IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S248 of 2015

BELL GROUP N.V. (IN LIQUIDATION)
First Plaintiff

GARRY TREVOR
Second Plaintiff

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and

STATE OF WESTERN AUSTRALIA
Defendant

No. P63 of 2015

W.A. GLENDINNING & ASSOCIATES PTY LTD
Plaintiff

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and

STATE OF WESTERN AUSTRALIA
Defendant

No. P4 of 2016

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MARANOA TRANSPORT PTY LTD (IN LIQUIDATION)
First Plaintiff

ANTONY LESLIE JOHN WOODINGS
Second Plaintiff

ANTONY LESLIE JOHN WOODINGS IN HIS CAPACITY AS TRUSTEE UNDER A DEED OF SETTLEMENT
Third Plaintiff

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and

STATE OF WESTERN AUSTRALIA
First Defendant

THE BELL GROUP LIMITED (IN LIQUIDATION) AND OTHER COMPANIES
Second Defendants

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ANNOTATED SUBMISSIONS OF THE ATTORNEY-GENERAL FOR SOUTH AUSTRALIA (INTERVENING)

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Part I: Certification

1. This submission is in a form suitable for publication on the internet.

Part II: Basis for intervention

2. The Attorney-General for South Australia (**South Australia**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) (**Judiciary Act**).

Part III: Leave to intervene

3. Not applicable.

Part IV: Applicable legislative provisions

4. South Australia adopts the statement by the Plaintiffs of the applicable legislative provisions.

10 **Part V: Submissions**

5. South Australia submits that the questions arising for determination in this proceeding ought to proceed first by reference to the alleged inconsistencies between the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Act 2015* (WA) (**Bell Act**) and the *Income Tax Assessment Act 1936* (Cth), the *Income Tax Assessment Act 1997* (Cth) and the *Taxation Administration Act 1953* (Cth) (**Taxation Legislation**). If the resolution of those issues is determinative of the validity of the Bell Act as a whole, then in accordance with settled principle in this Court, the other issues raised by the notices issued pursuant to 78B of the Judiciary Act ought not to be addressed.[1] South Australia makes no submission with respect to the interaction between the Bell Act and the Taxation Legislation.

20 6. South Australia confines its submissions to:

   i. the operation of ss5F and 5G of the *Corporations Act 2001* (Cth) (**Corporations Act**) and the potential application of those provisions to the Bell Act; and

   ii. the purported inconsistency between s39(2) of the Judiciary Act and the Bell Act and the related issues arising under Ch III of the Constitution.

7. In so doing, South Australia submits:

   i. taxation issues aside, the validity of the measures adopted in the Bell Act turn on three available constructions of ss5F and 5G, which for convenience may be identified as **broad, intermediate**, and **narrow**. Relevantly, the **broad** construction permits "excluded matters" (s5F) and displacement provisions (s5G) to operate extraterritorially, the

30 **intermediate** construction permits them to operate within the geographical limits of a

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1 *Duncan v New South Wales* (2015) 89 ALJR 462 at [52] (the Court) citing *Lambert v Weichelt* (1954) 28 ALJ 282 at 283 (Dixon J).

State (or Territory), and the **narrow** construction permits them to operate with respect to Corporations legislation provisions which possess geographical or territorial attributes. Of those three alternatives, it is submitted that:

a. the **broad** construction is to be preferred because it aligns with the purpose of ss5F and 5G of the Corporations Act, which is to "ameliorate" any alleged inconsistency between Corporations legislation and a State law. The broad construction also accommodates the fact that the things and entities regulated do not operate within confined geographical or territorial limits;

b. alternatively, the **intermediate** construction facilitates the regulation of those matters and things within the geographical or territorial limits of a State; and

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c. the **narrow** construction of ss5F and 5G applied in *HIH Casualty and General Insurance Ltd v Building Insurers' Guarantee Corporation* (***HIH***)[2] is flawed and is not consistent with the text, context and purpose of those provisions;

ii. there is no constitutional inconsistency between s39(2) of the Judiciary Act and the Bell Act. Section 22 of the Bell Act provides for the transfer of property from a company to the Authority. It does not define or otherwise address the jurisdiction of courts.

iii. the Bell Act does not "direct" the State Supreme Court as to the manner or outcome of the exercise of its jurisdiction (federal or otherwise). Section 73(1) of the Bell Act, which preserves the discretion of a Court to grant leave to begin or continue a proceeding, is premised on the fact that the scheme established under Part 4 of that Act is validly established. Upon that premise, there is nothing offensive about the operation of s73(1) of the Bell Act. Whether legislation operates to deny relief in a proceeding does not indicate that a provision "directs" a court as the manner or exercise of its discretion; and

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iv. the Bell Act does not provide for the exercise of the judicial power of the Commonwealth by the State Executive because the Bell Act does not operate to "transfer" to the Executive of the State the power to "quell" existing controversies under the Commonwealth law. Rather, the Bell Act operates such that there is no factual or legal controversy under the Commonwealth law to be quelled. In effect, the factual substratum for the operation of the Bell Act presumes that there is no controversy to be quelled by the exercise of the judicial power of the Commonwealth. Any potential controversy arising under the State scheme is subject to review for jurisdictional error.

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[2] *HIH Casualty and General Insurance Ltd v Building Insurers' Guarantee Corporation* (2003) 188 FLR 153 at [72] (Barrett J) (***HIH***).

A. INCONSISTENCY AND THE *CORPORATIONS ACT 2001* (CTH)

Section 109 inconsistency

8. The applicable principles underpinning the operation of s109 of the Constitution are well settled. Those principles, emanating from Dixon J in *Victoria v Commonwealth*,[3] but all of which have been re-articulated by the Court in *Telstra Corporation Ltd v Worthing*,[4] *Dickson v The Queen*,[5] *Jemena Asset Management Pty Ltd v Coinvest Ltd*[6] and *Momcilovic v The Queen*[7] are:

    i. a State law, if valid, that alters, impairs or detracts from the operation of a law of the Commonwealth is to that extent inoperable;[8]

    ii. if it appears from the terms, nature or subject of the matter of a Commonwealth law that it is intended to operate as a complete statement of the law governing a particular set of rights and duties, a State law which regulates the same matter is regarded as a detraction from the Commonwealth law and is inconsistent;[9]

    iii. the notions of "altering", "impairing" or "detracting from" the operation of a Commonwealth law refer to the State law undermining the Commonwealth law in a significant and not trivial manner;[10]

    iv. the extent of any inconsistency depends upon the text and operation of the respective laws;[11] and

    v. with concurrent federal and State powers, express statements of legislative intention are relevant but not determinative of inconsistency.[12]

9. If inconsistency is established, the provisions of the State Act are not invalid in the sense of ultra

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3 *Victoria v Commonwealth* (1937) 58 CLR 618 at 630 (Dixon J).

4 *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 at 76 [28] (the Court) citing and applying *Victoria v Commonwealth* (1937) 58 CLR 618 at 630 (Dixon J).

5 *Dickson v The Queen* (2010) 241 CLR 491 at 502 [13]-[14] (the Court).

6 *Jemena Asset Management (3) Pty Ltd v Conivest Ltd* (2011) 244 CLR 508 at [41] (the Court).

7 *Momcilovic v The Queen* (2011) 245 CLR 1.

8 *Victoria v Commonwealth* (1937) 58 CLR 618 at 630 (Dixon J), cited and applied in *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 at 76 [28] (the Court); *Dickson v The Queen* (2010) 241 CLR 491 at 502 [13]-[14] (the Court) applying both *Victoria v Commonwealth* and *Telstra v Worthing*, which was reiterated in *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 at 523 [37]-[38] (the Court).

9 *Victoria v Commonwealth* (1937) 58 CLR 618 at 630 (Dixon J); *Dickson v The Queen* (2010) 241 CLR 491 at 502 [13]-[14] (the Court).

10 *Jemena Asset Management (3) Pty Ltd v Conivest Ltd* (2011) 244 CLR 508 at [41]-[45] (the Court).

11 *Jemena Asset Management (3) Pty Ltd v Conivest Ltd* (2011) 244 CLR 508 at [41]-[45] (the Court) citing *Western Australia v Commonwealth* (1995) 183 CLR 373 at 465 (Mason, Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Wenn v Attorney-General (Vic)* (1948) 77 CLR 84 at 120 and 122 (Dixon J).

12 *Momcilovic v The Queen* (2011) 245 CLR 1 at [111] (French CJ); [208], [266]-[272] (Gummow J); [307], [344] (Hayne J); [637]-[638] (Crennan and Kiefel JJ); [660] (Bell J).

vires the State Parliament.[13] Rather, the provisions of the State Act are rendered inoperative to the extent of their inconsistency with the Commonwealth law.

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

10. Part 6 of the Bell Act is addressed to the interaction between that Act and "Corporations legislation".[14]

11. Relevantly, s51 declares each "WA Bell Company" to be an "excluded matter" in relation to the whole of the Corporations legislation (except to the extent specified in ss51(2) and (3)) for the purposes of s5F of the Corporations Act.

12. Section 52 of the Bell Act declares Parts 3, 4 and 5 and ss55 and 56(3) of that Act to be "Corporations legislation displacement provisions" for the purposes of s5G of the Corporations Act in relation to the whole of the Corporations legislation.[15] Part 3 provides for the transfer of property of WA Bell Companies to the Authority established by s7 of the Bell Act and makes consequential provisions for the treatment of liabilities and the voiding of the pre-existing agreements identified in s26. Part 4 provides for the completion of the winding up of WA Bell Companies. Part 5 provides for the winding up of the Authority and the closure of the fund established by s16.

Part 1.1A of the *Corporations Act 2001* (Cth)

13. Part 1.1A of the Corporations Act addresses the issue of concurrency of operation of Commonwealth "Corporations legislation"[16] and State and Territory legislation. The Part applies to Corporations legislation which includes, relevantly, the Corporations Act and any regulations made under that Act: Corporations Act s5D(2).

14. The Bell Act is an Act to which Part 1.1A of the Corporations Act applies because it is a law of a State that is a "referring State"[17] and is thus "in this jurisdiction".[18]

15. The Special Case is concerned, amongst other things, with the interaction between the Bell Act and the Corporations Act in light of the operation of ss5E-5G of the Corporations Act. Sections

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[13] *Carter v Egg and Egg Pulp Marketing Board (Vic)* (1942) 66 CLR 557 at 573 (Latham CJ); *Wenn v Attorney-General (Vic)* ((1948) 77 CLR 84 at 120, 122 (Dixon J); *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 at [44] (the Court).

[14] Defined in s50 of the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Act 2015* (WA) (**Bell Act**) to mean "the Corporations legislation to which the Corporations Act Part 1.1A applies".

[15] Insofar as s52 of the Bell Act has effect, see s52(1).

[16] Which means the *Corporations Act 2001* (Cth), (**Corporations Act**), the *Australian Securities and Investments Commission Act 2001* (Cth) and associated rules of the Federal Court and State Supreme Courts: Corporations Act s9.

[17] Corporations Act s4 read with *Corporations (Commonwealth Powers) Act 2001* (WA).

[18] Corporations Act s5D(1).

5E-5G are designed to regulate the interaction between "Corporations legislation" and certain State and Territory provisions in a manner which minimises the scope for conflict between them.[19]

Indirect Inconsistency: Section 5E

16. Section 5E is addressed to what is otherwise described as "indirect" inconsistency between State and Territory laws and the Corporations legislation. The text constitutes a statement by the Commonwealth Parliament that the Corporations legislation "is not intended to make exhaustive or exclusive provision with respect to the subject with which it deals."[20] However, "the Commonwealth law does not of its own force give State law a valid operation. All that it does is to make it clear that the Commonwealth law is not intended to cover the field, thereby leaving room for the operation of such State laws as do not conflict with Commonwealth law."[21] Thus, while it may well be "established that a provision in a Commonwealth statute evincing an intention that the statute is not intended to cover the field cannot avoid or eliminate a case of direct inconsistency or collision",[22] as was made clear in *Momcilovic v The Queen*, statements of legislative intention are relevant but not determinative of the question of inconsistency under s109 of the Constitution.[23]

17. The inconsistencies alleged by the plaintiffs in the present case are direct in nature. Consequently, it is the potential application of ss5F and 5G which fall for consideration.

Direct Inconsistency: Sections 5F and 5G

18. For State and Territory provisions which would otherwise be directly inconsistent with the Corporations Act to survive the operation of s109, a Commonwealth law needs to accommodate them expressly.[24]

19. Both ss5F and 5G are provisions of this nature. Provisions of this kind do not amount to an attempt on the part of the Commonwealth legislature to "cut across" the operation of s109 of the Constitution by purporting to cause that which s109 declares inoperable to be nevertheless operable. Indeed, such an attempt would be ineffective.[25] Rather, such provisions define and

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19 See *Loo v Director of Public Prosecutions (Vic)* (2005) 192 FLR 271 at [25] (Winneke P, Charles JA agreeing); *HIH Casualty and General Insurance Ltd v Building Insurers' Guarantee Corporation* (2003) 188 FLR 153 at [72] (Barrett J) (***HIH***).

20 *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation* **(*Credit Tribunal*)** (1977) 137 CLR 545 at 563 (Mason J).

21 *Credit Tribunal* at 563 (Mason J).

22 *Credit Tribunal* at 563 (Mason J).

23 *Momcilovic v The Queen* (2011) 245 CLR 1 at [111] (French CJ); [208], [266]-[272] (Gummow J); [307], [344] (Hayne J); [637]-[638] (Crennan and Kiefel JJ); [660] (Bell J).

24 In relation to ss5F-5G, see *HIH* at [79] (Barrett J).

25 *University of Wollongong v Metwally* (1984) 158 CLR 447 at 455-6 (Gibbs CJ).

mould the operation of the Commonwealth provisions in a manner which anticipates a potential inconsistency and pre-emptively curtails the operation of the Commonwealth provision such that no inconsistency ever arises.[26] In this way such provisions operate (where enlivened) as constructional or interpretive instructions.

20. The submissions now turn to the operation and construction of ss5F and 5G of the Corporations Act.

Section 5F

21. Western Australia relies on s51 of the Bell Act in its declaration that each "WA Bell Company"[27] is an "excluded matter" for the purposes of s5F of the Corporations Act to the extent set out in
10 ss51(2) and (3). Consequently, Western Australia has triggered ss5F(1)(d) and 5F(2)(d). Relevantly, s5F(1) and 2(d) provide:

> (1) Subsection (2) applies if a provision of a law of a State or Territory declares a matter to be an excluded matter for the purposes of this section in relation to:
>
> ...
>
> (d) the Corporations legislation otherwise than to a specified extent.
>
> (2) By force of this subsection:
>
> ...
>
> (d) the provisions of the Corporations legislation (other than this section and otherwise than to the specified extent) **do not apply in the State**
> 20 or Territory **in relation to** the matter if the declaration is one to which paragraph (1)(d) applies. (emphasis added)

22. The disapplication of the Corporations legislation provided for by s5F(1) is triggered by "a provision of a law of a State ... " which declares a "matter" to be an "excluded matter".[28] The text thus operates by reference to the exercise of the legislative power of a State in declaring a matter. The field within which the State law operates unimpeded by the Corporations legislation is bounded by the matter subject of the declaration. Section 5F does not itself authorise the exercise of State legislative power in respect of a declared matter. The validity of a State law owes its existence to the powers vested in it by its Constitution. Section 5F is directed to the scope of the application of a Commonwealth law, which may have consequences for the application of
30 s109 of the Constitution. That is, s5F provides a mechanism whereby the field otherwise occupied by a Commonwealth law is reduced in order to accommodate a law of a State that operates in the same field, where that field is identified by the terms of the State declaration

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26 As was noted in *HIH* at [80] (Barrett J).

27 The WA Bell Companies are defined in s3(1) of the Bell Act by reference to the list set out in Schedule 1 of that Act.

28 Corporations Act s5F(1).

provision. Thus, when triggered, s5F effects a limitation on the field of operation of the Commonwealth law in a State.

23. There is no limitation on a State Parliament with respect to the "matter" that may be declared. Once the matter is declared, the field that would otherwise have been occupied by the Corporations legislation is vacated and that field may (but need not) be replaced or "populated" by State laws.

24. Once the "excluded matter" is identified, s5F operates such that the Corporations legislation does not apply "in the State ... in relation to" the excluded matter. There are then two features of s5F that need to be discerned to determine if s51 of the Bell Act successfully excludes the operation of the Corporations legislation. The first issue is whether the words "in the State" are to be construed so as to deny such a State law extraterritorial operation. Or to put it differently, whether the words "in the State" are to be construed such that the Corporations legislation continues to apply to the excluded matter outside the geographic boundaries of the State. The second issue is whether the breadth of the words "in relation to" add anything to the analysis.

25. As noted earlier, the resolution of the first issue will be determined by whether the words "in the State" bear a broad, intermediate or narrow meaning. Those constructional possibilities are addressed below by reference to the axiomatic principle that matters of construction are concerned with text, context and purpose.[29]

(a) the broad construction

Text

26. The relevant question of construction, namely, whether "in the State" may be construed so as to accommodate State laws operating with extraterritorial effect is not decisively determined by reference to the text. There is no decisive textual indicator to resolve whether the words "in the State" only accommodate State laws that operate within the geographical limits of the State or refer to the law area of the State. There is latent ambiguity. The phrase "in the State" is not defined in the Corporations Act. The definition of "State" in s9 of the Corporations Act contemplates a meaning of "State" other than by reference to its geographical territory. The latent ambiguity ought to be resolved by construing "in the State" as meaning "within the law area of the State", which phrase recognises that State laws "may reach beyond the geographical area of

[29] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69]- [71]; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [51]; *Independent Commission Against Corruption v Cunneen* (2015) 89 ALJR 475 at [57], [62]; *Tabcorp Holdings Limited v Victoria* [2016] HCA 4 at [8] (the Court).

the State".[30]

Context & Purpose

27. The context and purpose of Part 1.1A provide support for a broader construction of "in the State". Prior to the enactment of Part 1.1A, the Corporations Law recognised the power of liquidators to exercise powers and functions of a liquidator that were "of a kind" that a liquidator of a company may exercise in another jurisdiction.[31] In effect, under the scheme existing prior to July 2001, liquidators were enabled by the various Commonwealth and State laws to exercise powers in another jurisdiction to ensure the liquidator's duties to control and recover assets were facilitated. Despite the fact that the constitutional status of the Corporations Law was at that time directly referable to a State or Territory law in each jurisdiction, that scheme facilitated cross-jurisdictional action. While the cross-vesting elements of the Corporations Law gave rise to the constitutional difficulties identified in *Re Wakim; ex parte McNally*[32] and R *v Hughes*,[33] the other aspects of the scheme that recognised the rights of liquidators to take action within other States (under the corresponding State law) was a key aspect of that scheme. There is no indication that the enactment of the current scheme, following the Corporations Agreement[34] and the State referrals under s51(xxxvii), was intended to produce a narrower or more confined capacity for taking action in the process of winding up corporations where such action necessitates the recovery of assets in other States. Indeed, given the nature of the modern economy, including internet trading and banking facilities, in the context of legislative regulation of corporations and their activities it should not readily be inferred that references to a "State" warrant a construction which effects a geographical limit on the operation of a law.[35]

28. The Corporations Agreement, which facilitated the State referrals, provides expressly for concurrent State laws as well as future State laws that is inconsistent with the Commonwealth law.[36] The extrinsic materials also provide some support for a broader rather than narrower construction of "in the State". The explanatory memorandum to the Corporations Bill 2001 (Cth) indicated that the operation of s5F was meant to "ameliorate"[37] the fact that the States would otherwise not be able to modify the Corporations Act once it was enacted as Commonwealth

30 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at [2] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), though as the Court observed in that case, the difficult question that may arise where the statute law of two law areas differs was not in issue in that proceeding.

31 *Corporations Law* s588B (as provided for by s82 of the *Corporations Act 1989* (Cth))

32 (1999) 198 CLR 511.

33 (2000) 202 CLR 535.

34 *Corporations Agreement 2002* (as amended).

35 See *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at [14] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ); Posner, "Antitrust in the New Economy", *Antitrust Law Journal*, 68 (2001) 925.

36 See *Corporations Agreement 2002* (as amended), clauses 512-515.

37 Explanatory Memorandum, Corporations Bill 2001 (Cth) [5.74], 23.

law. The purpose of s5F then was to permit a State to "regulate the matter"[38] that it "declared". This supports a construction of s5F which facilitates the delineation of the field within which certain "matters" are identified as either Corporations legislation matters (and thus subject to regulation by the Commonwealth law) or excluded matters (and thus not subject to regulation by Commonwealth law). There is no indication that s5F was intended to ring-fence the territorial reach of State legislative power when it declared the matter an excluded matter. That is to say, there is no indication that a provision that exists for the purpose of permitting States to exclude particular matters from the reach of the Commonwealth was intended to be limited to the extent that the "excluded matter" was within the geographical boundaries of the State.

10 29. The additional words "in relation to" in s5F do not add to the analysis with respect to the territorial reach contemplated by the provision. It is accepted that "in relation to" are of wide import, however, such words do not speak to the territorial operation of a law, but to the relationship between the law and the matter regulated.[39]

30. To the extent that s5F is construed as having a purpose which facilitates State provisions having extraterritorial effect, "in the State" should be construed as meaning "within the law area of the State". The reach of such State laws into other States or Territories would be determined by reference to orthodox principles concerning territorial nexus[40] between the thing in the other State or Territory and the State law.

31. Any potential conflict between State laws operating on the same "matter" or operating "in
20 relation to" the same matter would be determined by choice of law rules.[41] As noted in *Sweedman v Transport Accident Commission*:[42]

> ...the choice of law rules have the important function, in the absence of an effective statutory overriding requirement, of selecting the law to be applied to determine the consequences of acts or omission which occurred in a State (or Territory) other than that where is brought. This means that questions of alleged "inconsistency" between laws of several States must be considered not at large, but first with allowance for the operation of applicable choice of law rules. This may remove the necessity in a given case to answer those questions of inconsistency.

32. The choice of law rules apply irrespective of whether a matter is in state or federal jurisdiction.[43]
30 Where it is in federal jurisdiction, the choice of law rules are applied through s80 of the Judiciary

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38 Explanatory Memorandum, Corporations Bill 2001 (Cth) [5.74 (dot point 1)], 23.

39 See, eg, O'Grady v Northern Queensland Co Ltd (1990) 169 CLR 356 at 374 (Toohey and Gaudron JJ), 376 (McHugh J).

40 *Pearce v Florenca* (1976) 135 CLR 507 at 518 (Gibbs J).

41 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1; *Sweedman v Transport Accident Commission* (2006) 226 CLR 362.

42 (2006) 226 CLR 362 at [19] (Gleeson CJ, Gummow, Kirby and Hayne JJ) (footnotes omitted).

43 *Sweedman v Transport Accident Commission* (2006) 226 CLR 362 at [33] (Gleeson CJ, Gummow, Kirby and Hayne JJ).

Act.[44] In the present case, assuming there to be a conflict between the Bell Act and another State or Territory law, the conflict would be resolved by reference to the "predominant territorial interest of the State".[45] That is, the issue would be resolved by reference to the nature of the territorial interests at stake.

(b) the intermediate construction

33. In the alternative, the words "in the State" read with the definition of "State" in s9 support a construction of s5F which permits a State, at a minimum, to disapply the Corporations legislation in relation to a matter within the geographical confines of the State.

Text

10 34. As noted earlier, s9 of the Corporations Act defines "State" in terms that include geographical boundaries. Construing the preposition "in" in accordance with its ordinary natural meaning — "inclusion within space or limits" — indicates that the words "in the State" mean the area, space or limits of the State. So, if "State" is construed by reference to its geographical existence rather than its political or constitutional attributes, then the words "in the State" make it plain that the disapplication of the Corporations legislation by a provision of a State law extends to the geographical limits of the State. It is to be noted that the geographical limits include the coastal sea of the State.[46]

Context & purpose

35. Such a construction reflects the surrounding context in which the States enacted their references
20 for the purposes of s51(xxxvii) of the Constitution. As the second reading speech to the Corporations (Commonwealth Powers) Bill 2001 (WA) made plain: "the [Corporations] agreement also preserves the rights of the States to make laws that modify the operation of the Corporations Act in relation to their own activities; for example, the regulation of state bodies corporate."[47] Unsurprisingly, that approach appeared to be uniform amongst the States.[48] As the extrinsic materials indicate, the States were keen to ensure that they retained the legislative capacity to control the operation of the Corporations legislation "in relation to their own activities". Given the text of s5F, and the context in which the reference was made, it is tolerably clear that the States were of the view that they retained the ability to legislate with respect to any

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44 *Sweedman v Transport Accident Commission* (2006) 226 CLR 362 at [33] (Gleeson CJ, Gummow, Kirby and Hayne JJ).

45 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at [64] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); Leeming, *Resolving Conflicts of Laws* (2011), 209-210.

46 Corporations Act s9 "State".

47 Legislative Council WA Hansard 29 May 201 557b-559a.

48 Corporations (Commonwealth Powers) Bill 2001 (SA), Legislative Council (29 May 2001), 1544.

matters they considered to be relevant within their own jurisdictions.

(c) narrow construction

36. The narrow construction is premised on the interpretation of "in" by Barrett J in *HIH*.[49] In that case, Barrett J reasoned from a premise that only Corporations Act provisions possessing "clear territorial attributes"[50] are provisions operating "in" a State within the meaning of s5F(2). With respect, that reasoning reverses the orthodox approach to construction. Instead of beginning by looking at the text of s5F to determine the meaning of "in the State", Barrett J began by locating provisions of the Corporations Act which could be identified as possessing territorial or geographical attributes. There is no statutory warrant for doing so. Such an approach necessarily pre-determines the construction of s5F because it utilises provisions of the Corporations legislation that are characterised as "territorial" to determine whether "in the State" is confined to geographic territory. Put another way, this approach to construction assumes what is to be established, namely, that "in" is confined to provisions possessing geographical or territorial attributes. Such an approach imposes a rule of construction that renders Part 1.1A subject to any provision of the Corporations legislation that may be construed as possessing non-geographical or territorial attributes. Precisely how such an approach sits with the extent of the exclusion provided for by ss5F(1)(a) (i.e. "the *whole* of the Corporations legislation) and 5F(2)(a) (i.e. "*none* of the provisions…") is unclear. Presumably those words would be read down and confined only to those provisions possessing a territorial attribute. Such an approach to Part 1.1A is excessively restrictive and is at odds with both the context and the purpose of the provision.

Section 5G

37. As noted above at [12], s52 of the Bell Act declares Parts 3, 4 and 5 and ss55 and 56(3) of that Act to be displacement provisions for the purposes of s5G of the Corporations legislation. The constructional issue concerning the phrase "in the State" identified above in relation to s5F applies equally to s5G(11) of the Corporations Act but, as will be seen below, does not apply in relation to ss5G(4) and 5G(8).

38. Section 5G(1) provides that the provision applies despite any other provision of the Corporations legislation. The evident purpose of the provision is to avoid "direct inconsistency" between a provision of a State law and a Corporations legislation provision.

39. Section 5G(3) provides that s5G only applies to a State provision that falls within the table set out in that subsection. By virtue of s5G(14), the Bell Act falls within item 3 of the table at s5G(3).

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[49] *HIH* at [72] (Barrett J).

[50] *HIH* at [89] (Barrett J).

Further, note 1 of s5G(11) imposes an interpretive rule on the application of s5G such that a provision of the State that is supported by an earlier subsection of s5G is not covered by s5G(11). Thus, it is necessary to determine whether s52 of the Bell Act is supported by ss5G(4) and 5G(8) before determining whether it is supported by s5G(11).

40. One textual point of difference between the text of ss5G(4) and 5G(8)[51] on the one hand, and s5G(11) (and s5F) on the other, is that the displacement effected by ss5G(4) and (8) is not in any way referenced to geographic or jurisdictional limits. There is no textual reference to a State law applying "in the State". Rather, ss5G(4) and 5G(8) displace a Corporations Act provision if "a provision of a law of a State" either "specifically authorises or requires" the doing of an act (s5G(4)) or is a State provision that is a "scheme of arrangement, receivership, winding up ..." and the activity being pursued is in accordance with the "scheme of arrangement, receivership, winding up ..." (s5G(8)). Thus, on the assumption that the relevant State law is intended to operate extraterritorially and otherwise satisfies the usual "connection"[52] test in relation to extraterritoriality, the text of ss5G(4) and 5G(8) does not limit the geographical application of the State law at all. The implication of this construction for the State's support for a broader construction of "in the State" in s5G(11) and 5F is addressed below at [42].

41. Accordingly, if the Bell Act is capable of falling within the terms of ss5G(4) and/or 5G(8), the non-taxation and non-Ch III aspects of the proceeding would be capable of resolution in favour of the Defendant. South Australia makes no submission on whether the provisions of the Bell Act, properly construed, fall within the terms of ss5G(4) or 5G(8).

42. The fact that ss5G(4) and (8) are not cast in the same terms of s5G(11) (or s5F) may be taken to indicate that the words "in the State" in s5G(11) (and by implication s5F) have been deliberately chosen as words of geographical limitation. There are two reasons why such an inference ought not be drawn. First, the "*expressio unius est exclusion alterius*" presumption is to be applied with extreme caution.[53] The textual difference between ss5G(4) and 5G(8) on the one hand and s5F and 5G(11) on the other needs to be understood in context. Construed in the context of Part 1.1A as a whole, it is tolerably clear that the purpose of s5G(11) is for it to be a provision of last resort; one that is meant to apply only to those specific cases of direct inconsistency that are not

[51] It is noted that ss5G(5)-(10) are cast, relevantly, in the same terms as ss5G(4) and (8). Given the terms of Special Case, however, it ss5G(4) and 5G(8) that arise for consideration. See eg, S248 of 2015 (Bell Group NV proceeding), Special Case at [85]-[89]; **SCB** Vol 1, pp 50-51.

[52] *Australia Act 1986* (Cth) s2(1); *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 14 (the Court) endorsing *Pearce v Florenca* (1976) 135 CLR 507 at 518 (Gibbs J); *Port McDonnell Professional Fisherman's Association Inc v South Australia* (1989) 168 CLR 340 at 372-373 (the Court).

[53] See eg, *Houssein v Under Secretary of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88 at 94 (the Court); *O'Sullivan v Farrer* (1989) 168 CLR 210 at 215 (Mason CJ, Brennan, Deane and Gaudron JJ); *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 575 (Mason CJ, Dawson, Toohey and Gaudron JJ).

otherwise accommodated by ss5G(4) and (8). Secondly, the evident purpose of ss5G(4) and 5G(8) is to roll-back the potential sanctions that may be visited upon company directors who take specific action under a State law that may be prohibited under the Corporations Act or on liquidators who take action in relation to a "winding up" that would otherwise be directly inconsistent with Part 5.6 of the Corporations Act. It is unsurprising then that ss5G(4) and 5G(8) by express words removes any doubt about the liability that company directors and liquidators may otherwise be exposed to in such cases. However, that does not mean that the words "in the State" in s5G(11) are to be confined to the geographical boundaries of a State. Section 5G(11) operates on an assumption that there is an existing State law in a State law area that is directly
10 inconsistent with a Commonwealth law operating in the same area. It is the non-geographic "area of law" covered by the Commonwealth that is rolled back by the State law.

43. For the reasons identified above, ss5G(4), (8) and (11) provide for the application of a law of a State to operate in the field that would, but for those provisions, be occupied by the Corporations Act. With respect to s5G(11), the words "in the State" are to be construed consistently with s5F to permit extraterritorial operation of a State law where such an operation fulfils the relevant test of connection.

B. FEDERAL JURISDICTION AND CH III

44. This section of the submissions deals with the Ch III issues raised by BGNV and Glendinning in their respective notices under s78B of the Judiciary Act. Maranoa do not seek to impugn the Bell
20 Act on Ch III grounds. The submissions address the three infirmities that are said to attach to the Bell Act because of Ch III: (a) the interaction of s39(2) of the Judiciary Act and the Bell Act; (b) the alleged interference with the institutional integrity of the Supreme Court of Western Australia by ss25(5) and 73 of the Bell Act; and (c) the alleged "transfer" of Commonwealth judicial power to State Executive power under the Bell Act.

(a) Section 39(2) Judiciary Act

45. BGNV and Glendinning rely on s39(2) of the Judiciary Act as the linchpin for an attack on the Bell Act as a whole as well as specific provisions within it. In summary, the argument is that once a State court is vested with federal jurisdiction that jurisdiction cannot be altered in any way by a State law. Put at that high level of principle, the propositions have an attractive appeal. The
30 difficulty with the scope of the proposition advanced lies in its application to this case.

46. The submissions with respect to s39(2) of the Judiciary Act fail to appreciate the significance of the carve-out afforded by the Corporations legislation. In this case, the Commonwealth law (the Corporations Act) specifically contemplates a future change in the operation of a federal law and

thus the extent of federal jurisdiction in that field. That is to say, ss5F and 5G provide a space within which the Commonwealth law will cease to operate. So understood, there must be a corresponding reduction in the *scope* of federal jurisdiction mirroring the roll-back of the Commonwealth law. Indeed, it would be an odd result if the Corporations legislation provided for the enactment of State laws capable of declaring matters to be "excluded matters" or displacing provisions of a Commonwealth law but s39(2) Judiciary Act operated to prevent that very effect. The attack on the Bell Act via s39(2) of the Judiciary Act falls away if the primary attack on the interaction between the Bell Act and ss5F and 5G of the Corporations legislation fails. If the Bell Act operates within the ambit contemplated by ss5F and 5G, the argument with respect to s39(2) of the Judiciary Act must fail.

(b) Institutional integrity

47. The principles with respect to institutional integrity of State Supreme Courts are not in dispute. The principle, derived from Ch III and enunciated in *Kable* applies to ensure the institutional integrity of courts capable of exercising federal jurisdiction. The concept of institutional integrity directs attention to the focus of the *Kable* principle which is concerned with incursions on the defining characteristics of courts. The relevant question is directed to whether a law in some way distorts the processes or functions inherent to the exercise of judicial power by courts. In recently summarising some of the propositions flowing from the principles articulated in *Kable* and developed in subsequent cases, French CJ, Kiefel and Bell JJ stated,[54] relevantly:

> (1) A State legislature cannot confer upon a State court a function or power which substantially impairs its institutional integrity, and which is therefore incompatible with its role, under Ch III of the *Constitution*, as a repository of federal jurisdiction and as a part of the integrated Australian court system.
>
> (2) The term "institutional integrity" applied to a court refers to its possession of the defining or essential characteristics of a court including the reality and appearance of its independence and its impartiality.
>
> ...
>
> (5) Nor can a State legislature validly enact a law which would effect an impermissible executive intrusion into the processes or decisions of a court.

48. Thus, *Kable* is only engaged where a law of a State or Territory substantially impairs the institutional integrity of a court, such that it is incompatible with that court's role as a repository of federal jurisdiction. Consequently, before *Kable* has any work to do, the impugned law must have some relevant effect on the institutional integrity of a court.

54 *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 90 ALJR 38 at [39] (French CJ, Kiefel and Bell JJ).

49. Drawing from those principles, BGNV and Glendinning submit that the Bell Act impermissibly interferes with the institutional integrity of the Supreme Court of Western Australia. That submission is anchored in ss25(5) and 73 of the Bell Act.

50. Section 25(5) of the Bell Act precludes claims or proceedings in relation to liabilities that may be proved following the call for proof pursuant to s34 otherwise than in accordance with the provisions of Part 4. Part 4 of the Bell Act provides for the "winding up" of the Bell Companies and puts in place a mechanism for the Governor to discharge liabilities of those companies to creditors as well as conferring a discretion to make payments to creditors who had funded the Bell litigation.[55] The Governor's discretion with respect to the determinations made following a process of information gathering[56] and recommendations[57] is broad,[58] but like any statutory discretion, is confined by the scope and purposes of the Act under which it is made. The administrative processes provided for under Part 4 are subject to review for jurisdictional error[59] as they must be.[60] It is against that background that ss25(5) and 73 are to be understood.

51. Section 25(5) makes plain that there is to be one process for the discharge of liabilities and payments to litigation funders, namely, that which is set out in Part 4 of the Bell Act and provides the usual mechanisms for the provision of information from liquidators and other interested persons.[61] So understood, that aspect of the Bell Act appears an orthodox example of an administrative process established under statute. The vice that two of the plaintiffs fasten upon is that that statutory process is not the same as the process established under Ch 5 of the Corporations Act in relation to "winding up". However, such an attack is sterilised if the scheme established by the Bell Act falls within the operation of ss5F and 5G of the Corporations Act. That is to say, there is nothing offensive in the scheme under the Bell Act per se. It does not speak to the processes or procedures of courts and certainly does not interfere with any judicial discretion that may be exercised upon review for jurisdictional error.

52. Further, if the Bell Act is otherwise permissible under Part 1.1A of the Corporations Act, there can be no complaint that it operates so as to render pending proceedings redundant. That is not impermissible in and of itself.[62] The question is the manner in which pending proceedings have

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55 See Bell Act ss41-43.
56 Bell Act Div 2 and s36(6).
57 Bell Act ss39 and 40.
58 Bell Act ss42, 43 and 74.
59 Bell Act s74(4).
60 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at [98]-[100].
61 Bell Act Div 2 and s36.
62 *Duncan v ICAC* (2015) 89 ALJR 835 at [31] (French CJ, Kiefel, Bell and Keane JJ); *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547 at [17]-[20] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ); *Nelungaloo Pty Ltd v Commonwealth* (1947) 75 CLR 495 at 503-504; *Australian Building Construction Employees and Builders Labourers Federation v Commonwealth* (1986) 161 CLR 88 at 96 (the Court); *AEU v Fair Work Australia*

been affected. If pending proceedings have been affected by a change in the substantive operation of the underlying law upon which such proceedings are based, such an affectation is constitutionally permissible. For the above reasons, the plaintiffs' attack on s25(5) is misplaced.

53. Similarly, the attack on s73 falls away if the primary attack on ss5F and 5G of the Corporations Act is not successful. Leaving aside s73(2), which carves out an exception for Part IVC proceedings under the *Taxation Administration Act 1953* (Cth) in relation to taxation objections, s73 operates on the assumption that the transfer of property effected under s22 into the Fund established under s16 is available for carrying out the administrative process established under Part 4. Again, assuming the Bell Act effectively rolls back the application of the Corporations
10 Act, there is nothing offensive in s73(1) vis-à-vis the institutional integrity of State Courts.

54. Section 73(1) vests a discretion in the Supreme Court[63] in any proceeding "with respect to" the "property" the subject of transfer under the Bell Act to grant leave for a proceeding to commence or to be maintained. The circumstances in which leave may be granted cannot be definitively identified but would no doubt be fact-specific and would be resolved by reference to criteria governing the granting of leave generally. On this aspect, BGNV and Glendinning attack the validity of s73 on the basis that the provisions of the Bell Act have been designed to answer the arguments advanced in pending proceedings (being COR 146 of 2014, COR 179 of 2014 and COR 208 of 2014).[64] Accordingly, they submit that the possibility of granting leave is "illusory".[65] The difficulties with that submission are twofold. First, the provision does not direct the Court as
20 to the manner or exercise of a discretion. The Court retains the function of determining whether a particular case raises issues that require leave to be granted. Secondly, the fact that other aspects of the Bell Act may operate conclusively to determine the outcome of proceedings that may have been able to be prosecuted under a different legislative arrangement had the Bell Act not been enacted does not speak to the validity of the Bell Act. Assuming the Parliament of Western Australia otherwise has the legislative power to enact the Bell Act and has effectively rolled-back or displaced the Corporations Act to enable the Bell Act to operate according to its terms, it cannot be impugned if in doing so it has an effect on pending proceedings. It is well established that a Parliament may change the applicable law, retrospectively or prospectively, without interfering with the judicial process,[66] even where litigation is pending.[67] That a court mid-

(2012) 246 CLR 117 at [49] (French CJ, Crennan and Kiefel JJ), [86], [95]-[97] (Gummow, Hayne and Bell JJ); *Oakes v Chief Executive, Department of Premier & Cabinet* (2015) 124 SASR 56 at [22], [24], [30] (Gray ACJ; Sulan J and Stanley J agreeing).

63 As defined in s3(1) of the Bell Act.

64 BGNV submissions [143]-[144]; Glendinning submissions [132].

65 BGNV submissions [145]; Glendinning submissions [132].

66 *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 534, 540 (Mason CJ), 643-4 (Dawson J), 719, 721 (McHugh J); *Nicholas v The Queen* (1998) 193 CLR 173 at [114] (McHugh J), [149] (Gummow J).

proceeding may be required to apply a fresh law does not impermissibly interfere with exercise of judicial power unless such laws amount to a directed outcome. That is not this case.

55. There is no legislative direction contained in s73, and contrary to the submission of BGNV,[68] nor is there any conclusive legislative adjudication in favour of the State in relation to a controversy. Nor is this a *Mistretta* or *Totani* aspect to the operation of the s73. This is not a case of cloaking the work of political branches in the neutral colours of judicial action. Rather, as noted above, subject to judicial discretion to grant leave, s73 is a mechanism to identify the avenue by which issues with respect to property transferred under the Bell Act will generally, but not always, be taken: namely, via review for jurisdictional error following the administrative process provided for by Part 4. Assuming the Bell Act is otherwise valid, that aspect of s73(1) is not repugnant to Ch III.

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(c) Bell Act as an exercise of Commonwealth judicial power

56. It is not in dispute that the judicial power of the Commonwealth cannot be exercised by the Executive Government of the Commonwealth, or relevantly, a State. Glendinning submits that the administrative process established under Part 4 of the Bell Act is invalid because it transfers the function of quelling a controversy arising under Commonwealth law to the State Executive. Leaving aside the issues raised in relation to the Taxation legislation, that submission will only succeed if the Bell Act does not validly roll-back or displace the operation of the Corporations Act in relation to the winding up of the WA Bell Companies. If, however, the Bell Act is otherwise valid there is no "transfer". Rather, the Corporations Act-related proceedings and processes do not apply in relation to the WA Bell Companies (because the Commonwealth law facilitates that result) and there is a new process provided in relation to the "winding up" of the WA Bell Companies. That is to say, any pre-existing controversy as may have been in existence in relation to matters arising under the Corporations legislation (leaving aside Taxation legislation) for those companies is legislatively concluded by the combined operation of Commonwealth law and State law. The relevant Commonwealth law ceases to operate in relation to those companies — the Commonwealth's jurisdiction in relation to those companies under the relevant Commonwealth law is removed. Accordingly, there is no "controversy" under that law that stands to be quelled by an exercise of the judicial power of the Commonwealth. A fortiori, if the

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67 *Duncan v ICAC* (2015) 89 ALJR 835 at [31] (French CJ, Kiefel, Bell and Keane JJ); *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547 at [17]-[20] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ); *Nelungaloo Pty Ltd v Commonwealth* (1947) 75 CLR 495 at 503-504; *Australian Building Construction Employees and Builders Labourers Federation v Commonwealth* (1986) 161 CLR 88 at 96 (the Court); *AEU v Fair Work Australia* (2012) 246 CLR 117 at [49] (French CJ, Crennan and Kiefel JJ), [86], [95]-[97] (Gummow, Hayne and Bell JJ); *Oakes v Chief Executive, Department of Premier & Cabinet* (2015) 124 SASR 56 at [22], [24], [30] (Gray ACJ; Sulan J and Stanley J agreeing).

68 BGNV submissions [143].

Bell Act is otherwise valid, the issue simply does not arise.

Part VI: Estimate of time for oral argument

57. South Australia estimates that 20 minutes will be required for the presentation of oral argument.

Dated: 23 March 2016

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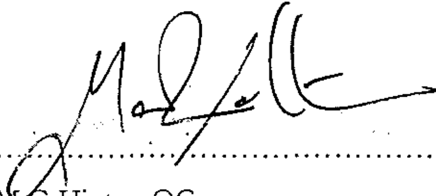

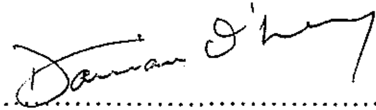

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