. Neither of s.215 nor s.254 of the *ITAA 1936* were exceptions or such special provisions.

108. The 1990 national corporations scheme legislation (that came into operation in 1991) included an amended s.556.

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[125] The text of ss.440 and 441 are in the proposed Court Book.
[126] Law Reform Commission, *General Insolvency Inquiry*, Report No 45 (1988).
[127] Law Reform Commission, *General Insolvency Inquiry*, Report No 45 (1988) at 299 [733].
[128] *Farley* [1940] HCA 13; (1940) 63 CLR 278 at 289 (Latham CJ).
[129] *Farley* [1940] HCA 13; (1940) 63 CLR 278 at 289 (Latham CJ).
[130] The text of ss.555 and 556, as enacted, are in the proposed Court Book.
[131] Explanatory Memorandum, Corporations Bill 1989 (Cth) at 455 [1763].

109. Following the Harmer Report[132] remaining Commonwealth tax priorities in insolvencies were abolished by the *Insolvency (Tax Priorities) Legislation Amendment Act 1993* (Cth)[133].

What flows from this

110. This recounting reflects the understanding that, when considering the purpose and effect of s.215 of the *ITAA 1915*, to determine whether the *Bell Act* undermines it, s.215 is not concerned with receipt, let alone does it confer on the Commonwealth a right to receive anything. As found in *Farley*, *Uther* and *Cigamatic*, s.215 is consistent with State laws that provide nothing to the Commonwealth, and State laws that provide a payment to the Commonwealth of less than an amount set aside by a liquidator.

111. That the *Bell Act* creates a mechanism for distribution of assets of (formerly) insolvent companies, of which the Commonwealth was a creditor, that may result in the Commissioner receiving less than any set aside amount for the payment of which a liquidator is personally liable does not give rise to any inconsistency with s.215 of the *ITAA 1915*.

112. Further, by reason of s.3 of the *Crown Debts (Priority) Act*, even if otherwise not subject, the Crown in right of the Commonwealth is subject to any provision of a law of a State relating to the order in which debts or liabilities of a body (whether corporate or unincorporate) are to be paid or discharged.

113. So long as a State law provides a means by which any notified amount is available to be distributed in the final distribution of a winding up, it is not inconsistent with s.215 of the *ITAA 1915*.

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

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

115. An equivalent of s.254 of the *ITAA 1936* has been in Commonwealth income tax legislation from the first Commonwealth income tax Act. In *Australian Building Systems*[134] French CJ and Kiefel J traced the progenitors of s.254 of the *ITAA 1936*[135]; from s.91[136] of the *Income Tax Act 1799*[137]; to the near identical terms of

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[132] Law Reform Commission, *General Insolvency Inquiry*, Report No 45 (1988).

[133] This is made clear in the Explanatory Memorandum, Insolvency (Tax Priorities) Legislation Amendment Bill 1993 (Cth) at 13–14.

[134] *Commissioner of Taxation v Australian Building Systems Pty Ltd (in liq)* [2015] HCA 48; (2015) 326 ALR 590 (*'Australian Building Systems'*).

[135] *Australian Building Systems* [2015] HCA 48; (2015) 326 ALR 590 at 593–596.

[136] Section 91 provided: it shall be lawful for every such Person who shall be so assessed, by and out of such Annual Income as shall come to his or her Hands or Hand as such Trustee... or other Officer, to retain so much and such Part of such Annual Income as shall from Time to Time be sufficient to pay such Assessment.

s.93 of the *Income Tax Act 1803*[138]; to s.103 of the *Income Tax Act 1805*[139]; to s.58 of the *Income Tax Act 1806*[140]; and to s.44 of the *Income Tax Act 1842*[141]. The *Income Tax Act 1842* levied income tax in the United Kingdom until 1918[142]. Prior to federation, Australian colonies introduced income taxes[143] and forerunners to s.254 were s.12 of the *Income Tax Act 1895* (Vic) and ss.18–20 of the *Land and Income Tax Assessment Act 1895* (NSW)[144].

116. Section 12 of the *Income Tax Act 1895* (Vic) applied to "every agent for any taxpayer permanently or temporarily out of Victoria and every trustee"[145]. Section 12(1)(a) provided that every such person was "answerable for the doing of all such acts matters or things as are required to be done by virtue of this Act" to ensure the assessment of the relevant income and for paying the tax in respect thereof. Section 12(1)(c) dealt with retention[146]. Section 12(1)(d) imposed personal liability on the agent or trustee, limited to [unpaid] tax if the agent or trustee, "alienates charges or disposes of such income; or disposes of or parts with any fund or money which comes to him after the tax is payable from or out of which fund or money such tax could legally have been paid"[147].

117. The first federal income tax Act, the *Income Tax Assessment Act 1915* (Cth), contained s.52 which, although modelled on s.12 of the *Income Tax Act 1895* (Vic), differed from it in three respects. *First*, s.52 made no express provision for agents of taxpayers outside Australia. Separate provision to deal with this was made by s.52A of the *ITAA 1915*, which was inserted in 1918[148]. Section 52A is

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[137] 39 Geo. III, c.13. The 1799 Act first introduced income tax in England in an effort to raise revenue to fight the war against France — see Peter Harris, 'Metamorphosis of the Australasian Income Tax: 1866 to 1922' (Research Study No 37, Australian Tax Research Foundation, 2002) at 17.

[138] 43 Geo. III, c.122.

[139] 45 Geo. III, c.49.

[140] 46 Geo. III, c.65. The 1806 Act expired on 6 April 1816 following the cessation of hostilities with France. Income tax was not revived until in the 1842 Act, in a time of peace, after repeated budget deficits. See Peter Harris, 'Metamorphosis of the Australasian Income Tax: 1866 to 1922' (Research Study No 37, Australian Tax Research Foundation, 2002) at 17–18.

[141] 5 & 6 Vict., c.35.

[142] See Peter Harris, 'Metamorphosis of the Australasian Income Tax: 1866 to 1922' (Research Study No 37, Australian Tax Research Foundation, 2002) at 18.

[143] See Peter Harris, 'Metamorphosis of the Australasian Income Tax: 1866 to 1922' (Research Study No 37, Australian Tax Research Foundation, 2002) at 18.

[144] These were not the first colonial income tax statutes. Those were the *Real and Personal Estates Duties Act 1880* (Tas), which imposed a limited income tax and the *Taxation Act* 1884 (SA) which imposed the first broad-based income tax in Australia. See Peter Harris, 'Metamorphosis of the Australasian Income Tax: 1866 to 1922' (Research Study No 37, Australian Tax Research Foundation, 2002) at 65, 92.

[145] Section 12(1).

[146] An agent or trustee was: authorised and required to retain from time to time in each year out of any money which comes to such agent or trustee as such agent or trustee so much as is sufficient to pay the tax for the current year in respect of any income subject to the tax; and is hereby indemnified for all payments which such agent or trustee may make in pursuance of this Act or by requirement of the Commissioner.

[147] Section 12 of the *Income Tax Act 1895* (Vic) differed from the provisions of equivalent United Kingdom legislation of the time in two respects. *First*, by introducing the concept of "answerability" (in terms similar to s.254(1)(a)) for the doing of things required under the Act. *Second*, by requiring, in addition to authorizing, retention of funds sufficient to pay tax, but limited to "tax for the current year".

[148] Section 52A was inserted by s.35 of the *Income Tax Assessment Act 1918* (Cth). As noted above, the *ITAA 1918* also inserted the first progenitor of s.215 into the *ITAA 1915*.

the antecedent to s.255 of the *ITAA 1936*. Sections 52 and 52A reflected the dichotomy in ss.47 and 48 of the *War-time Profits Tax Assessment Act 1917* (Cth). The retention obligation in both ss.47 and 48 of the *War-time Profits Tax Assessment Act* was the same[149], and in the same terms as s.52(e) in the *ITAA 1915* (and s.254(1)(d) in the *ITAA 1936*), except that it was in respect of "the war-time profits tax" rather than the "income, profits or gains".

118. Section 52 of the *ITAA 1915*, *secondly*, differed from s.12 of the *Income Tax Act 1895* (Vic) in the provision of s.52(e), when contrasted with s.12(1)(c) of the *Income Tax Act 1895* (Vic). Section 52 authorized and required retention "sufficient to pay the income tax which is or will become due in respect of the income".

119. *Third*, the personal liability of an agent or trustee imposed by s.52(f) of the *ITAA 1915*, differed from s.12(1)(d) of the *Income Tax Act 1895* (Vic)[150].

120. Sections 52 and 52A of the *ITAA 1915* were reproduced in ss.89 and 90 of the *ITAA 1922*. Sections 89(e) and (f) were in identical terms to ss.52(e) and (f).

121. As enacted, and in their current form, ss.254 and 255 of the *ITAA 1936* substantially reproduce these antecedents[151]. The retention obligation in s.254(1)(d) is in identical terms to its *ITAA* antecedents. The personal liability imposed by s.254(1)(e) (unlike s.52(f) of the *ITAA 1922*) is expressly limited to what the agent or trustee retained or should have retained under s.254(1)(d).

122. Section 254(1) has remained substantially unaltered since its enactment in 1936[152].

The operation and effect of s.254

123. As remarked by Gageler J in *Australian Building Systems*[153], s.254 of the *ITAA 1936* has been the subject of little judicial consideration. Little descends to none when searching for judicial consideration of the operation of s.254 in respect of any 'priority' of the liability created. In *Australian Building Systems*, as Gageler J

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[149] See s.47(e) and s.48(c) of the *War-time Profits Assessment Act 1917* (Cth).

[150] Section 52(f) provided that: He is hereby made personally liable for the income tax payable in respect of the income if, after the Commissioner has required him to make a return, or while the tax remains unpaid, he disposes of or parts with any fund or money which comes to him from or out of which income tax could legally be paid, but he shall not be otherwise personally liable for the tax:
Provided that the Commissioner may, upon application by the agent, permit disposal of such fund or money or part thereof as he considers necessary.

[151] As enacted, ss.254(1)(d) and (e) provided:
(d) He is hereby authorized and required to retain from time to time out of any money which comes to him in his representative capacity so much as is sufficient to pay the tax which is or will become due in respect of the income.
(e) He is hereby made personally liable for the tax payable in respect of the income to the extent of any amount that he has retained, or should have retained, under the last preceding paragraph; but he shall not be otherwise personally liable for the tax.

[152] Section 254(1) is now gender neutral (see items 336–349, Sch.5 to the *Tax Laws Amendment (2011 Measures No 2) Act 2011* (Cth)); and refers to "income, profits or gains"; with "profits or gains" inserted to deal with capital gains by s.33 of the *Income Tax Assessment Amendment (Capital Gains) Act 1986* (Cth).

[153] *Australian Building Systems* [2015] HCA 48; (2015) 326 ALR 590 at 604 [52].

noted[154], it was unnecessary to consider the question of "whether the operation of ss.501, 555 and 556 of the *Corporations Act* is affected by s.254 of the [1936 Act], such that the [C]ommissioner enjoys a form of priority because of s.254, notwithstanding what would otherwise be the effect of these provisions of the *Corporations Act* in a winding up".

124. Because in dissent in *Australian Building Systems*, Keane J and Gordon J considered aspects of the operation and effect of s.254, in particular s.254(1)(d) and s.254(1)(e).

125. It is notable that s.254 applies to several discrete classes of persons; a liquidator is one of several defined "trustees"[155]. In certain respects, material to the reasoning of Keane J and Gordon J, the obligations of liquidators are different to those of trustees 'proper' and all others captured by the definition of "trustee", and by the notion of "agent".

126. In *Australian Building Systems* Keane J observed, in considering the purpose of s.254, that[156]:

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

127. Neither of these two essential characteristics of "trustees" for the purpose of s.254 applies to liquidators. A liquidator is not actively involved in generating income, profits or gains on behalf of unsecured creditors. Any income, profit or gain made in the course of the winding up would be incidental to the winding up. More importantly, a liquidator is never "obliged" to pay away income, profits or gains in the manner of, say, a trustee to a beneficiary[157] or an agent to a principal. The obligations of the liquidator in distributing any such income, profits or gains are and have always been tightly prescribed and regulated.

128. This inapplicability of certain of Keane J's reasoning to liquidators applies equally to reasoning of Gordon J. Her Honour noted that s.254(1)(d) operates to "interrupt" any instruction to the agent or trustee for delivery up of money belonging to a beneficiary, a principal or a company and thereby settles the question of whether it would be lawful for an agent or trustee to retain such

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[154] *Australian Building Systems* [2015] HCA 48; (2015) 326 ALR 590 at 606 [63].

[155] Section 6 of the *ITAA 1936* defines "trustee":
trustee in addition to every person appointed or constituted trustee by act of parties, by order, or declaration of a court, or by operation of law, includes:
(a) an executor or administrator, guardian, committee, receiver, or liquidator; and
(b) every person having or taking upon himself the administration or control of income affected by any express or implied trust, or acting in any fiduciary capacity, or having the possession, control or management of the income of a person under any legal or other disability

[156] *Australian Building Systems* [2015] HCA 48; (2015) 326 ALR 590 at 619 [130].

[157] It was in the context of the discrete scenario of a trustee and beneficiary that this Court considered s.12 of the *Income Tax Act 1895* (Vic) in *Webb v Syme* [1910] HCA 32; (1910) 10 CLR 482.

money in the face of a demand from that person or entity[158]. Again, this notion of interruption is inapposite to a liquidator, even though it applies to a trustee facing the demand of a beneficiary, or an agent *qua* principal.

129. In *Australian Building Systems* Keane J also observed[159] that the rationale underlying s.254 — to ameliorate the risk to the revenue arising from the trustee who "may be obliged to pay away to it the income, profits or gains derived on [another's] behalf" — is addressed by two aspects of s.254; requiring that a sufficient sum to pay tax be retained (s.254(1)(d)) (or in the terms used in s.215 — set aside); and imposing personal liability on the liquidator to pay that sum if it is not retained. His Honour's reasoning concluded[160]:

> The retention obligation serves to ensure that there is sufficient money in the hands of the agent or trustee to pay his or her liability for the tax which is assessed as owing or which will be assessed as owing should the principal or beneficiary, for any reason, not meet that liability when it is assessed.

130. Similarly, Gordon J viewed the retention obligation in s.254(1)(d) as being addressed to the (sole) purpose of meeting the ancillary tax payment obligation imposed on the agent or trustee in s.254(1)(a)[161]. Her Honour reasoned that, "in aid of" s.254(1)(d), s.254(1)(e) imposed a personal liability on the agent or trustee "for not keeping a reserve of income or funds in hand to satisfy the tax, until it is seen whether it is paid by or recoverable from the beneficiary [or principal]"[162].

131. This reasoning too is inapposite to liquidators. Unsecured creditors are different, in this respect, to the beneficiaries of a trustee or the principal of an agent. They can only receive anything from the liquidator *via* the statutory priority ordering, and this has been the case since s.254 was first enacted.

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

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[158] *Australian Building Systems* [2015] HCA 48; (2015) 326 ALR 590 at 631 [192]. See also at 632–633 [199]–[200]. In respect of the first "essential characteristic" propounded by Keane J, the reasoning of Gordon J at 638 [222] is apparently consistent, although not in these terms. Her Honour describes the agent or trustee as being in a "direct" relationship with the income, profits or gains derived (cf. a "controller" of a non-resident's income, profit or gains in s.255).

[159] *Australian Building Systems* [2015] HCA 48; (2015) 326 ALR 590 at 619–620 [130]–[132].

[160] *Australian Building Systems* [2015] HCA 48; (2015) 326 ALR 590 at 620 [132].

[161] *Australian Building Systems* [2015] HCA 48; (2015) 326 ALR 590 at 631 [193]. Both her Honour and Keane J considered that s.254(1)(a) imposes an ancillary liability for tax on an agent or trustee for the purpose of ensuring the payment of the tax. See [2015] HCA 48; (2015) 326 ALR 590 at 614 [104] (Keane J), 627 [171], 628 [176] (Gordon J).

[162] *Australian Building Systems* [2015] HCA 48; (2015) 326 ALR 590 at 632 [196], citing *Webb v Syme* [1910] HCA 32; (1910) 10 CLR 482 at 498.

Commissioner would receive 1/3(500/1500) of $1,200; that is less than the retained amount.

133. This scenario illustrates that the position of liquidators under s.254 of the *ITAA 1936* is different to that of others who fall within the definition of trustee. This is so because s.254, like s.215 of the *ITAA 1936*, "do[es] not give a right to the Commonwealth to receive the sum which is set aside"[163] or retained, actually or putatively. This is because the entitlement of the Commissioner to receive from the liquidator is not determined by s.254, and never has been. It is determined, and always has been determined, by provisions in companies legislation; historically State legislation, and recently, Commonwealth. To the extent that, following the decision in *Cigamatic*[164], this was otherwise, it was because of the nature of a Commonwealth prerogative, which was abolished in 1979[165].

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

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

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

137. As in respect of s.215 of the *ITAA*, an interpretation of s.254 that would require that the Commissioner receive tax due on post liquidation income in priority to all other creditors is inconsistent with s.3 of the *Crown Debts (Priority) Act 1981*.

138. For completeness it should be noted that no issue arises with s.254(1)(h) of the *ITAA 1936*. Wigney J in *Bell Group Limited (in liq) v Deputy Commissioner of Taxation*[166] determined that; "...s 254(1)(h) of the *ITAA36* ... does not confer any remedy on the Commissioner against the property of a company after the commencement of the winding up of the company because such property is not attachable property"[167].

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[163] *Farley* [1940] HCA 13; (1940) 63 CLR 278 at 289 (Latham CJ).
[164] *Cigamatic* [1962] HCA 40; (1962) 108 CLR 372.
[165] Be this as it may, it is a seeming mystery of the Missen Report and the *Taxation Debts (Abolition of Crown Priority) Act* that neither dealt expressly with s.254 of the *ITAA 1936*.

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

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

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

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

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

INCONSISTENCY OF THE *BELL ACT* WITH SECTIONS 177, 208 AND 209 OF THE *ITAA*

Sections 208 and 209 of the *ITAA*

142. The former ss.208 and 209 of the *ITAA 1936* were preceded by s.57 of the *ITAA 1922*. Section 57 replicated the terms of s.44 of the *ITAA 1915*. Both antecedent sections were in identical terms. Section 57 of the *ITAA 1922* was not amended from its enactment until its subsequent replacement by ss.208 and 209 of the *ITAA 1936*[168]. As enacted in the *ITAA 1936*, ss.208 and 209 replicated almost precisely[169], the terms of subsections 57(1) and 57(2) of the *ITAA 1922*. Sections 208 and 209 remained unaltered until the 1980s. In 1981, s.208 was amended so as to omit the reference to the King, and to instead provide that income tax "is a

[168] The consolidated reprint of the *ITAA 1922–1934*, incorporating amendments to 1 January 1936, does not note a single amendment next to s.57.

[169] Income tax was no longer "deemed" to be a debt due to the King as in s.57(1); rather s.208 provided it "shall be" due. Instead of providing for recovery of "any income tax unpaid, including any additional tax" as did s.57(2); s.209 provided for recovery of "any tax unpaid".

debt due to the Commonwealth"[170]. In 1984, a new subsection (2) was inserted to both of ss.208 and 209 to include "additional tax under section 207 or Part VII" within the meaning of "tax" for the purposes of subsection (1)[171]. Subsection (2) was amended twice, in 1992[172] and in July 1999[173]. In December 1999, subsection (3) was inserted into both of ss.208 and 209 so as to limit their application to tax due and payable prior to 1 July 2000[174] in parallel with the insertion of s.255-5 into Schedule 1 of the *TAA 1953*[175]. A minor amendment to subsection (3)(b) occurred in 2000[176].

143. In their consolidated form immediately prior to their repeal in 2006, subsections 208(1) and 209(1) provided:

> 208 Tax a debt due to the Commonwealth
>
> (1) Income tax when it becomes due and payable shall be a debt due to the Commonwealth, and payable to the Commissioner in the manner and at the place prescribed.
>
> 209 Recovery of tax
>
> (1) Any tax unpaid may be sued for and recovered in any Court of competent jurisdiction by the Commissioner or a Deputy Commissioner suing in his official name.

144. Subsections (2) and (3) of ss.208 and 209 were identical[177]. As noted above, both of ss.208 and 209 of the *ITAA 1936* were displaced by amendments in 1999 but are continued in force in respect of amounts of income tax due and payable prior to 1 July 2000[178]. In respect of amounts due and payable after 1 July 2000, "like provision"[179] is made by ss.255-5(1) and 255-5(2) of Schedule 1 to the *TAA 1953*. Section 255-5 has the same effect as former ss.208 and 209, but in respect of a "tax-related liability"[180]. This difference is accounted for by the extrinsic

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[170] See the table of 'Formal Amendments' in the Schedule to the *Income Tax Laws Amendment Act 1981* (Cth).

[171] See ss.113 and 114 of the *Taxation Laws Amendment Act 1984* (Cth).

[172] So as to include "interest under section 170AA or 207A" within the meaning of tax for the purposes of subsection (1): see s.33(3), Sch.3 to the *Taxation Laws Amendment (Self Assessment) Act 1992* (Cth).

[173] To provide in the same terms as those immediately prior to the repeal of ss.208 and 209: see items 74, 75, 77, 78 in Sch.1 to the *Taxation Laws Amendment Act (No 3) 1999* (Cth).

[174] Subsection (3) was inserted into ss.208 and 209 of the *ITAA 1936* by items 25 and 26 in Sch.2 to the *A New Tax System (Tax Administration) Act 1999* (Cth).

[175] Section 255-5 was inserted into Sch.1 to the *TAA 1953* by item 1 in Sch.2 to the *A New Tax System (Tax Administration) Act 1999* (Cth).

[176] See items 22 and 23 in Sch.2 to the *A New Tax System (Tax Administration) Act (No 1) 2000* (Cth).

[177] (2) In subsection (1), [income] tax includes the general interest charge under a provision of this Act and additional tax under Part VII.

(3) This section does not apply in relation to:

(a) any [income] tax that becomes due and payable on or after 1 July 2000; or

(b) any other amount that becomes due and payable on or after that day, and that is taken to be income tax for the purposes of this section because of any provision of this or any other Act.

[178] See item 7, Sch.6 to the *Tax Laws Amendment (Repeal of Inoperative Provisions) Act 2006* (Cth).

[179] *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd* [2008] HCA 41; (2008) 237 CLR 472 at 488 [28] (Gummow A-CJ, Heydon, Crennan and Kiefel JJ).

[180] Which is defined as "a pecuniary liability to the Commonwealth (including a liability the amount of which is not yet due and payable) arising directly under a taxation law", that is an Act of which the

materials to the *A New Tax System (Tax Administration) Act 1999* (Cth), which inserted (*inter alia*) s.255-5 into the *TAA 1953*. A purpose of that Act was to introduce standardised rules to enable the Commissioner to collect and recover tax-related liabilities[181]. The aim was to remove the multiplicity of existing recovery provisions to replace them with one provision[182]. Section 255-5 is the standardised provision to replace existing provisions in all recovery areas of the various taxation laws, including ss.208 and 209 of the *ITAA 1936* for income tax and s.94 of the *Fringe Benefits Tax Assessment Act 1986* (Cth)[183].

The purpose of these provisions

145. The purpose of ss.208 and 209 of the *ITAA 1936* derives from the nature of the Crown prerogative. In times prior to and shortly after federation, the manner of establishing or proving a taxation liability as a debt that was due and payable was rather haphazard[184].

146. Higgins J explained in *Commissioner of Stamps (WA) v West Australian Trustee Executor & Agency Co Ltd*[185], in respect of the predecessor provision to ss.208 and 209, that[186]:

> The words of this section are not happily chosen, but they do not mean that there is nothing owing in the ordinary sense until the money becomes *payable*. This is a procedure section, and means that when proceedings have to be taken to recover the debt it is to be treated as a Crown debt, with any privileges and priorities that a Crown debt has.

147. Section 208 and its predecessor provisions established the relevant tax liability not only as a debt, but as a Crown debt to which the prerogative of priority, *prima facie*, applied. It also empowered the Commissioner *qua* Crown to claim it. This, and the purpose of s.209, was explained in the judgments of Pidgeon J and Ipp J (with whom Wallwork J agreed) in *Commissioner of State Taxation v Pollock*[187]. Ipp J referred to Street J's judgment in *Re Smith; Ex parte Commissioners of Taxation*[188] where Street J observed that:

Commissioner has the general administration. See, s.995-1 of the *ITAA 1997*; s.255-1(1) in Sch.1 to the *TAA 1953*.

[181] Treasury, Parliament of Australia, *Bills Digest*, No 56 of 1999 (2 September 1999) – "Purpose".

[182] Treasury, Parliament of Australia, *Bills Digest*, No 56 of 1999 (2 September 1999) – "[2.1] Standardised rules".

[183] Explanatory Memorandum, A New Tax System (Tax Administration) Bill 1999 (Cth) at [2.57].

[184] Lord Macnaghten records in *Commissioner of Taxation (NSW) v Palmer* [1907] AC 179 at 183: "... prior to 1895 Crown debts [in New South Wales] were so paid without further verification than a letter from the Crown solicitor, but that since that time, in accordance with the directions of the late Manning J, claims on behalf of the Crown have been verified by the statutory declaration of a responsible officer of the Crown Department concerned who may have knowledge of the matter".

[185] *Commissioner of Stamps (WA) v West Australian Trustee Executor & Agency Co Ltd* [1925] HCA 20; (1925) 36 CLR 98.

[186] *Commissioner of Stamps (WA) v West Australian Trustee Executor & Agency Co Ltd* [1925] HCA 20; (1925) 36 CLR 98 at 116.

[187] *Commissioner of State Taxation v Pollock* (1993) 11 WAR 64 at 68–69 (Pidgeon J), 74–77 (Ipp J).

[188] *Re Smith; Ex parte Commissioners of Taxation* (1908) 8 SR (NSW) 246 at 250–251.

> Under the Act the only persons who are entitled to receive the tax and who can give a good receipt for it are the Commissioners, and, in my opinion s 49 in declaring that the tax shall be deemed to be a debt due to the Crown was only introduced for the purpose of enlarging the powers of the Commissioners and facilitating the recovery of the debt by giving it the status of a Crown debt.

148. Ipp J in *Commissioner of State Taxation v Pollock*, after referring to the judgments of Higgins J and Street J quoted above, and going on to refer to Hutley JA's remarks in *Deputy Commissioner of Taxation (Cth) v Peacock*[189], concluded that[190]:

> ... implicit in the remarks of both Street J and Higgins J is that the purpose of the deeming provision is to confer upon the debt the prerogative of priority, that being necessary as the debt is made payable to a statutory officer rather than the Crown.

149. It is apt to note Hutley JA's remarks in *Deputy Commissioner of Taxation (Cth) v Peacock*[191] in respect of s.208 of the *ITAA 1936*[192]:

> The section is purely concerned with enforcement; and, perhaps for more abundant precaution, purports to preserve the advantages which debts of the Crown may have, even though payment has to be made to the Commissioner. Debts of the Crown once carried with them considerable advantages; whether or not the Crown debts still enjoy the privileges which they once had and which are set out in *Chitty on the Prerogatives of the Crown*, it is not necessary to consider, but, in my opinion, this section is solely concerned with ensuring that these special privileges, if they continue to exist, cannot be invoked against the subject, unless and until the date for payment fixed in the notice of assessment has passed. In my opinion, none of the enforcement provisions, to which I have referred, has anything to do with the question as to when income tax becomes due.

150. On all fours with this are observations of Dixon CJ, Fullagar and Kitto JJ in *James v Deputy Federal Commissioner of Taxation*[193], where their Honours quoted with approval the passage from the judgment of Street J in *Re Smith; Ex parte Commissioners of Taxation*[194] extracted above.

151. The earlier versions of ss.208 and 209 of the *ITAA 1936* were noted in each of *Farley* and *Uther*. In *Farley*[195], s.57 of the *ITAA 1922* and its equivalents in respect of Commonwealth sales tax and postal and telegraph tax[196] were referred to by Latham CJ, Starke J and Dixon J[197], together with s.56 of the *Income Tax (Management) Act 1928* (NSW)[198] which provided in identical terms to the Commonwealth provisions. Because the 'competing creditors' were the State and

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[189] *Deputy Commissioner of Taxation (Cth) v Peacock* [1980] 2 NSWLR 130 at 134.
[190] *Commissioner of State Taxation v Pollock* (1993) 11 WAR 64 at 77.
[191] *Deputy Commissioner of Taxation (Cth) v Peacock* [1980] 2 NSWLR 130.
[192] *Deputy Commissioner of Taxation (Cth) v Peacock* [1980] 2 NSWLR 130 at 134–135.
[193] *James v Deputy Federal Commissioner of Taxation* [1957] HCA 36; (1957) 97 CLR 23 at 35.
[194] *Re Smith; Ex parte Commissioners of Taxation* (1908) 8 SR (NSW) 246 at 251.
[195] *Farley* [1940] HCA 13; (1940) 63 CLR 278.
[196] Namely s.30 of the *STAA (No 1) 1930–1935* (Cth) and ss.4, 5 and 93 of *the Post and Telegraph Act 1901 –1934* (Cth).
[197] See *Farley* [1940] HCA 13; (1940) 63 CLR 278 at 285 (Latham CJ), 293 (Starke J), 300 (Dixon J).
[198] See *Farley* [1940] HCA 13; (1940) 63 CLR 278 at 285 (Latham CJ).

the Commonwealth, and both had provisions like ss.208 and 209, no issue as to the effect of such provisions arose.

152. In *Uther*[199], no issue arose as to the State prerogative. Each of Latham CJ, Starke and Williams JJ referred to s.30 of the *STAA (No 1) 1930–1942* and s.28 of the *PTAA 1941–1942 (Cth)*[200] — the equivalent provisions to ss.208 and 209 of the *ITAA 1936*. Their Honours, with Rich J, formed the majority in holding that the Commonwealth prerogative priority accorded to the relevant tax liabilities, by virtue of their status as Crown debts, was subject to provisions of the *Companies Act 1936* (NSW)[201]. Dixon J noted that "the consequence at common law of giving the taxes this character of Crown debts is to entitle the Commonwealth to priority over other creditors of equal degree"[202]. His Honour left open the question of "the operation of s.109 with reference to [those provisions] by which the taxes are deemed to be debts due to the King"[203] as against State laws which affected the collection of taxes by the Commonwealth.

153. Sections 208 and 209 did not provide a means by which the taxation debts of the Commonwealth were removed from the priorities provided for in windings up and bankruptcy. The provisions in effect provided that the Commissioner could sue on behalf of the Crown in respect of a tax liability and that the debt when due attracted the Crown priority, if not otherwise inapplicable. No "special privilege" as a 'Crown debt' now exists, following the *Taxation Debts (Abolition of Crown Priority) Act* and s.3 of the *Crown Debts (Priority) Act*.

154. In light of s.3 of the *Crown Debts (Priority) Act*, the question left open by Dixon J in *Uther* does not arise.

155. With this understanding of the purpose of ss.208 and 209 of the *ITAA 1936* it would be astonishing if the effect of these provisions, *simpliciter* now, was that they are inconsistent with an alteration to Commonwealth priority in winding up. This is particularly so having regard to the course of amendment to the *ITAA*.

What this means — and the plaintiffs' contentions

156. It does not appear to be contended by the plaintiffs that s.25(5) of the *Bell Act* is inconsistent with ss.208 or 209 of the *ITAA 1936* because these latter provisions confer a priority.

157. The *first* contention of inconsistency with ss.208 and 209 is that s.25(5) of the *Bell Act* is inconsistent with (in the sense that it "takes away"[204] or "effectively stays"[205]) the Commissioner's right under ss.208 and 209 to pursue recovery proceedings against, relevantly, the WA Bell Companies or in respect of Mr

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[199] *Uther* [1947] HCA 45; (1947) 74 CLR 508.
[200] See *Uther* [1947] HCA 45; (1947) 74 CLR 508 at 513 (Latham CJ), 525 (Starke J), 537 (Williams J).
[201] Namely, s.282 of the *Companies Act 1936* (NSW), which provided for *pari passu* distribution of a company's property on its winding up subject to s.297, which provided for preferential payments or priorities. See *Uther* [1947] HCA 45; (1947) 74 CLR 508 at 522 (Latham CJ), 524 (Rich J), 525 (Starke J), 539 (Williams J).
[202] *Uther* [1947] HCA 45; (1947) 74 CLR 508 at 527. See Dixon J also at 531.
[203] *Uther* [1947] HCA 45; (1947) 74 CLR 508 at 532.
[204] BGNV's Submissions at [60].
[205] Federal Commissioner of Taxation's Submissions for leave to intervene at [45(d)].

Woodings' personal liability under ss.215 and 254 of the *ITAA 1936*. Why this submission should be rejected is dealt with below.

158. BGNV (*secondly*) contends[206] that the Commissioner's rights to pursue recovery proceedings under ss.208 and 209 of the *ITAA 1936* against Mr Woodings in respect of his personal liability, for instance under s.254(1)(e) of the *ITAA 1936*, have been rendered nugatory by s.45 of the *Bell Act*. Section 45 discharges a liquidator of a WA Bell Company from all liability upon dissolution of that company. This contention should be rejected. For the reasons outlined above, any personal liability of a liquidator under ss.215(3)(c) and (4) (or s.260-45 of Schedule 1 to the *TAA 1953*) or s.254(1)(e) of the *ITAA 1936* is illusory where the *Bell Act* effects a process by which a distribution to the Commissioner can be made.

159. BGNV (*thirdly*) contends[207] that s.25(5) prevents the Commonwealth from lodging any proof of debt in the winding up of a WA Bell Company and that any such proof of debt would be rendered inutile. This contention too should be rejected. Section 25(5) does not preclude the Commissioner from lodging a proof of debt with the Authority. Sections 208 and 209 relate to the commencement of proceedings "in any Court of competent jurisdiction".

160. BGNV (*fourthly*) contends[208] that the *Bell Act* (in particular ss.22 and 29) is inconsistent with ss.208 and 209 because they render inutile any pursuit of tax related liabilities. This is on the contended basis that there are no funds in the winding up and the liquidator cannot exercise any of his powers in the winding up.

161. This contention, and perhaps others, requires an understanding of the 'right' of a creditor to sue and company in liquidation. The right of the Commissioner under ss.208 and 209 is not a priority. So, in respect of a company in liquidation — what is it? Neither section removes tax liabilities (even though by the terms of s.208 they remain Crown debts) from the operation of companies legislation providing for distributions to creditors.

162. Plainly, s.25(5) of the *Bell Act* is in different terms to the present s.471B of the *Corporations Act 2001*[209], which permits (*inter alia*) the Commissioner to bring or continue a proceeding against a company being would up, with leave. But s.471B does not confer any right upon the Commissioner that is undermined by s.25(5) of the *Bell Act* having regard to the operation of ss.177, 208 and 209 of the *ITAA 1936*. Section 177 is dealt with below.

163. It does not follow that because s.25(5) of the *Bell Act* does not provide for the granting of leave to permit the Commissioner to proceed with an action under

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[206] BGNV's Submissions at [60].
[207] BGNV's Submissions at [60].
[208] BGNV's Submissions at [60].
[209] Section 471B provides: "While a company is being wound up in insolvency or by the Court, or a provisional liquidator of a company is acting, a person cannot begin or proceed with: (a) a proceeding in a court against the company or in relation to property of the company; or (b) enforcement process in relation to such property; except with the leave of the Court and in accordance with such terms (if any) as the Court imposes".

s.209 of the *ITAA 1936*, that the two provisions are inconsistent. Section 471B does not permit the Commonwealth to seek leave, or empower a Court to grant leave, to enable the Commissioner to commence or continue with an action under s.209 that will give the Commonwealth a priority.

164. The terms of s.471B of the *Corporations Act 2001* have remained essentially the same throughout their iterations in various uniform companies legislation schemes in Australia; State companies legislation prior to those schemes; and United Kingdom legislation[210].

165. The purpose of s.471B and its predecessor provisions was explained by McClelland J in *Re Sydney Formworks Pty Ltd (in liq)*[211]:

> This view is in keeping with what I consider to be the obvious intention of the section, namely, to ensure that the assets of the company in liquidation will be administered in accordance with the provisions of the Companies Act and that no person will get an advantage to which, under these provisions, he is not properly entitled...

166. To similar effect is McPherson J in *Re Gordon and Grant*[212]:

> The precise purpose and function of provisions similar to s.230(3) [a predecessor of s.471B] have seldom been explained. From time to time the suggestion has been made that the prohibition exists in order to effectuate the statutory policy of ensuring that corporate assets are distributed rateably amongst all creditors so that none of them will gain an advantage over others: see eg *Re Sydney Formworks Pty Ltd* [1965] NSWR 646 at 649–650. But in Australia at least it is not often that the institution of proceedings or even the recovery of judgment operates to confer a priority or advantage on a litigating creditor. A more convincing explanation is that, without the relevant restriction, a company in liquidation would be subjected to a multiplicity of actions which would be both expensive and time-consuming, as well in some cases as unnecessary. This explanation has been accepted in a number of Canadian cases and appears also to have been adopted by Street J in *Re AJ Benjamin Ltd* (1969) 90 WN (NSW) 107 at 109. It is consistent with this that there should be no automatic prohibition upon proceedings against a company in members' voluntary winding up, where the company is solvent and therefore less likely to be the target of numerous actions.

167. In respect of this passage, the unaddressed issue in it is clarified in *McPherson's Law of Company Liquidation*[213]:

> The assumption underlying such statements appears to be that a creditor whose action is permitted to continue may somehow thereby obtain priority in the winding up, but this consideration is valid only in those comparatively rare instances where a judgment, without more, has the effect of creating a security interest in the property of the company. Indeed, once a writ in rem (eg against a ship) is issued, the plaintiff becomes a secured creditor and would therefore probably be entitled to leave under the section [citing *Re Aro Co Ltd* [1980] Ch 196]. Moreover, this explanation assumes that creditors' actions are the only ones affected by s.471B, whereas the prohibition is

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[210] *Re Sydney Formworks Pty Ltd (in liq)* [1965] NSWR 646 at 648 (McLelland J).
[211] *Re Sydney Formworks Pty Ltd (in liq)* [1965] NSWR 646 at 649–650.
[212] *Re Gordon and Grant Pty Ltd* [1983] 2 Qd R 314 at 316–317.
[213] Thomson Reuters, *McPherson's Law of Company Liquidation* (at 9 April 2015) at [7.900]. See also, *Re Aro Co Ltd* [1980] Ch 196 at 203.

> directed equally against actions by shareholders and others as well [citing *Lepage v Stewart* (1916) 53 SCR 337; 29 DLR 607 at 351 (Brodeur J)] (though in practice it is with creditors' actions that s.471B is chiefly concerned)...
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> The real justification for s.471B is to be found elsewhere. Its purpose is two-fold: to avoid for the liquidator inconvenience and expense of litigation; and to oblige all claimants to submit to the procedural scheme established in winding up, which provides for an orderly process of winding up.

168. Because s.471B of the *Corporations Act 2001* does not confer a priority, nothing in the *Bell Act* undermines s.209 of the *ITAA 1936*.

169. Further to this, having regard to the submissions below concerning s.177 of the *ITAA 1936*, a circumstance would not arise where the Commissioner would seek leave under s.471B in respect of a taxation liability that is a Crown debt.

170. Sections 208 and 209 of the *ITAA 1936* did not remove due income tax debts, owed by insolvent companies to the Commonwealth, outside of the operation of companies legislation that dealt with priorities in winding up. As with s.215, s.208 does not confer upon the Commonwealth any assurance of receipt or priority.

171. Due and payable income tax remains a debt due to the Commonwealth and a liability of the WA Bell Companies to be dealt with pursuant to Part 4 Division 3 of the *Bell Act*. This is in the same manner as such liabilities would have been dealt with prior to the *Corporations Act 2001* under other State laws.

Section 177 of the *ITAA*

172. There is a further contended for inconsistency with the *ITAA 1936*, namely s.177. Section 177 was replaced as and from 1 July 2015 by item 2 of s.350-10(1) of Schedule 1 to the *TAA*[214]. Section 177(1) and item 2 of s.350-10(1) operate in the same way in respect of notices of assessment.

173. The effect of s.177 of the *ITAA 1936*, with s.7 of the *Acts Interpretation Act 1901* (Cth), is that a notice of assessment 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[215].

174. BGNV contends[216] that a consequence of the Commissioner serving pre and post liquidation assessments is that the assessment of liability is conclusive (in the sense explained) and that as a consequence; a liquidator is bound by the conclusive evidence provision; the Commissioner has a "statutory right" to prove in the winding up of a company; subject to some exceptions, a right to *pari passu* treatment with other unsecured creditors; and a right to the benefit of the liquidator's administration of the company's estate.

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[214] See Amended Special Case in S248 of 2015 at [66] (SCB at 184).
[215] See Amended Special Case in S248 of 2015 at [66] (SCB at 184).
[216] BGNV's Submissions at [61].

175. It is contended that the *Bell Act* undermines this in a number of ways. *First*, because the Authority can determine the liabilities of the WA Bell Companies and the Governor can make a determination inconsistent with the conclusive evidence provisions[217]. *Second*, because the liabilities of a WA Bell Company (including to the Commissioner) are extinguished upon dissolution of the company under s.30 of the *Bell Act*[218]. *Third*, because ss.42 to 44 of the *Bell Act* provide for the release, discharge and extinguishment of liabilities of a WA Bell Company[219].

176. For the reasons adverted to above in the consideration of ss.215 and 254 of the *ITAA 1936*, the contention that the Commissioner has a right "subject to some exceptions" to *pari passu* treatment with other unsecured creditors should be rejected. This is also addressed below. No-one has a "right" to *pari passu* distribution of the assets of an insolvent company. Such a contention is inconsistent with the Crown's prerogative.

PART VII: LENGTH OF ORAL ARGUMENT

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

Dated: 23 March 2016

G R Donaldson SC
Telephone: (08) 9264 1806
Facsimile: (08) 9321 1385
Email: grant.donaldson@sg.wa.gov.au

A J Sefton
Telephone: (08) 9264 1661
Facsimile: (08) 9321 1385
Email: a.sefton@sso.wa.gov.au

R Young
Telephone: (08) 9264 1692
Facsimile: (08) 9321 1385
Email: r.young@sso.wa.gov.au

[217] BGNV's Submissions at [61].
[218] BGNV's Submissions at [62].
[219] BGNV's Submissions at [62].