

**BELL GROUP N.V. (IN LIQ) & ANOR v STATE OF WESTERN AUSTRALIA (S248/2015)**

**W.A. GLENDINNING & ASSOCIATES PTY LTD v THE STATE OF WESTERN AUSTRALIA (P63/2015)**

**MARANOA TRANSPORT PTY LTD (IN LIQ) & ORS v STATE OF WESTERN AUSTRALIA & ORS (P4/2016)**

Dates writs of summons filed: 27 November 2015,  
18 December 2015 and  
4 February 2016

Date special cases referred to Full Court: 29 February 2016

The companies of a consolidated group known as “the Bell Group” are in the process of being liquidated, pursuant to orders made in the 1990s by the Supreme Court of Western Australia (“the Supreme Court”) under the *Corporations Law* (Cth) (which has since been superseded by the *Corporations Act* 2001 (Cth)). The holding company of the group is The Bell Group Ltd (In Liq) (“TBGL”). Wholly owned subsidiaries of TBGL include Bell Group Finance Pty Ltd (In Liq) (“BGF”), which acted as the group’s treasury entity, and Bell Group N.V. (In Liq) (“BGNV”), a foreign company registered in Australia. The liquidator of BGNV in Australia is Mr Garry Trevor, while the sole liquidator of the Australian companies of the Bell Group is Mr Antony Woodings.

In the liquidation of the Bell Group companies, the Commonwealth has lodged proofs of debt in respect of eleven companies for unpaid tax totalling \$293 million. W.A. Glendinning & Associates Pty Ltd (“WAG”) is an ordinary unsecured creditor of BGF, with an admitted proof of debt of \$183 million. BGNV is an ordinary unsecured creditor of both TBGL and BGF, with admitted proofs of debt totalling \$464 million.

In July 2014 a chain of litigation (“the Bell Litigation”), involving claims by the liquidators of TBGL and BGF (and others) against various banks, came to an end. This was upon the discontinuance of an appeal (and a cross-appeal) to this Court (*Westpac Banking Corporation & Ors v Bell Group Ltd (In Liq) and Ors* (P18/2013)) from a decision of the Court of Appeal of the Supreme Court. The claimants in the Bell Litigation had been funded, through several agreements for indemnification (“the Funding Agreements”), by a group of entities that included BGNV, the Commonwealth and the Insurance Commission of Western Australia (“ICWA”).

The Bell Litigation resulted in various banks making payments that totalled more than \$1.7 billion (“the Bell Litigation funds”). Approximately \$718 million of those payments was paid to certain companies of the Bell Group pursuant to orders that were not contested in the appeal to this Court. The remainder of the Bell Litigation funds was then paid to Mr Woodings in his capacity as trustee of a trust (“the Settlement Trust”) that was established in accordance with a Deed of Settlement executed by the parties to the Bell Litigation.

On 27 November 2015 the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Act 2015* (WA) (“the Bell Act”) came into force. The Bell Act establishes a body corporate known as “The WA Bell Companies Administrator Authority” (“the Authority”). Section 22 of the Bell Act provides that the property of many of the Bell Group companies, along with property held on trust in relation to the liquidation of those companies, is transferred to the Authority. The objects of the Bell Act stated in s 4 of it include the distribution of the Bell Litigation funds, without further litigation, in accordance with the substance of the Funding Agreements.

At the time of writing, various proceedings commenced in 2014 were underway in the Supreme Court in relation to the distribution of funds received by Mr Woodings from the Bell Litigation. An application to the Supreme Court by BGNV for the dismissal of one of those proceedings became the subject of an application for removal into this Court (*Bell Group N.V. (In Liq) v The Insurance Commission of Western Australia & Ors* (S247/2015)). On 18 March 2016 Justice Bell stood that application for removal over to a date to be fixed.

On 27 November 2015, Mr Trevor and BGNV filed a writ of summons and a statement of claim (“SOC”) in this Court, commencing proceedings to challenge the validity of the Bell Act. Similar proceedings were then commenced by WAG, followed by proceedings brought by Maranoa Transport Pty Ltd (In Liq) (“Maranoa”), an Australian company of the Bell Group which is not a subject of the Bell Act. In the latter proceeding Mr Woodings is also a plaintiff, in his capacities as liquidator of Maranoa and as trustee of the Settlement Trust.

In all three proceedings the respective plaintiffs have filed a Notice of a Constitutional Matter. The Attorneys-General of Victoria, South Australia, Tasmania, Queensland and New South Wales are all intervening in each of the proceedings. The Federal Commissioner of Taxation has also applied for leave to intervene in all three proceedings.

In each proceeding the parties filed an amended special case, stating questions that were then referred by Justice Bell for consideration by a Full Court.

In proceeding S248/2015, the referred questions are as follows:

1. Do the plaintiffs have standing to seek relief in respect of the alleged invalidity of Parts 3 and 4 of the Bell Act on the grounds alleged in paragraph 56 of the SOC?
  - 1A. Does any justiciable controversy arise in respect of the alleged invalidity of Parts 3 and 4 of the Bell Act on the grounds alleged in paragraphs 56.1 and 56.2 of the SOC insofar as the grounds rely on former s 215 of the *Income Tax Assessment Act 1936* (Cth) (“the ITAA 1936”) (and alternatively, s 260-45 of Schedule 1 to the *Taxation Administration Act 1953* (Cth) (“the TAA”))?
2. Is the Bell Act invalid in its entirety?

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 Act invalid (and, if so, to what extent)?
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)?
5. Who should pay the costs of the special case?

In proceeding P63/2015, the questions are:

1. Do the plaintiffs have standing to seek relief in respect of the alleged invalidity of Parts 3 and 4 of the Bell Act on the grounds alleged in paragraphs 56 to 58 of the SOC?
2. Does any justiciable controversy arise in respect of the alleged invalidity of Parts 3 and 4 of the Bell Act on the grounds alleged in paragraphs 56.1 and 56.2 of the SOC insofar as the grounds rely upon s 215 of the ITAA 1936 (alternatively, s 260-45 of Schedule 1 to the TAA)?
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 ITAA 1936, the *Income Tax Assessment Act* 1997 (Cth) (“the ITAA 1997”) or the TAA, on the grounds alleged in paragraphs 56 to 58 of the SOC; further or alternatively
      - (2) the Corporations Act, on the grounds alleged in paragraphs 72 to 88 of the SOC; further or alternatively
      - (3) s 39(2) of the *Judiciary Act* 1903 (Cth), on the grounds alleged in paragraphs 59 to 68 of the SOC?; further or alternatively
    - (b) because it infringes Chapter III of the Constitution, on the grounds alleged in paragraphs 59 to 68 of the SOC?
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?
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 SOC?
6. Who should pay the costs of the special case?

In proceeding P4/2016, the questions are:

1. Do the plaintiffs have standing to seek relief in respect of the alleged invalidity of Parts 3 and 4 of the Bell Act on the grounds alleged in:
  - (a) paragraph 56.1 of the SOC, insofar as the grounds rely upon s 215 of the ITAA 1936 (alternatively, s 260-45 of Schedule 1 to the TAA) and s 254(1)(h) of the ITAA 1936; and
  - (b) paragraphs 56.2, 56.3 and 56.4 of the SOC?
2. Does any justiciable controversy arise in respect of the alleged invalidity of Parts 3 and 4 of the Bell Act on the grounds alleged in paragraphs 56.1 and 56.2 of the SOC insofar as the grounds rely upon s 215 of the ITAA 1936 (alternatively, s 260-45 of Schedule 1 to the TAA) and s 254(1)(h) of the ITAA 1936?
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 ITAA 1936, the ITAA 1997 or the TAA, on the grounds alleged in paragraphs 40 to 56 and 91A of the SOC; further or alternatively:
  - (b) the Corporations Act, on the grounds alleged in paragraphs 59 to 91 and 91B of the SOC?
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?
5. Who should pay the costs of the special case?