

# HIGH COURT OF AUSTRALIA

FRENCH CJ,  
KIEFEL, BELL, GAGELER, KEANE, NETTLE AND GORDON JJ

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**Matter No S248/2015**

BELL GROUP N.V. (IN LIQUIDATION) & ANOR PLAINTIFFS

AND

THE STATE OF WESTERN AUSTRALIA DEFENDANT

**Matter No P63/2015**

W.A. GLENDINNING & ASSOCIATES PTY LTD PLAINTIFF

AND

THE STATE OF WESTERN AUSTRALIA DEFENDANT

**Matter No P4/2016**

MARANOA TRANSPORT PTY LTD (IN LIQ) &  
ORS PLAINTIFFS

AND

STATE OF WESTERN AUSTRALIA & ORS DEFENDANTS

*Bell Group N.V. (in liquidation) v Western Australia*  
*W.A. Glendinning & Associates Pty Ltd v Western Australia*  
*Maranoa Transport Pty Ltd (in liq) v Western Australia*

[2016] HCA 21

16 May 2016

S248/2015, P63/2015 & P4/2016



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**ORDER**

**Matter No S248/2015**

*The questions stated by the parties in the amended special case dated 29 February 2016 and referred for consideration by the Full Court be answered as follows:*

**Question 1**

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

**Answer**

*Yes.*

**Question 1A**

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

**Answer**

*Yes.*

**Question 2**

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

**Answer**

*Yes.*



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**Question 3**

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

**Answer**

*Unnecessary to answer.*

**Question 4**

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

**Answer**

*Unnecessary to answer.*

**Question 5**

*Who should pay the costs of the special case?*

**Answer**

*The defendant.*

**Matter No P63/2015**

*The questions stated by the parties in the amended special case dated 26 February 2016 and referred for consideration by the Full Court be answered as follows:*

**Question 1**

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

**Answer**

*Yes.*



**Question 2**

*Does any justiciable controversy arise in respect of the alleged invalidity of Parts 3 and 4 of the Bell Act on the grounds alleged in paragraphs 56.1 and 56.2 of the statement of claim insofar as the grounds rely upon s 215 of the [Income Tax Assessment Act 1936 (Cth)] (alternatively, s 260-45 of Schedule 1 to the [Taxation Administration Act 1953 (Cth)])?*

**Answer**

Yes.

**Question 3**

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

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

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

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

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

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

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

**Answer**

(a)(i)(1) *Yes. The Bell Act is invalid in its entirety.*



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(a)(i)(2) *Unnecessary to answer.*

(a)(i)(3) *Unnecessary to answer.*

(b) *Unnecessary to answer.*

**Question 4**

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

**Answer**

*The Bell Act is invalid in its entirety.*

**Question 5**

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

**Answer**

*Unnecessary to answer.*

**Question 6**

*Who should pay the costs of the special case?*

**Answer**

*The defendant.*

**Matter No P4/2016**

*The questions stated by the parties in the amended special case dated 26 February 2016 and referred for consideration by the Full Court be answered as follows:*

**Question 1**

*Do the Plaintiffs have standing to seek relief in respect of the alleged invalidity of Parts 3 and 4 of the [Bell Group Companies (Finalisation of*



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Matters and Distribution of Proceeds) Act 2015 (WA) ("the Bell Act")] on the grounds alleged in:

- (a) paragraph 56.1 of the [statement of claim], insofar as the grounds rely upon ss 215 of the [Income Tax Assessment Act 1936 (Cth)] (alternatively, s 260-45 of Schedule 1 to the [Taxation Administration Act 1953 (Cth)]) and 254(1)(h) of the [Income Tax Assessment Act 1936 (Cth)]; and
- (b) paragraphs 56.2, 56.3 and 56.4 of the [statement of claim]?

**Answer**

- (a) Yes.
- (b) Yes.

**Question 2**

Does any justiciable controversy arise in respect of the alleged invalidity of Parts 3 and 4 of the Bell Act on the grounds alleged in paragraphs 56.1 and 56.2 of the [statement of claim] insofar as the grounds rely upon s 215 of the [Income Tax Assessment Act 1936 (Cth)] (alternatively, s 260-45 of Schedule 1 to the [Taxation Administration Act 1953 (Cth)]) and s 254(1)(h) of the [Income Tax Assessment Act 1936 (Cth)]?

**Answer**

Yes.

**Question 3**

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

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



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

**Answer**

(a) *Yes. The Bell Act is invalid in its entirety.*

(b) *Unnecessary to answer.*

**Question 4**

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

**Answer**

*The Bell Act is invalid in its entirety.*

**Question 5**

*Who should pay the costs of the special case?*

**Answer**

*The first defendant.*

**Representation**

B W Walker SC with A A D'Arcy for the plaintiffs in S248/2015 (instructed by Lipman Karas)

S Penglis with A K Sharpe and B C Gauntlett for the plaintiff in P63/2015 (instructed by DLA Piper Australia)

C G Colvin SC with J C Vaughan SC and P A Walker for the plaintiffs in P4/2016 (instructed by Ashurst)

G R Donaldson SC, Solicitor-General for the State of Western Australia with A J Sefton and R Young for the defendant in S248/2015 and P63/2015 and the first defendant in P4/2016 (instructed by State Solicitor (WA))

Submitting appearance for the second defendants in P4/2016



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### **Interveners**

J T Gleeson SC, Solicitor-General of the Commonwealth with J A Watson, M J O'Meara and Z C Heger for the Attorney-General of the Commonwealth and the Commissioner of Taxation, both intervening (instructed by Australian Government Solicitor)

M G Sexton SC, Solicitor-General for the State of New South Wales with S Robertson for the Attorney-General for the State of New South Wales, intervening (instructed by Crown Solicitor (NSW))

M G Hinton QC, Solicitor-General for the State of South Australia with D F O'Leary for the Attorney-General for the State of South Australia, intervening (instructed by Crown Solicitor (SA))

P J Dunning QC, Solicitor-General of the State of Queensland with A D Keyes for the Attorney-General of the State of Queensland, intervening (instructed by Crown Law (Qld))

M E O'Farrell SC, Solicitor-General of the State of Tasmania with S K Kay for the Attorney-General of the State of Tasmania, intervening (instructed by Crown Law (Tas))

R M Niall QC, Solicitor-General for the State of Victoria with K E Foley for the Attorney-General for the State of Victoria, intervening (instructed by Victorian Government Solicitor)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.



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## CATCHWORDS

**Bell Group N.V. (in liquidation) v Western Australia**  
**W.A. Glendinning & Associates Pty Ltd v Western Australia**  
**Maranoa Transport Pty Ltd (in liq) v Western Australia**

Constitutional law – Inconsistency between Commonwealth and State laws – *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Act 2015 (WA)* – Where rights and obligations arose and had accrued to Commonwealth under Commonwealth law prior to commencement of State law – Where State law purports to create scheme under which Commonwealth tax debts stripped of characteristics ascribed to them by *Income Tax Assessment Act 1936 (Cth)* and *Taxation Administration Act 1953 (Cth)* – Whether State law invalid by reason of s 109 of Constitution – Whether State law alters, impairs or detracts from operation of Commonwealth law – Whether provisions can be read down or severed – Whether State law invalid in its entirety.

Constitutional law – Standing – Where Attorney-General of Commonwealth intervened generally in support of plaintiffs – Whether plaintiffs have standing in their own right to challenge validity of State law.

Words and phrases – "accrued rights", "alter, impair or detract from", "inconsistency", "justiciable controversy", "reading down", "severance", "standing".

Constitution, s 109.

*Income Tax Assessment Act 1936 (Cth)*, ss 177, 208, 209, 215, 254.

*Taxation Administration Act 1953 (Cth)*, Sched 1, ss 255-5, 260-45, 350-10(1).

*Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Act 2015 (WA)*.



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1 FRENCH CJ, KIEFEL, BELL, KEANE, NETTLE AND GORDON JJ. In November 2015, the Parliament of Western Australia enacted the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Act 2015* (WA) ("the Bell Act")<sup>1</sup> – an "Act to provide a legislative framework for the dissolution, and administration of the property, of The Bell Group Ltd ACN 008 666 993 (In Liquidation) and certain of its subsidiaries and for related purposes"<sup>2</sup> – to deal with a list of companies, each defined in the Bell Act as a "WA Bell Company"<sup>3</sup>. When the Bell Act was enacted, each WA Bell Company was in liquidation or deregistered. None of the windings up of the companies in liquidation had concluded prior to 27 November 2015, which was the "transfer day" under the Bell Act<sup>4</sup>.

2 There are three proceedings before the Court – S248 of 2015 ("the BGNV Proceeding"), P63 of 2015 ("the WA Glendinning Proceeding") and P4 of 2016 ("the Maranoa Transport Proceeding"). The State of Western Australia is a defendant in each proceeding.

3 In each proceeding, the parties stated a special case and questions of law arising for the opinion of the Full Court under r 27.08.1 of the High Court Rules 2004 (Cth). The questions of law include whether the Bell Act or certain provisions of the Bell Act are invalid by the operation of s 109 of the Constitution because of inconsistency with one or more provisions of the *Income Tax Assessment Act 1936* (Cth) ("the 1936 Act") and the *Taxation Administration Act 1953* (Cth) ("the TAA") (collectively, "the Tax Acts"), the *Corporations Act 2001* (Cth) ("the Corporations Act"), and s 39(2) of the *Judiciary Act 1903* (Cth) ("the Judiciary Act"). The plaintiffs in the BGNV Proceeding and the

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1 The Bell Act received the Royal Assent on 26 November 2015. The Bell Act was amended by the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Amendment Act 2016* (WA) ("the Amending Act"). The Amending Act received the Royal Assent on the evening of 5 April 2016 – the first day of the hearings before this Court.

2 Long title.

3 s 3(1), Sched 1 to the Bell Act.

4 Section 3(1) of the Bell Act defines "transfer day" to mean "the day on which Part 3 [of the Bell Act] comes into operation", which was on the day after the Bell Act received the Royal Assent: s 2(1)(d) of the Bell Act.

French CJ  
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WA Glendinning Proceeding also contended that provisions of the Bell Act are invalid because they infringe Ch III of the Constitution.

### Interveners

4 The Commissioner of Taxation ("the Commissioner") sought, and was granted, leave to intervene in each proceeding in relation to the question of inconsistency between the Bell Act and the Tax Acts. The Attorney-General of the Commonwealth intervened pursuant to s 78A of the Judiciary Act in each proceeding.

5 The Solicitor-General of the Commonwealth appeared for both the Commissioner and the Attorney-General of the Commonwealth in relation to the question of inconsistency between the Bell Act and the Tax Acts. The Attorney-General of the Commonwealth also made submissions in respect of three other issues – aspects of the proper construction of ss 5F and 5G of the Corporations Act; whether the Bell Act is inconsistent with s 39(2) of the Judiciary Act within the meaning of s 109 of the Constitution; and whether the Bell Act infringes Ch III of the Constitution.

6 Each of the Attorneys-General of the other States intervened. Each intervening State addressed the question of the proper construction of ss 5F and 5G of the Corporations Act. South Australia, Queensland and Victoria also addressed whether the Bell Act is inconsistent with s 39(2) of the Judiciary Act within the meaning of s 109 of the Constitution and whether the Bell Act infringes Ch III of the Constitution.

### Standing

7 In each proceeding, the State of Western Australia initially contested the standing of the plaintiffs to challenge the validity of the Bell Act in relation to inconsistencies with the Tax Acts. However, when the Attorney-General of the Commonwealth intervened and adopted the proposed submissions of the Commissioner, generally in support of the plaintiffs, that issue fell away<sup>5</sup>.

8 It should nevertheless be observed that the plaintiffs have standing in their own right to challenge the validity of the Bell Act. That is because, like the

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5 See *Williams v The Commonwealth* (2012) 248 CLR 156 at 181 [9], 223-224 [112], 240 [168], 341 [475], 361 [557]; [2012] HCA 23.

French CJ  
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Bell J  
Keane J  
Nettle J  
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Commissioner, they have an interest in the due administration of the liquidation of debtor companies – an interest which is sufficient to seek the assistance of the Court to ensure that the company's assets are dealt with in accordance with the law governing the winding up<sup>6</sup>. Once the plaintiffs' interest is correctly identified it will be understood that the central theme of Western Australia's argument, that the enactment of the Bell Act might not mean that the plaintiffs (and the Commissioner) will receive less than they would in a winding up, and that they will therefore not be adversely affected by it, misses the point.

### The Bell Act is invalid

9 For the reasons which follow, it should be concluded that the Bell Act is invalid in its entirety by the operation of s 109 of the Constitution because of inconsistency between provisions of the Bell Act and provisions of the Tax Acts. The Bell Act purports to create a scheme under which Commonwealth tax debts are stripped of the characteristics ascribed to them by the Tax Acts as to their existence, their quantification, their enforceability and their recovery. The rights and obligations which arose and had accrued to the Commonwealth as a creditor of the WA Bell Companies in liquidation, and to the Commissioner, under a law of the Commonwealth prior to the commencement of the Bell Act are altered, impaired or detracted from by the Bell Act.

### Facts

#### *Relevant entities*

(a) BGNV

10 The first plaintiff in the BGNV Proceeding, Bell Group NV (in liq) ("BGNV"), is a company formed or incorporated in the Netherlands Antilles. It was registered as a foreign company in each jurisdiction in Australia under s 344 of the Corporations Law on 4 April 1996. In 1995, Troika Holding BV was appointed BGNV's liquidator in the Netherlands Antilles. On 19 July 1996, the second plaintiff in the BGNV Proceeding ("Mr Trevor") was appointed the liquidator of BGNV in Western Australia by order of the Supreme Court of

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6 *Commissioner of Stamp Duties (Q) v Livingston* (1964) 112 CLR 12 at 22-23; [1965] AC 694 at 712-713; *Federal Commissioner of Taxation v Linter Textiles Australia Ltd (In liq)* (2005) 220 CLR 592 at 606-607 [31], 612-613 [54]; [2005] HCA 20.

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Western Australia to assist the insolvency administration of BGNV in the Netherlands Antilles.

11 On 26 March 1997, the Supreme Court of Western Australia ordered that BGNV be wound up by the Court in insolvency under the Corporations Law and that Mr Trevor be appointed as ancillary liquidator of BGNV in Australia for the purpose of its winding up. The winding up of BGNV has not concluded.

(b) TBGL and its subsidiaries

12 The Bell Group Limited (in liq) ("TBGL") is the holding company of a group of companies known as "the Bell Group". TBGL's wholly owned subsidiaries include BGNV, Bell Group Finance Pty Ltd (in liq) ("BGF") (which acted as the treasury entity for the Bell Group) and Maranoa Transport Pty Ltd (in liq) ("Maranoa Transport"), the plaintiff in the Maranoa Transport Proceeding.

13 Mr Woodings is the liquidator (or provisional liquidator) of a number of companies in the Bell Group. The companies relevantly fall into two groups – the WA Bell Companies<sup>7</sup> and those companies<sup>8</sup> that are not WA Bell Companies. Immediately prior to the commencement of the Corporations Act, each WA Bell Company was registered and incorporated in Western Australia under Western Australian law. After the commencement of the Corporations Act, each WA Bell Company was taken, by operation of s 1378 of that Act, to be registered in Western Australia and incorporated in Australia. Under the Bell Act as amended, a reference to a "WA Bell Company" includes Maranoa Transport<sup>9</sup>, even though

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7 Albany Broadcasters Ltd (in liq), Ambassador Nominees Pty Ltd (in liq), Belcap Enterprises Pty Ltd (in liq), Bell Bros Holdings Ltd (in liq), Bell Bros Pty Ltd (in liq), Bell Equity Management Ltd (in liq), BGF, Bell Publishing Group Pty Ltd (in liq), Dolfinne Pty Ltd (in liq), Dolfinne Securities Pty Ltd (in liq), Harlesden Finance Pty Ltd (in liq), Industrial Securities Pty Ltd (in liq), Maranoa Transport, Neoma Investments Pty Ltd (in liq), TBGL, TBGL Enterprises Ltd (in liq), Wanstead Pty Ltd (in liq), Wanstead Securities Pty Ltd (in liq), WAON Investments Pty Ltd (in liq), Wigmores Tractors Pty Ltd (in liq).

8 Great Western Transport Pty Ltd (in liq), Maradolf Ltd (in liq), W&J Investments Pty Ltd (in liq), Western Interstate Pty Ltd (Provisional Liquidator Appointed), Western Transport Pty Ltd (in liq).

9 s 3(5) of the Bell Act, inserted by s 4(2) of the Amending Act.

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that company was not taken to be registered in Western Australia, but in Queensland. As seen earlier, none of the windings up of the companies in liquidation had concluded prior to 27 November 2015, which was the "transfer day" under the Bell Act.

(c) Creditors of the Bell Group companies

14 BGNV is an ordinary, unsecured creditor of TBGL and BGF with an admitted proof of debt in the windings up of TBGL and BGF of \$69,334,059 and \$394,809,067.88 respectively.

15 WA Glendinning & Associates Pty Ltd ("WA Glendinning"), the plaintiff in the WA Glendinning Proceeding, is an ordinary, unsecured creditor of BGF with an admitted proof of debt in the winding up of BGF of \$183,297,347.04.

16 The Commonwealth is also a creditor. It has lodged proofs of debt (or amended proofs of debt) for unpaid tax liabilities totalling \$167,648,203.86 in the windings up of 10 WA Bell Companies. The proofs are largely in respect of assessments for income tax for income years prior to the commencement of the winding up of that company and additional tax for late payment ("the pre-liquidation assessments"). The proofs have either been admitted or not been determined.

17 On 5 August 2015, TBGL notified the Commissioner under Pt 3-90 of the *Income Tax Assessment Act* 1997 (Cth) that it had formed an income tax consolidated group with effect from 1 July 2002, and that, as at the date of the notification, certain Bell Group companies<sup>10</sup> were subsidiary members of the consolidated group.

18 In August 2015, the Commissioner issued further income tax assessments to TBGL and the remaining WA Bell Companies in liquidation not forming part

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**10** Albany Broadcasters Ltd (in liq), Ambassador Nominees Pty Ltd (in liq), Belcap Enterprises Pty Ltd (in liq), Bell Equity Management Ltd (in liq), BGF, Bell Publishing Group Pty Ltd (in liq), Dolfinne Pty Ltd (in liq), Great Western Transport Pty Ltd (in liq), Harlesden Finance Pty Ltd (in liq), Maradolf Ltd (in liq), Maranoa Transport, TBGL Enterprises Ltd (in liq), W&J Investments Pty Ltd (in liq).

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of the consolidated group<sup>11</sup> in respect of taxation liabilities incurred after liquidation (from activities during the liquidation process) ("the post-liquidation assessments"). An income tax assessment was also issued to Mr Woodings in his capacity as liquidator of TBGL. The total amount of the post-liquidation assessments is \$298,190,348.70. Each assessment was issued by the Commissioner prior to the enactment of the Bell Act and prior to the "transfer day" under the Bell Act.

19 Other known creditors of TBGL have claimed debts totalling in excess of \$1.02 billion. The amount owed to other known creditors of BGF is estimated to exceed \$1.6 billion. The other known creditors of 14 other WA Bell Companies have claimed debts from those companies of more than \$1.41 billion.

#### The Bell Act

20 The Bell Act received the Royal Assent on 26 November 2015. Part 1 of the Bell Act came into operation on that day<sup>12</sup>. Sections 54 to 56 of the Bell Act (dealing with offences) are deemed to have come into operation at 12 noon on 5 May 2015<sup>13</sup>. The rest of the Act, other than s 47, came into operation on 27 November 2015<sup>14</sup>, the transfer day. The Bell Act does not operate retrospectively, except for ss 54 to 56. The following references are to the Bell Act as amended by the Amending Act<sup>15</sup>.

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11 Bell Bros Holdings Ltd (in liq), Bell Bros Pty Ltd (in liq), Dolfinne Securities Pty Ltd (in liq), Industrial Securities Pty Ltd (in liq), Neoma Investments Pty Ltd (in liq), Wanstead Pty Ltd (in liq), Wanstead Securities Pty Ltd (in liq), WAON Investments Pty Ltd (in liq), Wigmore's Tractors Pty Ltd (in liq).

12 s 2(1)(a) of the Bell Act.

13 Being the day before the Bill for the Bell Act was introduced into the Western Australian Legislative Assembly. See s 2(1)(c) and (2) of the Bell Act.

14 s 2(1)(b) and (d) of the Bell Act.

15 Section 2(b) of the Amending Act provides that certain provisions of the Amending Act are deemed to come into operation on the transfer day.

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21 The objects of the Bell Act are set out in s 4:

- "(a) to provide a mechanism, that avoids litigation, for the distribution of funds (the **Bell litigation funds**) received by the liquidator of TBGL and certain of its subsidiaries (the **Bell group of companies**) as a consequence of the Bell litigation<sup>16</sup> and the settlement of it in 2013;
- (b) to provide a form of external administration of WA Bell Companies and require that it be carried out only in accordance with the provisions of this Act;
- (c) to provide appropriate compensation to the creditors who funded the Bell litigation taking into account the funding provided and the associated risks assumed by them;
- (d) to reflect the circumstance that without the funding mentioned in paragraph (c), the Bell litigation funds would not exist and the creditors of the Bell group of companies would have received no (or only nominal) dividends in the liquidation of those companies;
- (e) to make reasonable provision for the distribution of the property of the WA Bell Companies having regard to the uncertainties existing as to the nature and extent of that property;
- (f) to make reasonable provision for the satisfaction of liabilities owed to creditors having regard to the uncertainties existing as to the nature and extent of those liabilities;
- (g) to distribute the Bell litigation funds generally in accordance with the commercial substance of the agreements between the liquidator and the creditors who funded the Bell litigation, as made before the enactment of this Act;

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**16** The "Bell litigation" means the litigation listed in Sched 2 to the Bell Act: s 3(1). More than 20 proceedings are listed, divided into three groups – the "Main proceedings", related foreign proceedings and related Supreme Court of Western Australia proceedings.

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- (h) to avoid further litigation that will waste the resources of the State and other persons and consume the Bell litigation funds."

*The Authority and the Fund*

22 The WA Bell Companies Administrator Authority ("the Authority") and the WA Bell Companies Administrator Authority Fund ("the Fund") established by the Bell Act are essential to the scheme of the Bell Act.

23 Section 7 of the Bell Act establishes the Authority as a body corporate<sup>17</sup> with the "status, immunities and privileges of the State"<sup>18</sup>, to be governed by the "Administrator"<sup>19</sup>.

24 The functions of the Authority include "to collect, and realise or otherwise deal with, the property of the WA Bell Companies in accordance with the objects of [the Bell Act]"; "to administer each WA Bell Company until it is dissolved"; "to administer, invest and manage the Fund"; and "to perform any other functions that are conferred on it by [the Bell Act]"<sup>20</sup>.

25 Section 27(1) of the Bell Act provides that the Authority is "the administrator" of each WA Bell Company. While a WA Bell Company is under the administration of the Authority, the Authority has control of the WA Bell Company's property and affairs, with power, amongst other things, to manage that property and those affairs and dispose of any of that property<sup>21</sup>.

26 While a company is under the administration of the Authority, no person, other than the Authority, can perform or exercise, or purport to perform or exercise, a function or power as an officer of the company (including as liquidator) without the Authority's written approval, unless the performance or exercise of the function or power is in the exercise of a power or duty under the

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<sup>17</sup> s 7(1) and (2) of the Bell Act.

<sup>18</sup> s 7(6) of the Bell Act.

<sup>19</sup> s 7(5) of the Bell Act. The Administrator is appointed under s 8 of the Bell Act.

<sup>20</sup> s 9(1) of the Bell Act.

<sup>21</sup> s 28 of the Bell Act.

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Bell Act<sup>22</sup>. However, the Bell Act further provides that this restriction does not remove a director or the liquidator of a WA Bell Company from his or her office<sup>23</sup>.

27 The Fund is established under the Bell Act and is to be administered by the Authority<sup>24</sup>. The following must be credited to the Fund<sup>25</sup>:

- "(a) all money transferred to the Authority under Part 3 or realised out of other property transferred to, or vested in, the Authority under that Part;
- (b) money received from the investment of the Fund;
- (c) any advances made to the Authority under the *Financial Management Act 2006* section 28."

28 The amounts to be paid out of the Fund are listed in s 16(4) of the Bell Act and include, among other things, any payment determined by the Governor under s 44 of the Bell Act. It will be necessary to return to consider s 44.

### *Part 3 – WA Bell Companies*

29 Part 3 of the Bell Act is also essential to the scheme created by the Bell Act and ss 22 and 25 in that Part are critical.

30 Section 22, entitled "Transfer of property", relevantly provides:

- "(1) At the beginning of the *transfer day* the following are transferred to, and vested in, the Authority by force of this section —
  - (a) all property vested in a *WA Bell Company*, including property held by it on trust for any person;

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22 s 29(1) and (2) of the Bell Act.

23 s 29(3) of the Bell Act.

24 s 16(1) and (2) of the Bell Act.

25 s 16(3) of the Bell Act.

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- (b) all property held by any person (including a liquidator of a WA Bell Company) on behalf of or on trust for a WA Bell Company;
  - (c) all property held (in any capacity) by a person who is a liquidator of a WA Bell Company on trust for any person, other than property held in a capacity that does not relate to the liquidation of a WA Bell Company.
- (2) Property received by a WA Bell Company or another person, on or after the transfer day, that would have been transferred to, and vested in, the Authority by subsection (1) were it vested or held by the company or person as described in subsection (1) before the transfer day, is transferred to, and vested in, the Authority by force of this section, at the time at which it is received.
- (3) In relation to a reinstated WA Bell Company, property re-vested in the company as a consequence of its reinstatement is taken to have been received by the company for the purposes of subsection (2).
- (4) Subsection (1) or (2), whichever is relevant, does not apply to a share in a company that was a subsidiary of TBGL —
- (a) immediately before the transfer day; or
  - (b) if the company was deregistered before the transfer day — immediately before the time at which the company was deregistered.
- (5) A share to which subsection (1) or (2) would have applied but for subsection (4), is transferred to, and vested in, the Authority by force of this section immediately before the earlier of —
- (a) the day specified by the Authority, by instrument published in the *Gazette*, for the purposes of this paragraph; and
  - (b) the day on which the WA Bell Company is dissolved under section 30.
- (6) To the extent to which a right to make a taxation objection, or a right or capacity to seek the review of, or to appeal against, a decision of the Commissioner in relation to a taxation objection,

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is property of a WA Bell Company, subsection (1) or (2), whichever is relevant, does not apply to the right or capacity.

- (7) Words and expressions used in subsection (6) and also in [the TAA] Part IVC have the same meanings in that subsection as they have in that Part.
- (8) This section applies to property whether situated in or outside the State.
- (9) A transfer takes effect despite any restriction arising under contract, written law, the common law or in any other way.
- (10) All property transferred to the Authority under this section vests absolutely in the Authority freed from any encumbrance, trust, equity or interest (of any kind and however arising) to which it was subject immediately before so vesting.
- (11) The Authority has all the powers of an owner over property vested in it under this section.

..." (emphasis in sub-s (1) added)

31 Some aspects of s 22 and its interaction with other sections of the Bell Act should be noted.

32 The Authority has "all the powers of an owner over property vested in it" under s 22<sup>26</sup>. The Minister and the Authority "are each empowered and required to take all practicable steps" to secure the transfer and vesting of property under s 22 "[i]f a transfer and vesting of property under section 22 is not, *to any extent*, fully effective (whether because a matter is governed by a law other than the law of [Western Australia], or for any other reason)"<sup>27</sup> (emphasis added).

33 There are two exceptions in s 22 to property of the WA Bell Companies being transferred to, and vested absolutely in, the Authority on the transfer day: first, a right of a WA Bell Company to make a taxation objection or a right or

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26 s 22(11) of the Bell Act.

27 s 24 of the Bell Act.

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capacity of the company to seek the review of, or to appeal against, a decision of the Commissioner in relation to a taxation objection<sup>28</sup>; second, a share in a company that was a subsidiary of TBGL either immediately before the transfer day or, if the company was deregistered before the transfer day, immediately before the time at which the company was deregistered<sup>29</sup>. Any such share under the second exception is transferred to and vests in the Authority immediately before the earlier of the day specified by the Authority or the day on which the WA Bell Company is dissolved<sup>30</sup>.

34 Section 25 deals with the "[t]reatment of liabilities" of WA Bell Companies. Section 25(1) provides that:

"If, immediately before the transfer day, a liability of a WA Bell Company was admissible to proof against the company in the winding up of the company, that liability may be proved in accordance with Part 4 Division 2 of [the Bell Act]."

35 Section 25(3) provides that "[t]he liabilities may be proved by the liquidator (or by a *creditor* of a WA Bell Company or the liquidator if they have not been paid or satisfied) in accordance with Part 4 Division 2" (emphasis added). "[C]reditor", in relation to a WA Bell Company, is defined to mean "a person in relation to whom, immediately before the transfer day, the WA Bell Company had a liability and includes a beneficiary of any trust of, or with respect to, a liability"<sup>31</sup>. As is apparent, it extends to include secured creditors as well as a beneficiary who would not be a creditor under the Corporations Act.

36 Section 25(4) provides that "[i]f, by section 22, property is freed from an encumbrance, trust, equity or interest on being transferred to, and vested in, the Authority, that encumbrance, trust, equity or interest may be proved as a liability in accordance with Part 4 Division 2." Section 25(5) provides that:

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28 s 22(6) and (7) of the Bell Act.

29 s 22(4) of the Bell Act.

30 s 22(5) of the Bell Act.

31 s 3(1) of the Bell Act.

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"No action, claim or proceeding of any nature arising out of, or relating to, a liability that may be proved in accordance with Part 4 Division 2 may, otherwise than in accordance with that Part, be made or maintained against —

- (a) the Authority; or
- (b) the Fund; or
- (c) a WA Bell Company; or
- (d) a liquidator of a WA Bell Company; or
- (e) the Administrator; or
- (f) the State."

*Part 4 – "Completion of winding up of WA Bell Companies"*

37 Part 4 of the Bell Act is also essential to the scheme created by the Bell Act. It is headed "Completion of winding up of WA Bell Companies", but the heading is misleading. The Part does not provide for completion of the winding up of WA Bell Companies. Rather, it provides for the termination of the winding up of the WA Bell Companies that is provided for under the Corporations Act, and, among other effects on creditors, the purported annihilation of the rights of the Commonwealth as a creditor of certain WA Bell Companies to a pro-rata distribution of any surplus in a winding up under subdiv D of Div 6 of Pt 5.6 of the Corporations Act.

38 Division 2 of Pt 4 contains two sections, ss 33 and 34. They identify how the liability of a WA Bell Company may be asserted and brought to the attention of the Authority. The methods in ss 33 and 34 of the Bell Act are the only methods by which a liability may be "proved" for the purposes of s 25 of the Bell Act<sup>32</sup>.

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32 See [34]-[36] above.

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(a) Determinations and recommendations by the Authority

39 Division 3 of Pt 4, among other things, deals with recommendations by the Authority to the Minister with respect to "liabilities".

40 Under s 37, the Authority must determine, and has an absolute discretion in determining, the property and liabilities of each WA Bell Company<sup>33</sup>, and in doing so must have regard to specified matters and any other matters that the Authority in its discretion considers appropriate<sup>34</sup>. The rules of natural justice, including any duty of procedural fairness, do not apply to the Authority or to the Administrator in discharging functions under Pts 3 or 4 of the Bell Act<sup>35</sup>. The Authority must report to the Minister on the property and liabilities of each WA Bell Company as finally determined by the Authority under s 37<sup>36</sup>. The report must contain the recommendation of the Authority<sup>37</sup>, to the Minister, made under s 39 of<sup>38</sup>:

"the amount (*if any*) to be paid to a person, or the property (*if any*) to be transferred to or vested in a person (instead of or in addition to the payment of money), *in respect of the aggregate of all liabilities of all WA Bell Companies to that person as a creditor.*" (emphasis added)

The recommendation need not contain reasons<sup>39</sup>.

41 The Authority has an absolute discretion as to the quantification of any liability; as to the amount recommended to be paid to a person or the property recommended to be transferred to, or vested in, a person; and as to the priority to

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33 ss 35 and 37(1) and (3) of the Bell Act.

34 s 37(2) of the Bell Act.

35 s 74(3)(c) and (d) of the Bell Act.

36 s 38(1) of the Bell Act.

37 s 38(2) of the Bell Act.

38 s 39(1) of the Bell Act.

39 s 39(5) of the Bell Act.

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give to that payment, transfer or vesting<sup>40</sup>. The Authority also has absolute privilege in making that recommendation and in relation to any fact or matter stated in the recommendation<sup>41</sup>.

42 In making a recommendation, the Authority must have regard to, among other things, the objects of the Bell Act and any agreement between any of the creditors as to the distribution of the proceeds of the Bell litigation entered into after 12 noon on 5 May 2015<sup>42</sup>. In addition, the Authority may have regard to, among other things, the Authority's *assessment* of the value of unliquidated liabilities; the relative importance of the satisfaction of a liability to a creditor; the detriment to a creditor of not receiving payment of any liability in full; and any amount paid by a creditor for the acquisition of, or of any interest in, a liability<sup>43</sup>. But, subject to those considerations, the Authority retains absolute discretion.

43 Two other aspects of s 39 should be noted. First, nothing in s 39 requires that "the aggregate value of all money recommended to be paid, and all property recommended to be transferred or vested, under this section must be equal to the value of the money or property held by the Authority or the total liabilities of all WA Bell Companies as determined under section 37"<sup>44</sup>. Any surplus vests in the State of Western Australia<sup>45</sup>. Second, nothing in s 39 "creates any right in, or for the benefit of, a creditor of a WA Bell Company or any other person"<sup>46</sup>.

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40 s 39(6) of the Bell Act.

41 s 39(9) of the Bell Act.

42 s 39(2)(a) and (b) of the Bell Act.

43 s 39(2)(e) of the Bell Act.

44 s 39(7) of the Bell Act.

45 ss 46(2) and 48 of the Bell Act.

46 s 39(8) of the Bell Act.

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## (b) The Governor's determination

44 Division 4 of Pt 4 deals with the Governor's determination. The Minister must submit the report of the Authority under s 38(1) of the Bell Act to the Governor<sup>47</sup>. The Governor *may* determine an amount to be paid to, or property to be transferred to or vested in, a person<sup>48</sup>. The Governor's determination need not contain reasons<sup>49</sup>. The Governor is not required "to determine that any amount is to be paid to, or any property is to be transferred to or vested in, any person *on any account whatsoever*"<sup>50</sup> (emphasis added). The Governor has absolute privilege in making a determination and in relation to any fact or matter stated in a determination<sup>51</sup>. The rules of natural justice do not apply<sup>52</sup>. The Governor is not required to perform a function, or exercise a power, in a particular way in any particular circumstance<sup>53</sup>.

45 The Bell Act also expressly provides that nothing in Div 4 of Pt 4<sup>54</sup> "creates any right in, or for the benefit of, a creditor of a WA Bell Company or any other person"<sup>55</sup>; and, further, that, on the Governor making the determination, "every liability of every WA Bell Company to a person to whom *nothing is to be paid* and to whom *no property is to be transferred* and in whom *no property is to*

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47 s 42(1) of the Bell Act.

48 s 42(2) of the Bell Act.

49 s 43(4) of the Bell Act.

50 s 43(1) of the Bell Act.

51 s 43(7) of the Bell Act.

52 s 74(3)(a) of the Bell Act.

53 s 74(2) of the Bell Act.

54 ss 41-43 of the Bell Act, which deal with the Governor's determination.

55 s 43(6) of the Bell Act.

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*be vested* under a determination under [Div 4 of Pt 4] is, by force of this Act, discharged and extinguished"<sup>56</sup> (emphasis added).

46 Additionally, as seen earlier in relation to the Authority making a recommendation under s 39, the Bell Act does not require "that the aggregate value of all money determined by the Governor to be paid, and all property determined by the Governor to be transferred or vested, under [Div 4 of Pt 4] must be equal to the value of the money or property held by the Authority or the total liabilities of all WA Bell Companies as determined under section 37"<sup>57</sup>. The surplus simply goes to the State of Western Australia<sup>58</sup>.

47 Section 44 of the Bell Act contains provisions which purport to give effect to the Governor's determination. Section 44(3) provides that a person is *not* entitled to have a payment made to them, or property transferred to or vested in them, unless the person gives to the Authority a deed that, among other things, provides for the release or discharge of any person from any liability that the Minister considers appropriate. There are also time limits. Section 44(5) provides that three months after notice of the Governor's determination is given to a person, "every liability of every WA Bell Company to [that] person is, by force of [the Bell Act], discharged and extinguished"<sup>59</sup> and if the person has not given the executed deed of release or discharge in relation to the determination, "the determination ceases to have effect in relation to [that] person"<sup>60</sup>.

*Stay of proceedings and no appeal or review*

48 Section 73(1) provides that, on and from the transfer day, a person cannot begin or continue proceedings in a court with respect to property that was, immediately before that day, property of a WA Bell Company, except with the leave of the Supreme Court of Western Australia. This restriction does not apply, however, to a right to make a taxation objection, or a right or capacity to

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56 s 43(8) of the Bell Act.

57 s 43(2) of the Bell Act.

58 ss 46(2) and 48 of the Bell Act.

59 See s 44(4), (5)(a) and (8) of the Bell Act.

60 s 44(4), (5)(b) and (8) of the Bell Act.

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seek the review of, or to appeal against, a decision of the Commissioner in relation to a taxation objection, to the extent such a right or capacity is the property of the company<sup>61</sup>.

49 Finally, although expressed not to affect the jurisdiction of the Supreme Court of Western Australia to grant relief for jurisdictional error<sup>62</sup>, the Bell Act provides that any decision made, or other thing done, by the Governor, the Minister, the Authority or the Administrator under or for the purposes of the Bell Act is final and conclusive<sup>63</sup>; must not be challenged, appealed against, reviewed, quashed or called into question in any court<sup>64</sup>; and is not subject to review or remedy by way of prohibition, mandamus, injunction, declaration or certiorari, or a remedy having the same effect as a remedy that could be provided by means of such a writ, in any court on any account<sup>65</sup>.

#### Applicable principles – s 109 of the Constitution

50 Where there is an alleged conflict between a Commonwealth law and a State law, "s 109 requires a comparison between any two laws which create rights, privileges or powers, and duties or obligations, and s 109 resolves conflict, if any exists, in favour of the Commonwealth"<sup>66</sup>.

51 A conflict may arise in a number of ways. The State law, if valid, might "alter, impair or detract from the operation of a law of the Commonwealth Parliament"<sup>67</sup>. If so, then to that extent it will be invalid because of what

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61 s 73(2) and (3) of the Bell Act.

62 s 74(4) of the Bell Act.

63 s 74(1)(a) of the Bell Act.

64 s 74(1)(b) of the Bell Act.

65 s 74(1)(c) of the Bell Act.

66 *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 at 523 [37]; [2011] HCA 33.

67 *Jemena* (2011) 244 CLR 508 at 524 [39]. See also *Victoria v The Commonwealth* ("*The Kakariki*") (1937) 58 CLR 618 at 630; [1937] HCA 82; *Telstra Corporation* (Footnote continues on next page)

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sometimes is described as "direct inconsistency"<sup>68</sup>. As the Court said in *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd*<sup>69</sup>:

"The crucial notions of 'altering', 'impairing' or 'detracting from' the operation of a law of the Commonwealth have in common the idea that a State law *conflicts* with a Commonwealth law if the State law undermines the Commonwealth law." (emphasis added)

The conflict may also arise from the laws' legal operation or from their practical effect<sup>70</sup>.

52 "[A]ny alteration or impairment of, or detraction from, a Commonwealth law must be significant and not trivial"<sup>71</sup>. The question of whether any alteration or impairment of, or detraction from, a Commonwealth law is significant is "always one of fact and degree"<sup>72</sup>. The starting point is an analysis of the laws in question and their true construction<sup>73</sup>. The extent of the inconsistency "depends

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*Ltd v Worthing* (1999) 197 CLR 61 at 76 [28]; [1999] HCA 12; *Dickson v The Queen* (2010) 241 CLR 491 at 502 [13]-[14]; [2010] HCA 30.

68 See *Dickson* (2010) 241 CLR 491 at 502 [14]. See also *Telstra* (1999) 197 CLR 61 at 76 [27].

69 (2011) 244 CLR 508 at 525 [41]. See also *Metal Trades Industry Association v Amalgamated Metal Workers' and Shipwrights' Union* (1983) 152 CLR 632 at 642-643, 651; [1983] HCA 28; *Telstra* (1999) 197 CLR 61 at 76 [27].

70 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 399-400 [202]-[206]; [2005] HCA 44.

71 *Jemena* (2011) 244 CLR 508 at 525 [41].

72 *APLA* (2005) 224 CLR 322 at 400 [206].

73 *Momcilovic v The Queen* (2011) 245 CLR 1 at 111 [242], 135 [323]; [2011] HCA 34.

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on the text and operation of the respective laws"<sup>74</sup>. As Dixon J explained in *Wenn v Attorney-General (Vict)*<sup>75</sup>:

"[W]hile s 109 invalidates State legislation only so far as it is inconsistent, the question whether one provision of a State Act can have any operation apart from some other provision contained in the Act must depend upon the intention of the State legislation, ascertained by interpreting the statute. ... No doubt s 109 means a separation to be made of the inconsistent parts from the consistent parts of a State law. But it does not intend the separation to be made where division is only possible at the cost of producing provisions which the State Parliament never intended to enact."

#### Inconsistency with the Tax Acts

53 As seen earlier, the Commonwealth is a substantial creditor of a number of WA Bell Companies. The tax liabilities include pre-liquidation tax debts<sup>76</sup> and liabilities incurred after liquidation<sup>77</sup>.

#### *Rights of the Commonwealth and the Commissioner*

54 The legal operation and practical effect of the Tax Acts is such that the production of a notice of assessment is conclusive evidence of the due making of the assessment of a taxation liability and, except in proceedings under Pt IVC of the TAA, that the amount and all the particulars of the assessment are correct<sup>78</sup>.

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74 *Jemena* (2011) 244 CLR 508 at 526 [45] quoting *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 465; [1995] HCA 47.

75 (1948) 77 CLR 84 at 122; [1948] HCA 13.

76 See [16] above.

77 See [18] above.

78 Former s 177 of the 1936 Act (now Item 2 of the table in s 350-10(1) of Sched 1 to the TAA). See *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146; [2008] HCA 32. Item 2 of the table in s 350-10(1) of Sched 1 to the TAA applies to assessments issued after 1 July 2015, namely the post-liquidation assessments.

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The assessed taxation liability is a debt due to the Commonwealth which may be recovered by the Commissioner<sup>79</sup>.

55 The rights of the Commonwealth and the Commissioner to rely on an assessment in relation to the existence, quantification, enforceability and recovery of a taxation liability accrued under a law of the Commonwealth (the Tax Acts) *prior* to the commencement of the Bell Act and accrued in the Commonwealth's capacity as a creditor of each relevant WA Bell Company, including rights to a pro-rata distribution of any surplus in a winding up under subdiv D of Div 6 of Pt 5.6 of the Corporations Act. The Bell Act purports to override those rights.

56 As explained earlier, the purported legal operation and practical effect of the Bell Act is that the State of Western Australia collects, pools, and vests in a State authority, the property of each WA Bell Company<sup>80</sup>. The State of Western Australia then determines in its "absolute discretion" who is paid an amount or has property transferred to or vested in them out of the pooled property (if anyone)<sup>81</sup>. And then, to the extent that the State of Western Australia chooses not to distribute the pooled property of the WA Bell Companies, the surplus vests in the State of Western Australia<sup>82</sup>.

57 The Authority has an absolute discretion to determine the *existence of a liability* of a WA Bell Company to the Commissioner<sup>83</sup>. The Authority also has an absolute discretion as to the *quantification* of any liability of a WA Bell Company to the Commissioner<sup>84</sup>. The Governor has an absolute discretion

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79 Former ss 208 and 209 of the 1936 Act (now s 255-5 of Sched 1 to the TAA). Sections 208 and 209 apply to amounts due and payable before 1 July 2000. For tax debts due and payable after 1 July 2000, s 255-5 of Sched 1 to the TAA applies. Section 255-5 of Sched 1 to the TAA is in substantially similar terms to ss 208 and 209 of the 1936 Act.

80 ss 9, 10, 16 and 22 of the Bell Act.

81 ss 37, 38, 39, 40, 42, 43 and 44 of the Bell Act.

82 ss 39(7), 43(2) and 48 of the Bell Act.

83 ss 35, 37, 38 and 39 of the Bell Act.

84 ss 35, 37, 38 and 39 of the Bell Act.

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(on the recommendation of the Authority) whether to make a *payment* (or transfer or vest property) in respect of any liability determined by the Minister and the *amount* to be paid (or the property to be transferred or vested)<sup>85</sup> in respect of that liability. And the Governor is given the power to *extinguish* the tax debts of the Commonwealth simply by making *no* determination in respect of them<sup>86</sup>.

58 If the Governor does make a determination, she is effectively empowered to require the release or discharge of liabilities of the WA Bell Companies to the extent that they exceed any determination made, because, if the Governor determines an amount to be paid to a creditor, that payment can only be made on the condition that any liability the Minister considers appropriate is otherwise released or discharged<sup>87</sup>. If that condition is not met within three months of the determination, the liability is discharged and extinguished<sup>88</sup>.

59 Further, the Bell Act not only purports to allow the tax debts owed to the Commonwealth to be extinguished<sup>89</sup>, it provides that nothing in the recommendation of the Authority or the determination of the Governor creates any right in, or for the benefit of, the Commonwealth as a creditor of a WA Bell Company<sup>90</sup> and it prohibits any action, claim or proceeding of any nature being brought or continued by the Commissioner against a WA Bell Company in relation to the tax liabilities<sup>91</sup>.

60 The Bell Act thus purports to create a scheme under which Commonwealth tax debts are stripped of the characteristics ascribed to them by

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85 ss 35, 38, 39, 42, 43 and 44 of the Bell Act.

86 ss 42 and 43 of the Bell Act.

87 s 44(3) of the Bell Act.

88 s 44(5) of the Bell Act.

89 ss 43(8) and 44 of the Bell Act.

90 ss 39(8) and 43(6) of the Bell Act.

91 ss 25(5), 73 and 74 of the Bell Act.

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the Tax Acts as to their existence<sup>92</sup>, their quantification<sup>93</sup>, their enforceability and their recovery<sup>94</sup>. It purports to override the Commonwealth's accrued rights under a law of the Commonwealth as a creditor of each of the WA Bell Companies. With respect to the recovery of tax debts due to the Commonwealth, the Commonwealth (and the Commissioner) is reduced to the position of a mere supplicant for the exercise of a favourable discretion on the part of the Executive of the State of Western Australia. In particular, ss 9, 16, 22, 25, 35, 37, 38, 39, 42, 43, 44, 73 and 74 of the Bell Act have the effect of altering, impairing or detracting from s 177 of the 1936 Act (now Item 2 of the table in s 350-10(1) of Sched 1 to the TAA) and ss 208 and 209 of the 1936 Act (now s 255-5 of Sched 1 to the TAA).

61 The Bell Act thereby purports to alter, impair or detract from the operation of each of those rights which arose, and had accrued, to the Commonwealth and to the Commissioner under a law of the Commonwealth prior to the enactment of the Bell Act. That alteration or impairment of, or detraction from, the Tax Acts is significant so as to engage s 109 of the Constitution.

*Liquidator's obligations to the Commissioner*

62 Additionally, by operation of other provisions of the Tax Acts, in particular s 215 of the 1936 Act (now s 260-45 of Sched 1 to the TAA) and s 254 of the 1936 Act, in relation to the pre-liquidation tax debts, obligations of the liquidator of each WA Bell Company in liquidation had arisen in favour of the Commissioner<sup>95</sup>. They include an obligation under s 215 of the 1936 Act not to

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92 ss 35, 37, 38 and 39 of the Bell Act.

93 ss 35, 37, 38 and 39 of the Bell Act.

94 ss 35, 38, 39, 42, 43, 44, 73 and 74 of the Bell Act.

95 Section 215 of the 1936 Act was repealed in 2006: Item 161 of Sched 1 to the *Tax Laws Amendment (Repeal of Inoperative Provisions) Act 2006* (Cth). It remains relevant for the WA Bell Companies, except Albany Broadcasters Ltd (in liq), in respect of assessments issued by the Commissioner for periods before the 2006-07 income year: Item 1 of Sched 6 to the *Tax Laws Amendment (Repeal of Inoperative Provisions) Act 2006* (Cth). Section 260-45 of Sched 1 to the TAA, which is in substantially similar terms to s 215, applies to Albany Broadcasters Ltd (in liq).

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part with any of the assets of the company without the leave of the Commissioner until the liquidator has been notified by the Commissioner of the amount which appears to be sufficient to provide for any tax which is or will become payable by the company<sup>96</sup>, an obligation to set aside, out of the assets available for payment of ordinary debts of the company, assets to meet the taxation liabilities of a WA Bell Company<sup>97</sup> and, to the extent of the value of the assets that the liquidator is required to set aside, a liability to pay the tax<sup>98</sup>.

63 In relation to the post-liquidation tax debts, obligations are imposed on the liquidator of the WA Bell Companies in liquidation under s 254 of the 1936 Act. They include an obligation, as taxpayer, to do all things that are required to be done by the 1936 Act, among other Acts, in respect of the income, or any profits or gains of a capital nature, derived by him as liquidator and for the payment of tax thereon<sup>99</sup>, as well as an obligation to retain from time to time out of any money that comes to him as liquidator so much as is sufficient to pay tax which is or will become due in respect of any income, or any profits or gains of a capital nature, derived by him as liquidator<sup>100</sup>. That retention obligation crystallised once the Commissioner issued the post-liquidation assessments<sup>101</sup>. To the extent of any amount that he retained or should have retained under s 254(1)(d), the liquidator is under a liability to pay the tax as liquidator and personally<sup>102</sup>.

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**96** s 215(2) and (3)(a) of the 1936 Act.

**97** s 215(3)(b) of the 1936 Act. See also *Bruton Holdings Pty Ltd (In liq) v Federal Commissioner of Taxation* (2009) 239 CLR 346 at 351 [12], 352-353 [16]; [2009] HCA 32.

**98** s 215(3)(c) and (4)(a) of the 1936 Act.

**99** s 254(1)(a) of the 1936 Act.

**100** s 254(1)(d) of the 1936 Act.

**101** *Federal Commissioner of Taxation v Australian Building Systems Pty Ltd (In liq)* (2015) 90 ALJR 151 at 155 [1], 160 [26], 163 [42]-[43], 166 [58]; 326 ALR 590 at 591, 598, 602, 605; [2015] HCA 48.

**102** s 254(1)(e) of the 1936 Act.

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64 Each of those obligations imposed on the liquidator under s 215 of the 1936 Act (now s 260-45 of Sched 1 to the TAA) and s 254 of the 1936 Act had arisen, and was owed to the Commissioner, prior to the commencement of the Bell Act.

65 Section 22 of the Bell Act purports to transfer to and vest in the Authority all WA Bell Company property<sup>103</sup>, with the result that no funds are retained by the liquidator to meet the accrued tax liabilities (or the proportionate share of them) of the WA Bell Companies in liquidation, or the tax liabilities of the liquidator in that capacity. As a result, the Bell Act purports to prevent and prohibit the liquidator from complying with his obligations to retain funds and pay or cause the companies to pay tax debts pursuant to the Tax Acts.

66 Section 22 of the Bell Act thereby purports to substitute, for the obligations which had arisen and were owed to the Commissioner under the Tax Acts<sup>104</sup>, a mere expectancy or possibility of the payment of an uncertain amount resting in the discretion of the Authority and ultimately the Governor. Section 22 of the Bell Act thus has the purported effect of altering, impairing or detracting from s 215 of the 1936 Act (now s 260-45 of Sched 1 to the TAA) and s 254 of the 1936 Act. That alteration or impairment of, or detraction from, the Tax Acts is significant so as to engage s 109 of the Constitution.

#### Justiciable controversy

67 There is a dispute, which this Court does not need to resolve, as to whether lodging proofs of debt in the windings up, based on pre-liquidation assessments<sup>105</sup>, constitutes notice under s 215(2) of the 1936 Act. The Commissioner also served post-liquidation assessments<sup>106</sup> and, on

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**103** See also s 16(3) of the Bell Act at [27] above.

**104** In addition to the accrued obligations owed to the Commissioner under s 215 of the 1936 Act (now s 260-45 of Sched 1 to the TAA) and s 254 of the 1936 Act, on the transfer day, the Commonwealth also had a right to a pro-rata distribution of any surplus in a winding up under subdiv D of Div 6 of Pt 5.6 of the Corporations Act.

**105** See [16] above.

**106** See [18] above.

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26 November 2015, demanded TBGL and Mr Woodings pay the outstanding tax pursuant to the post-liquidation assessments.

68 Even if none of the steps taken by the Commissioner constitute notice under s 215(2) so that the liquidator's obligation to set aside under s 215(3) has not yet arisen, the Bell Act is inconsistent with and purportedly alters, impairs or detracts from s 215 of the 1936 Act (now s 260-45 of Sched 1 to the TAA) and s 254 of the 1936 Act. For those reasons, a justiciable controversy did arise in respect of the alleged invalidity of Pts 3 and 4 of the Bell Act.

#### Severance and reading down

69 Although s 109 invalidates the Bell Act only so far as it is inconsistent with a law of the Commonwealth, the Bell Act presents as a package of interrelated provisions which appears intended to operate fully and completely according to its terms. The evident purpose of it is to provide a comprehensive regime for dealing with all the relevant property of the WA Bell Companies and to give the Authority and the Governor complete discretion as to how all the liabilities of the WA Bell Companies are to be determined and as to any payments to be made (or property to be transferred) in respect of those liabilities.

70 That is not to say that there are not some provisions of the Bell Act which, if standing alone, would not be inconsistent with the Tax Acts. But, as parts of a regime for dealing with all the relevant property of the WA Bell Companies and giving the Authority and the Governor complete discretion in the determination of liabilities, those provisions assume the valid operation of the provisions of the Bell Act that vest the WA Bell Companies' property in the Authority and give the Authority and the Governor complete discretion as to how the liabilities of the WA Bell Companies are to be determined and paid. Consequently, severance of the provisions of the Bell Act<sup>107</sup> that have been identified as inconsistent with provisions of the Tax Acts would result in a radically different and essentially ineffective residue. The offending provisions are so fundamental to the scheme of the Bell Act and thus so bound up with the remaining provisions that severance of the offending provisions would leave standing a residue of "provisions which the State Parliament never intended to enact"<sup>108</sup>.

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**107** ss 9, 16, 22, 25, 35, 37, 38, 39, 42, 43, 44, 73 and 74 of the Bell Act.

**108** *Wenn* (1948) 77 CLR 84 at 122.

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71 It might be suggested that if s 22 of the Bell Act was inconsistent with a provision of the Tax Acts, the offending aspects of s 22 should be read down. But it is impossible by any permissible process of reading down to produce a result which is consistent with s 109 of the Constitution. Section 109 does not permit reading down that results in provisions that the State Parliament could never have intended to enact. Nor does s 109 permit reading into s 22 words which are not there. In particular, it is not possible under s 109 to read s 22 as if it provided, for example, that all of the property of the WA Bell Companies other than that which is set aside under s 215 of the 1936 Act shall be vested in the Authority. Nor may that be done under s 7 of the *Interpretation Act* 1984 (WA). That section "does not speak to the situation where the issue is not one of the absence of State legislative power, but is one of the extent of inconsistency, by operation of s 109 of the Constitution, of a State law made in exercise of concurrent power"<sup>109</sup>.

72 The only means available under s 109 for making s 22 of the Bell Act cease to be inconsistent with a provision of the Tax Acts is to completely sever s 22. And since, for the reasons already given, the scheme of the Bell Act is dependent upon the vesting of the WA Bell Companies' property in the Authority, severance of s 22 would result in a set of provisions which, to the extent they might be capable of any rational application, could not possibly have been regarded as something which the Parliament of Western Australia intended.

73 It should be concluded, therefore, that the Bell Act is invalid in its entirety.

#### Other questions

74 Each special case may thus be answered by reference to the fact that the Bell Act creates a scheme under which Commonwealth tax debts are stripped of the characteristics ascribed to them by the Tax Acts as to their existence, their quantification, their enforceability and their recovery, with the result that the Bell Act purports to override the Commonwealth's accrued rights as a creditor of each of the WA Bell Companies and the rights of the Commissioner. The Bell Act thereby significantly alters, impairs or detracts from the rights and obligations created by a law of the Commonwealth and existing prior to the commencement

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<sup>109</sup> *Sportsbet Pty Ltd v New South Wales* (2012) 249 CLR 298 at 317 [13]; [2012] HCA 13.

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of the Bell Act. That alteration or impairment of, or detraction from, the Tax Acts engages s 109 of the Constitution, which operates to render the offending provisions of the Bell Act invalid. The invalid provisions of the Bell Act are not severable from the rest of the Bell Act. The Bell Act is therefore invalid.

75 That being so, it is unnecessary to consider the other challenges to the validity of the Bell Act. There is no reason to depart from this Court's settled practice that it does not decide constitutional questions unless necessary for the decision<sup>110</sup>.

### Conclusion

76 For these reasons, the questions of law which the parties agreed in stating in the form of a special case for the opinion of the Full Court under r 27.08.1 of the High Court Rules should be answered as follows:

#### *Matter No S248 of 2015 – The BGNV Proceeding*

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

Answer: Yes.

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

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**110** *Attorney-General for NSW v Brewery Employés Union of NSW* (1908) 6 CLR 469 at 590; [1908] HCA 94; *Re Patterson*; *Ex parte Taylor* (2001) 207 CLR 391 at 473-474 [248]-[252]; [2001] HCA 51; *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140 at 199 [141]; [2009] HCA 51.

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Schedule 1 to the [*Taxation Administration Act* 1953 (Cth)]?

Answer: Yes.

Question 2: Is the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Act* 2015 (WA) invalid in its entirety?

Answer: Yes.

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

Answer: Unnecessary to answer.

Question 4: If the answer to question 3 is yes is the invalid provision severable from the rest of the Act (and, if so, to what extent)?

Answer: Unnecessary to answer.

Question 5: Who should pay the costs of the special case?

Answer: The defendant.

*Matter No P63 of 2015 – The WA Glendinning Proceeding*

Question 1: Do the plaintiffs have standing to seek relief in respect of the alleged invalidity of Parts 3 and 4 [of] the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Act* 2015 (WA) (**Bell Act**) on the grounds alleged in paragraphs 56 to 58 of the statement of claim?

Answer: Yes.

Question 2: Does any justiciable controversy arise in respect of the alleged invalidity of Parts 3 and 4 of the Bell Act on the grounds alleged in paragraphs 56.1 and 56.2 of the statement

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of claim insofar as the grounds rely upon s 215 of the [*Income Tax Assessment Act 1936* (Cth)] (alternatively, s 260-45 of Schedule 1 to the [*Taxation Administration Act 1953* (Cth)])?

Answer: Yes.

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

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

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

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

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

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

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

Answer: (a)(i)(1) Yes. The Bell Act is invalid in its entirety.

(a)(i)(2) Unnecessary to answer.

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(a)(i)(3) Unnecessary to answer.

(b) Unnecessary to answer.

Question 4: If any provisions of the Bell Act are invalid, are they severable from the rest of the Act (and, if so, to what extent); or is the Bell Act invalid in its entirety?

Answer: The Bell Act is invalid in its entirety.

Question 5: Is the Bell Act invalid in its entirety because it infringes Chapter III of the *Constitution* on the grounds alleged in paragraphs 69 and 71 of the Statement of Claim?

Answer: Unnecessary to answer.

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

Answer: The defendant.

*Matter No P4 of 2016 – The Maranoa Transport Proceeding*

Question 1: Do the Plaintiffs have standing to seek relief in respect of the alleged invalidity of Parts 3 and 4 of the [*Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Act 2015 (WA)* ("the Bell Act")] on the grounds alleged in:

(a) paragraph 56.1 of the [statement of claim], insofar as the grounds rely upon ss 215 of the [*Income Tax Assessment Act 1936 (Cth)*] (alternatively, s 260-45 of Schedule 1 to the [*Taxation Administration Act 1953 (Cth)*] and 254(1)(h) of the [*Income Tax Assessment Act 1936 (Cth)*]; and

(b) paragraphs 56.2, 56.3 and 56.4 of the [statement of claim]?

Answer: (a) Yes.

(b) Yes.

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Question 2: Does any justiciable controversy arise in respect of the alleged invalidity of Parts 3 and 4 of the Bell Act on the grounds alleged in paragraphs 56.1 and 56.2 of the [statement of claim] insofar as the grounds rely upon s 215 of the [*Income Tax Assessment Act 1936 (Cth)*] (alternatively, s 260-45 of Schedule 1 to the [*Taxation Administration Act 1953 (Cth)*]) and s 254(1)(h) of the [*Income Tax Assessment Act 1936 (Cth)*]?

Answer: Yes.

Question 3: Are any of ss 9, 10, 22, 25, 27, 28, 29, 30, 33, 35, 37, 38, 39, 40, 41, 42, 43, 44, 45, 47, 54, 55, 56, 68, 69, 71, 72 or 73 of the Bell Act invalid, and, if so, which and to what extent, by the operation of s 109 of the Commonwealth *Constitution* by reason of inconsistency between that provision (as a law of the State of Western Australia) and:

- (a) the *Income Tax Assessment Act 1936 (Cth)*, the *Income Tax Assessment Act 1997 (Cth)* or the *Taxation Administration Act 1953 (Cth)*, on the grounds alleged in paragraphs 40 to 56 and 91A of the statement of claim; further or alternatively:
- (b) the *Corporations Act 2001 (Cth)*, on the grounds alleged in paragraphs 59 to 91 and 91B of the statement of claim?

Answer: (a) Yes. The Bell Act is invalid in its entirety.  
(b) Unnecessary to answer.

Question 4: If any provisions of the Bell Act are invalid, are they severable from the rest of the Act (and, if so, to what extent); or is the Bell Act invalid in its entirety?

Answer: The Bell Act is invalid in its entirety.

Question 5: Who should pay the costs of the special case?

Answer: The first defendant.

77 GAGELER J. Section 109 of the Constitution resolves an inconsistency between a State law and a Commonwealth law made in the exercise of concurrent legislative power by rendering the State law "invalid", in the sense of "inoperative"<sup>111</sup>, "to the extent of the inconsistency". Thus, in *Victoria v The Commonwealth* ("*The Kakariki*"), Dixon J stated that "[w]hen a State law, if valid, would alter, impair or detract from the operation of a law of the Commonwealth Parliament, then to that extent it is invalid"<sup>112</sup>. The section does not render an inconsistent State law invalid to the extent that the State law has an operation consistent with the Commonwealth law provided that the State law operating to that more limited extent remains an expression of the legislative will of the State Parliament. That is the import of the further statement of Dixon J in *Wenn v Attorney-General (Vict)* that, while "s 109 means a separation to be made of the inconsistent parts from the consistent parts of a State law"<sup>113</sup>, "it does not intend the separation to be made where division is only possible at the cost of producing provisions which the State Parliament never intended to enact"<sup>114</sup>.

78 I agree with the conclusion, expressed in the formal answers proposed by the other members of the Court to the questions reserved, that the Bell Act is invalid in its entirety by reason of inconsistency with the Tax Acts. I also agree that, although the plaintiffs have standing quite independently of any intervention to raise questions about other potential bases of invalidity of the Bell Act, the conclusion of invalidity by reason of inconsistency with the Tax Acts makes it unnecessary to answer most of the other questions set out in the special cases. I agree with the substance of all of the proposed answers and do not quibble about their form.

79 However, I reach the conclusion that the Bell Act is invalid on a narrower basis than the other members of the Court. In my opinion, it is sufficient to conclude that the Bell Act is invalid in its entirety that ss 22 and 29 of the Bell Act are essential to the scheme of the Bell Act and that those sections, if valid, would alter, impair or detract from the operation of ss 215 of the 1936 Act (and the relevant equivalent provision of the TAA) and 254 of the 1936 Act. I do not think it necessary to address the question of the effect of ss 177, 208 and 209 of the 1936 Act (and the equivalent provisions of the TAA) on the Bell Act or to delve into related issues canvassed in argument concerning the *Crown Debts (Priority) Act* 1981 (Cth).

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111 *Butler v Attorney-General (Vict)* (1961) 106 CLR 268 at 274; [1961] HCA 32.

112 (1937) 58 CLR 618 at 630; [1937] HCA 82.

113 Compare *Victoria v The Commonwealth* ("*The Kakariki*") (1937) 58 CLR 618 at 631.

114 (1948) 77 CLR 84 at 122; [1948] HCA 13.

80 Section 22 of the Bell Act, if valid, would have had the immediate result on 27 November 2015 of vesting in the Authority all of the property of each WA Bell Company, including those then in liquidation. Section 29, if valid, from that same date would have had the ongoing effect of preventing the liquidator from performing any function (including any duty or responsibility<sup>115</sup>) or exercising any power (including any authority or discretion<sup>116</sup>) of the liquidator except with the consent of the Authority.

81 Unless each of those sections has full operation, the elaborate scheme for the external administration of the WA Bell Companies mapped out in the Bell Act simply cannot work. Section 22 is needed to sweep up all of the assets of each WA Bell Company in order to establish the pool of property, which includes the Fund, from which the Authority is to make payments or transfers to be determined by the Governor. Section 29 is needed to prevent the performance of an obligation or the exercise of a power by a liquidator coming into conflict with the performance by the Authority of the numerous functions conferred on it, which include not only managing the Fund and making payments or transfers determined by the Governor but also collecting and realising or otherwise dealing with the property of each WA Bell Company and administering each WA Bell Company until it is dissolved.

82 There is no dispute that ss 215 of the 1936 Act (or the relevant equivalent provision of the TAA) and 254 of the 1936 Act operated in relation to each WA Bell Company that was in liquidation immediately before 27 November 2015 and would continue to operate to impose obligations on the liquidator of each such WA Bell Company but for the operation of ss 22 and 29 of the Bell Act. Western Australia nevertheless argues that there is no inconsistency between the two groups of sections. I am not sure that I am able to follow the totality of the argument; I am sure that I am unable to accept its conclusion.

83 Section 215 of the 1936 Act is addressed, amongst other things, to the pre-liquidation tax liabilities of a company in liquidation. Section 215 relevantly provides:

- "(1) Every person (in this section called *the trustee*):
- (a) who is liquidator of any company which is being wound up;
  - ...
  - ...

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115 Section 5 of the *Interpretation Act* 1984 (WA), "function".

116 Section 5 of the *Interpretation Act* 1984 (WA), "power".

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shall within 14 days after he has become liquidator, ... give notice thereof to the Commissioner.

- (2) The Commissioner shall as soon as practicable thereafter, notify to the trustee 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 or principal, as the case may be.
- (3) Subject to subsection (3B), if the trustee is a person of the kind referred to in paragraph (1)(a) ..., the trustee:
  - (a) shall not, without the leave of the Commissioner, part with any of the assets of the company until the trustee has been so notified;
  - (b) shall set aside, out of the assets available for payment of ordinary debts of the company, assets to the value of an amount that bears to the value of the assets available for payment of ordinary debts of the company the same proportion as the amount notified by the Commissioner under subsection (2) bears to the sum of:
    - (i) the amount notified by the Commissioner under subsection (2);
    - (ii) any amount of prescribed tax that the Commissioner is required to notify to the trustee under an Act other than this Act and has so notified; and
    - (iii) the aggregate of the ordinary debts of the company (excluding any debt in respect of tax or prescribed tax); and
  - (c) is, to the extent of the value of the assets that the trustee is so required to set aside, liable as trustee to pay the tax.

...

- (3B) Nothing in paragraph (3)(a) prevents the trustee parting with assets of the company for the purpose of paying debts of the company that are not ordinary debts of the company.
- (3C) For the purposes of subsections (3) and (3B), a debt of the company is an ordinary debt if:
  - (a) the debt is an unsecured debt; and

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- (b) the debt is not required, under a law of the Commonwealth or of a State or Territory, to be paid in priority to some or all of the other debts of the company.
- (3D) In subsection (3), *prescribed tax* means any amount that the Commissioner is required to notify under a section of another Act that corresponds to this section.
- (4) If the trustee refuses or fails to comply with any provision of this section or refuses or fails as trustee duly to pay the tax for which the trustee is liable under subsection (3) ..., the trustee:
  - (a) is, to the extent of the value of the assets that the trustee is required under subsection (3) ... to set aside, personally liable to pay the tax".

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The section has a sequential operation. First, it imposes an obligation on a liquidator to notify the Commissioner of his or her appointment and not to part with any of the assets of the company without the leave of the Commissioner until such time as the liquidator is notified by the Commissioner of the amount which appears to be sufficient to provide for any tax which is or will become payable by the company ("the liquidator's initial retention obligation"). It confers a power on the Commissioner to notify the liquidator of the amount which appears to the Commissioner to be sufficient to provide for any tax which is or will become payable by the company ("the Commissioner's notification power"). Next, it imposes an obligation on the liquidator to set aside, out of the assets available for payment of ordinary debts of the company, assets to the value of an amount that is proportionate to the proportion which the amount notified by the Commissioner bears to the sum of the tax debts and other ordinary debts of the company ("the liquidator's proportionate setting aside obligation"). It imposes a liability on the liquidator, as liquidator, to pay the tax to the extent of the value of the assets that the liquidator is so required to set aside ("the liquidator's payment obligation"). Finally, in the event of the liquidator refusing or failing to comply with any of those obligations, it operates to impose a personal liability on the liquidator to pay the tax to the extent of the value of the assets that the liquidator is so required to set aside ("the liquidator's personal tax liability").

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Extrapolating from observations made by members of the Court in the course of adjudicating on issues of priority of payment which arose in the application of legislative antecedents of s 215<sup>117</sup>, Western Australia argues that the section is no more than a machinery provision imposing obligations on a

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<sup>117</sup> See the references in *The Commonwealth v Cigamatic Pty Ltd (In liq)* (1962) 108 CLR 372 at 388-389; [1962] HCA 40.

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liquidator for the purpose of ensuring that there will be funds at the conclusion of the winding up of a company sufficient to cover any distribution that might ultimately be required to be made to the Commonwealth in respect of that company's pre-liquidation tax debts. Just what that distribution might be, Western Australia argues, is left by the section to be determined in accordance with whatever the law is that governs the winding up, irrespective of whether that law is a law of the Commonwealth or of a State or Territory. The Bell Act, Western Australia argues, is such a law.

86 Western Australia's characterisation glosses the legal operation of the section and understates its purpose. The characterisation fails to account for the precise method of quantification of the liquidator's proportionate setting aside obligation set out in s 215(3)(b). That method of quantification provides its own measure of the value of the assets of a company that are to be set aside in performance of the liquidator's proportionate setting aside obligation. Through the definition of "ordinary debt" in s 215(3C)(b), that method of quantification draws on the effect of such law of the Commonwealth or of a State or Territory as might govern the priority of payment of debts of the company. But the method of quantification is not otherwise dependent on the operation of any law of the Commonwealth or of a State or Territory.

87 Western Australia's characterisation, more fundamentally, fails to account for the equivalence of the value of the assets required to be set aside in performance of the liquidator's proportionate setting aside obligation with the amount of the liquidator's payment obligation imposed, separately from any other law of the Commonwealth or of a State or Territory, by force of s 215(3)(c).

88 The method of quantification of the liquidator's proportionate setting aside obligation has the result that the amount of the liquidator's payment obligation coincides with the amount which would ordinarily be required to be paid to the Commonwealth in respect of the tax debts of the company in accordance with the general requirement of s 555 of the Corporations Act that all debts proved in a winding up rank equally except as otherwise provided by that Act. The amount derived under that method of quantification also coincides with the amount that would previously have been ordinarily required to be paid to the Commissioner in respect of the tax debts of the company in accordance with the equivalent provision of the Corporations Law of a State or Territory.

89 That coincidence of the amount of the liquidator's payment obligation with the requirements which exist under another law of the Commonwealth, or which previously existed and which might even now have the potential to exist under a law of a State or Territory, is part of the design of s 215 which has allowed the section ordinarily to operate in harmony with applicable

Commonwealth, State and Territory winding up regimes<sup>118</sup>. The coincidence cannot be allowed to obscure what is for present purposes the critical point. It is that s 215 operates as a separate and distinct law of the Commonwealth of its own force to impose the liquidator's payment obligation and to impose in addition, in default of the liquidator meeting that obligation, the liquidator's personal tax liability. The section is a machinery provision for the protection of the revenue, but the scope of its protection is considerably more extensive and prescriptive than is accommodated by Western Australia's characterisation.

90 Western Australia argues next that a liquidator cannot breach the liquidator's initial retention obligation by parting with property involuntarily. Western Australia also argues that, despite the Commissioner having issued notices of assessment and having proved in the liquidations for the pre-liquidation tax liabilities of WA Bell Companies, there is no agreed fact, and no basis for inferring, that the Commissioner has yet exercised the Commissioner's notification power in respect of the pre-liquidation tax liabilities of any of the WA Bell Companies.

91 Assume all of that to be so. It means that the liquidator would not be placed in breach of the liquidator's initial retention obligation by operation of s 22 of the Bell Act and that the liquidator's proportionate setting aside obligation and the liquidator's payment obligation had not arisen by 27 November 2015 and could not arise thereafter. It does not mean that, if valid, s 22 of the Bell Act did not, or that s 29 of the Bell Act does not, alter, impair or detract from the operation of s 215 of the 1936 Act.

92 To the contrary, s 22, if valid, would have removed from the control of the liquidator of each WA Bell Company that was in liquidation the whole of the property that formed the subject-matter of the liquidator's initial retention obligation. The section would have correspondingly removed from the control of the liquidator the whole of the property capable of forming the subject-matter of the liquidator's proportionate setting aside obligation and the liquidator's payment obligation, each of which would arise as a result of any subsequent exercise of the Commissioner's notification power. The section would thereby render any such exercise of the Commissioner's notification power futile. And s 29, if valid, would prohibit observance by the liquidator of each of those obligations in the absence of the Authority choosing to consent.

93 Thus, s 22 would have resulted in the targeted removal of the factual substratum of the obligations imposed by s 215 of the 1936 Act and s 29 would operate to prevent their observance in any event. Together, ss 22 and 29 would

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**118** Compare *Bruton Holdings Pty Ltd (In liq) v Federal Commissioner of Taxation* (2009) 239 CLR 346 at 354 [21]; [2009] HCA 32.

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denude s 215 of its relevant practical operation and in so doing flout its protective purpose. Their practical effect would be to "qualify, impair and, in a significant respect, negate the essential legislative scheme"<sup>119</sup>.

94 Section 254 of the 1936 Act is addressed, amongst other things, to the post-liquidation tax liabilities of a company in liquidation. Including a liquidator within its reference to a "trustee", the section relevantly provides:

"(1) With respect to every agent and with respect also to every trustee, the following provisions shall apply:

(a) He or she shall be answerable as taxpayer for the doing of all such things as are required to be done by virtue of this Act in respect of the income, or any profits or gains of a capital nature, derived by him or her in his or her representative capacity, or derived by the principal by virtue of his or her agency, and for the payment of tax thereon.

(b) He or she shall in respect of that income, or those profits or gains, make the returns and be assessed thereon, but in his or her representative capacity only, and each return and assessment shall, except as otherwise provided by this Act, be separate and distinct from any other.

...

(d) He or she is hereby authorized and required to retain from time to time out of any money which comes to him or her in his or her representative capacity so much as is sufficient to pay tax which is or will become due in respect of the income, profits or gains.

(e) He or she is hereby made personally liable for the tax payable in respect of the income, profits or gains to the extent of any amount that he or she has retained, or should have retained, under paragraph (d); but he or she shall not be otherwise personally liable for the tax."

95 Section 254 operates to impose an obligation on a liquidator to make returns and be assessed in respect of income, or profits or gains of a capital nature, derived in his or her capacity as liquidator. Where the Commissioner makes an assessment of the amount of tax payable on such income, profits or

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<sup>119</sup> *Australian Mutual Provident Society v Goulden* (1986) 160 CLR 330 at 339; [1986] HCA 24.

gains so derived by the liquidator<sup>120</sup>, it operates sequentially to impose an obligation on the liquidator to retain from time to time out of any money which comes to the liquidator so much as is sufficient to pay tax which is or will become due ("the liquidator's retention obligation") and to impose a liability on the liquidator to pay the tax payable to the extent of any amount that he or she has retained, or should have retained ("the liquidator's taxation liability").

96 Western Australia's arguments about s 254 mirror its arguments about s 215 and must suffer the same fate. Sections 22 and 29 of the Bell Act, if valid, would alter, impair or detract from the operation of s 254 – s 22 because it would have resulted in the same targeted removal of the factual substratum of each of the separate and distinct obligations imposed by force of s 254, and s 29 because it would operate to prevent the observance of each of those obligations in any event.

97 The fact that the Commissioner had made post-liquidation assessments before 27 November 2015 adds yet another dimension to that inconsistency. The making of the assessments meant that both the liquidator's retention obligation and the liquidator's taxation liability had by that date been triggered so as to have given rise to a corresponding right on the part of the Commonwealth to payment. "A provision which prevents or suspends the enforcement of an accrued right cannot do otherwise than impair the enjoyment of that right"<sup>121</sup>.

98 The Commissioner concludes his written submissions with the observation that the basic problem here is that the drafter of the Bell Act either has forgotten the existence of the Tax Acts or has decided to proceed blithely in disregard of their existence. That, indeed, is the basic problem.

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**120** See *Federal Commissioner of Taxation v Australian Building Systems Pty Ltd (In liq)* (2015) 90 ALJR 151; 326 ALR 590; [2015] HCA 48.

**121** *Stock Motor Ploughs Ltd v Forsyth* (1932) 48 CLR 128 at 136; [1932] HCA 40.

