IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S248 of 2015

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

and

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

and

THE STATE OF WESTERN AUSTRALIA
Defendant

PLAINTIFFS' ANNOTATED SUBMISSIONS IN REPLY

Filed on behalf of the Plaintiffs by
Lipman Karas
Level 23, 25 Grenfell Street
ADELAIDE SA 5000

Telephone: 08 8239 4600
Fax: 08 8239 4699
Ref: Skip Lipman

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I. CERTIFICATION

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

II. ARGUMENT

Issue 1: tax legislation inconsistency

2. The defendant's response to the plaintiffs' case on former s.215 and s.254 of the 1936 Act primarily focuses on the position of the Commissioner and ignores the position of the liquidator. It therefore fails to address a key element of the plaintiffs' case dealt with in paragraphs 49 to 57 of the plaintiffs' submissions in chief.

3. The defendant's case is that the Commissioner is in *"precisely the same position"* after the Bell Act as he was before and that the set aside amount is held by the Authority *"in the same way"* that it was held by the liquidator prior to the enactment of the Bell Act.[1] Both contentions are wrong. The position of the Commissioner before and after the Bell Act must be assessed having regard to the obligations imposed on the liquidator by ss.215 and 254 and the position of the liquidator before and after the Bell Act.

4. The liquidator's obligations under former s.215 were described in *Bruton Holdings Pty Ltd (in liq) v FCT* (2009) 239 CLR 346 (a case dealing with the equivalent provision in s.260-45 of Schedule 1 to the TAA) as follows at [16]:

> *The section further provides, in effect, that the liquidator is obliged (s 260-45(6)) to set aside from the assets of the company available to pay tax-related liabilities and other, non-priority, unsecured debts, the proportion of those available assets that would be applied in accordance with s 555 of the Corporations Act to meet the notified amount of tax-related liabilities. The liquidator is then personally obliged (s 260-45(7), (8)) to discharge the outstanding tax liabilities of the company to the extent of the value of the assets the liquidator is required to set aside under the proportionate formula. Failure by the liquidator to comply with these obligations is a criminal offence (s 260-50).*

5. Those obligations are imposed on the liquidator as part of a specific scheme to protect the revenue.[2] The same legislative purpose is reflected in s.254.[3] Section 254 is both a collecting provision and a liability-imposing provision in that, as an aid to the collection of tax, it imposes a personal liability to tax on the liquidator.[4] Section 254 imposes three liabilities on the liquidator. First, a liability in respect of the income, profits or gains (**IPG**), making the liquidator answerable as taxpayer, including *"for the payment of tax thereon"* (s.254(1)(a)). Second, a liability of the liquidator to make the returns in respect of the IPG and be assessed thereon in his representative capacity (s.254(1)(b)). The purpose of s.254(1)(b) is to ensure payment of the tax.[5] Third, a personal liability for the tax payable in respect of the IPG to the extent of any amount that the liquidator retained or should have retained under s.254(1)(d) (s.254(1)(e)). The purpose of the s.254(1)(d) authorisation and retention obligation is to meet the tax payment obligation imposed on the liquidator by s.254(1)(a).[6] The Bell Act undermines these purposes. It does so by rendering the liquidator's liabilities nugatory as a result of transferring the retained and set aside funds from the possession and control of the liquidator to an Authority that is free to deal with those funds at the Authority's absolute, unfettered discretion.

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1 See DS [30], [31], [34] and [58].

2 *Bruton Holdings Pty Ltd (in liq) v FCT* (2009) 239 CLR 346 (***Bruton***) at [16]-[18] (the Court) in relation to the equivalent of s.215.

3 *Commissioner of Taxation v Australian Building Systems Pty Ltd (in liq)* (2015) 326 ALR 590 (***ABS***) at [130]-[132] (Keane J) and [187] and [193] (Gordon J).

4 *ABS* at [104] (Keane J) and [171] and [176] (Gordon J).

5 *ABS* at [174] and [187] (Gordon J).

6 *ABS* at [193] (Gordon J) and [70], [84] and [132] (Keane J).

6. The position of both the liquidator and the Commissioner before the Bell Act is fundamentally different from their position after that Act. The defendant seeks to resist this conclusion by contending that before the Bell Act neither s.215, nor s.254, created a right in the Commonwealth to receive any sum, nor did those provisions ensure that the Commonwealth would receive anything in a winding up[7] and then contending that the Commonwealth's position after the Bell Act is no different. This overstates the position and inappropriately excludes from the relevant analysis the fact that ss.215 and 254 operate in a fundamentally different context before the Bell Act, compared with after the Bell Act, for the reasons explained below.

7. If a winding up has no assets, or no money comes to the liquidator after the commencement of the winding up from the derivation of IPG, then there is nothing for the liquidator to set aside under s.215 or retain under s.254. If there are no available assets or money to set aside or retain, it necessarily follows that the Commonwealth will not receive anything in the winding up. However, the position is very different where the liquidator does have assets available for payment of ordinary debts and has derived income and received money after the date of winding up. In this situation both s.215 and s.254 apply and have a substantive operation. Section 215, which deals with pre-appointment tax-related liabilities,[8] either required Mr Woodings to set aside an amount calculated in accordance with s.215(3)(b) (if, as the plaintiffs contend, he had received a s.215(2) notice) or not part with any assets (if no s.215(2) notice had been given, as the defendant contends). Prior to the Bell Act the *"proportionate system"*[9] established by s.215 meant, having regard to the operation of Chapter 5 of the Corporations Act, that the Commonwealth would receive a pro-rata distribution in the winding up from the set aside funds. Similarly, s.254, which addresses post-liquidation debts or claims,[10] obliged and authorised Mr Woodings to retain $298,190,348.70.[11] Mr Woodings set aside sufficient funds to meet this obligation.[12] The effect of s.254, operating with Chapter 5, was that the post-liquidation tax expenses of the WA Bell Companies would be paid to the Commissioner in the windings up of those companies proportionally with other post-liquidation creditors. This is confirmed by the example given in paragraph 51 of the defendant's submission. It is not to the point that the amount received by the Commissioner in that example is less than the amount retained or less than the tax payable. What is relevant is that the Commissioner does receive a payment from the set aside amount and ss.215 and 254 provide a mechanism for the enforcement of the Commissioner's rights to receive that payment. This outcome is not a question of priority for the Commissioner but a reflection of, and is consistent with, the statutory scheme under the Corporations Act that post-liquidation creditors are to be treated equally and paid in a particular order.[13]

8. The Bell Act fundamentally changes this outcome and undermines the position of both the liquidator and the Commissioner for the reasons explained in paragraphs 50 to 57 of the plaintiffs' submissions in chief. In short, the funds Mr Woodings retained and set aside to meet his obligations under ss.215 and 254 are no longer held or retained by him because they have been transferred to the Authority. The Authority holds those funds for the purposes of discharging its functions under the Bell Act. The Authority does not hold the funds for the purpose of discharging Mr Woodings' obligations under ss.215 or 254 or for paying the tax owing to the Commissioner.

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7 Defendant's submission (**DS**), [26].
8 *ABS* at [204] (Gordon J) and DS [28].
9 *Bruton* at [20] (the Court).
10 *ABS* at [204] (Gordon J) and DS [33].
11 Amended Special Case (**ASC**) [73], Court Book (**CB**), p.188).
12 ASC [40.1], CB, p.176.
13 *ABS* at [207] (Gordon J).

9. The defendant seeks to avoid this consequence by saying that just as the liquidator before the Bell Act had a sum of money to distribute *"according to law"*, so too, after the Bell Act, does the Authority,[14] hence the Commissioner is in no different position. This ignores the fact that in saying that before the Bell Act the liquidator was obliged to deal with the set aside amount "according to law", the relevant law was that found in Chapter 5 of the Corporations Act which, by force of s.556, conferred priority on the Commissioner in respect of the post-liquidation tax payable by the WA Bell Companies. But after the Bell Act the liquidator is prohibited from applying that law and the "law" to be applied by the Authority is no law at all - it is absolute, unfettered discretion. The defendant accepts as much in paragraph 160 of its submission in P63 of 2015 in which it states: *"In exercising its powers under s.39 of the Bell Act* [i.e. in making a recommendation to the Minister as to how much, if any, should be paid to the Commonwealth] *the Authority does not inquire into or apply 'the law'"*.

10. In these circumstances, it cannot be said that the set aside amount is held by the Authority in the "same way" that it was held by the liquidator. It is equally wrong to say, as the defendant does, that *"[l]ike duties are imposed on the Administrator"*.[15] They are not. The defendant is thus forced to contend that the liquidator's liability under ss.215(3)(c), 215(4) and 254(1)(e) is *"illusory"* and not *"real"* so long as the Bell Act provides for a process by which distributions to the Commissioner in respect of the liability for tax to which ss.215 and 254 relates can be made.[16] This contention is wrong for a number of reasons, not least because the only way a liquidator can meet his personal liability under ss.215 and 254 is if the liquidator does the things that he is required to do under those sections. It is no answer for the liquidator to say that he has discharged his obligation to retain the funds because those funds are held by a third party over whom the liquidator has no control and who is not subject to the same obligations in respect of the those funds that the liquidator was subject. As Dixon J noted in *Farley*,[17] the set aside obligation requires the liquidator *"to retain the amount and ... not to distribute it or to appropriate it to some other purpose"*. As a result of the Bell Act the liquidator no longer retains the amount which has been appropriated to the Authority for a purpose different to that for which it was held prior to the Bell Act.

11. Further, the Bell Act does not effect a process by which the Commissioner will receive a payment corresponding to the payment that the Commissioner would have received from the liquidator complying with his obligations under ss.215 and 254. Even if the defendant was right to say (which it is not) that the set aside amount is now held by the Authority,[18] the Authority has no obligation to the Commissioner under the Bell Act in respect of that amount. The Authority in its absolute, unfettered discretion can do what it likes, including recommending that no payment be made to the Commissioner. Even if the Authority recommended that a payment be made to the Commissioner, the Governor is free to ignore that recommendation and determine that no payment is to be made. Unlike the position of the Commissioner vis-à-vis the liquidator under ss.215 and 254, the Commissioner under the Bell Act has no enforceable rights against the Authority or Governor in respect of the set aside amount.[19]

12. There is thus no substance to the defendant's contention that the Commissioner is in precisely the same position after the Bell Act compared to its position before the Bell Act. (Even if there was, the fact that the liquidator is not in the same position is fatal to the

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[14] DS [32].
[15] DS [57].
[16] DS [32] and [35].
[17] *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd* (1940) 63 CLR 278 at 311.
[18] DS [32].
[19] Bell Act, ss.39(8) and 43(6).

defendant's argument). The defendant recognises as much in paragraph 57 of its submission which states:

The Administrator has received all property that the liquidator had. The only real difference between the two schemes is that the Commonwealth may not receive as much in a final distribution as it may have if a final distribution were made by a liquidator.

13. But that essential difference between the two schemes is critical. It confirms that the position of the Commissioner (and the position of the liquidator) before and after the Bell Act is not precisely the same. Rather, their positions are completely different.

Issue 2: standing

14. The question of the plaintiffs' standing to raise Issue 1 is a non-issue for three reasons. First, the Commonwealth has intervened pursuant to s.78A of the Judiciary Act to support the plaintiffs on Issue 1 and contend that the Bell Act is invalid for inconsistency with the tax legislation. The question of the plaintiffs' separate standing to raise that issue thus falls away.[20] Secondly, having regard to the principles enunciated in *Roadshow Films Pty Ltd v IINet Limited (No 1)* (2011) 248 CLR 37 at [2]-[3] the Commissioner should be given leave to intervene. The Commissioner's legal interest will be directly affected by the outcome of this case. The Commissioner is therefore entitled to intervene to protect that interest. In addition, in circumstances where the defendant objects to the plaintiffs' standing to raise Issue 1 (on the basis that only the Commissioner has standing to do so) it cannot be said, as the defendant does,[21] that the submissions of the Commissioner are unlikely to add to the submissions made by the plaintiffs. Indeed, the Commissioner seeks to put submissions in support of the contention that the Bell Act is invalid that the defendant says cannot be put by the plaintiffs. The defendant cannot have it both ways. It cannot on the one hand say that the Commissioner (and not the plaintiffs) is the only person with standing to raise Issue 1 and then say, on the other, that the Commissioner should not be given leave to be heard on that issue because the Commissioner's submissions do not add to the issues. Plainly, the Commissioner's submissions do add to the issues.

15. Thirdly, the plaintiffs seek a declaration that the Bell Act, or certain of its provisions, are invalid. The jurisdiction which the plaintiffs have invoked is that conferred on this Court, pursuant to s.76(i) of the Constitution, by s.30(a) of the Judiciary Act in "all matters arising under the Constitution or involving its interpretation". Accordingly, any questions of standing which arise are directed to what is required of a plaintiff in a matter arising under the Constitution or involving its interpretation.[22]

16. It is well established that in federal jurisdiction, questions of standing to seek a declaration of invalidity of an impugned law are subsumed within the constitutional requirements of a "matter".[23] It is equally well established that a "matter" may consist of a controversy between a person who has a sufficient interest in the subject and who asserts that a purported law is invalid and the polity whose law it purports to be.[24] Thus it has been the

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[20] *Williams v The Commonwealth* (2012) 248 CLR 156 at [112] (Gummow and Bell JJ), French CJ agreeing at [9], Hayne J agreeing at [168], Crennan J agreeing at [475] and Kiefel J agreeing at [557].

[21] DS [19].

[22] *Croome v Tasmania* (1997) 191 CLR 119 (***Croome***) at 130 (Gaudron, McHugh and Gummow JJ).

[23] *Croome* at 132-133 (Gaudron, McHugh and Gummow JJ), *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at [37] (Gaudron, Gummow and Kirby JJ), *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at [50]-[51] (French CJ) and [152] (Gummow, Crennan and Bell JJ), *S10/2011 v Minister for Immigration and Citzenship* (2012) 246 CLR 636 at [68] (Gummow, Hayne, Crennan and Bell JJ) and *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1 at [22] (French CJ, Kiefel and Nettle J).

[24] *Croome* at 125 (Brennan CJ, Dawson and Toohey JJ).

practice of this Court for more than a century to allow the constitutional validity of statutes to be challenged by interested persons in actions claiming only declarations of invalidity.[25] Over 70 years ago Latham CJ said in *Toowoomba Foundry Pty Ltd v The Commonwealth* (1945) 71 CLR 545 at 570:

It is now, I think, too late to contend that a person who is, or in the immediate future probably will be, affected in his person or property by Commonwealth legislation alleged to be unconstitutional has not a cause of action in this Court for a declaration that the legislation is invalid.

17. The same principle applies where a declaration of invalidity is sought of State legislation.[26]

18. What then is the "matter" in respect of which this Court is seised of jurisdiction in S248 of 2015? It is convenient to answer this question by adopting the tripartite inquiry referred to by Gaudron and Gummow JJ in *Re McBain; ex parte Catholic Bishops Conference* (2002) 209 CLR 372 at [62]. That inquiry requires first, identification of the subject matter for determination in S248 of 2015, secondly, identification of the right, title, duty, liability, privilege or immunity sought to be established by the plaintiffs in the proceeding and thirdly, identification of the controversy between the parties for the quelling of which the judicial power of the Commonwealth has been invoked.[27] Whilst each of these inquiries may be pursued separately, all are related aspects of the basal question, is there a "matter" in the sense required by Ch III of the Constitution?[28]

19. In the present case, the subject matter for determination is the validity of the Bell Act. In a case where, as here, the jurisdiction of the Court that is invoked is that under s.30(a) of the Judiciary Act in a matter arising under the Constitution or involving its interpretation, the right, title, privilege or immunity which the plaintiffs seek to establish in the proceeding must arise under the Constitution.[29] That requirement is satisfied in this case because the plaintiffs claim a privilege or immunity from the requirement to observe the Bell Act by reason of s.109 of the Constitution and Ch III of the Constitution.[30] That is, the plaintiffs claim that one or both of s.109 and Ch III release them from the obligation to comply with the Bell Act.[31] Finally, the controversy between the parties to S248 of 2015 for the quelling of which the judicial power of the Commonwealth has been invoked is the controversy whether s.109 of the Constitution and/or Ch III invalidate some or all of the provisions of the Bell Act.

20. It may be accepted that a justiciable controversy does not arise unless the person who challenges the validity of the impugned law has a sufficient interest to do so.[32] However, the plaintiffs in this case have such an interest. The Bell Act affects both BGNV's property and its person. The legislation affects BGNV's property in two main respects. First, s.26(1)(i) destroys BGNV's contractual rights under PTICA.[33] Secondly, ss.22, 25(1) and 25(5) render nugatory BGNV's rights as a creditor of TBGL and BGF to receive the benefit of a s.564 order under the Corporations Law and to be paid a dividend

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25 *Toowoomba Foundry Pty Ltd v The Commonwealth* (1945) 71 CLR 545 at 570 and the cases there cited.
26 *Croome* at 137 (Gaudron, McHugh and Gummow JJ).
27 *Re McBain; ex parte Catholic Bishops Conference* (2002) 209 CLR 372 (***McBain***) at [62] (Gaudron and Gummow JJ).
28 *McBain* at [62] (Gaudron and Gummow JJ).
29 *James v South Australia* (1927) 40 CLR 1 at 40 (Gavan Duffy, Rich and Starke JJ), *Croome* at 126 (Brennan CJ, Dawson and Toohey JJ) and *McBain* at [68] (Gaudron and Gummow JJ).
30 *McBain* at [69] (Gaudron and Gummow JJ).
31 *Croome* at 127 (Brennan CJ, Dawson and Toohey JJ).
32 *Croome* at 126 (Brennan CJ, Dawson and Toohey JJ).
33 The plaintiffs' written submission dated 3 March 2016 (**PS**) at [87].

on its proofs of debt in the windings up of TBGL and BGF.[34] Before the Bell Act BGNV had valuable property in Australia which Mr Trevor, as its liquidator, was obliged to recover and realise. After the Bell Act, BGNV has no such property. The Bell Act also affects the plaintiffs' person in a variety of ways. For example: ss.22, 25, 58 and 73 interfere with BGNV's rights as a litigant in federal jurisdiction;[35] s.25(5) prevents BGNV from pursuing its existing proofs in the winding up of TBGL and BGF; and both BGNV and Mr Trevor are subject to criminal sanction for non-compliance with the Act. In short, the Bell Act adversely affects the plaintiffs' legal rights and economic interests in a material way. It does so by depriving the plaintiffs of rights which they would otherwise have and imposing obligations on them to which they would not otherwise be subject. The plaintiffs' grievances concerning the validity of the Bell Act go beyond that of a mere member of the general public.

21. The plaintiffs therefore have a real and sufficient interest to support an application for a declaration that the Bell Act is invalid, including by reason of s.109 of the Constitution arising from the inconsistency between the Bell Act and the provisions of the taxation legislation pleaded in paragraph 56 of the statement of claim. Section 109 operates of its own force, even in the absence of a plaintiff seeking declaratory relief, to render invalid, to the extent of the inconsistency, the relevant law of the State.[36] The plaintiffs have a real interest in having their legal position clarified in respect to this issue because it is their case that if the impugned provisions are invalid by reason of s.109 the provisions cannot be severed.[37] As a result, the Bell Act will have no effect and not apply to the plaintiffs. Thus, contrary to the defendant's case,[38] the plaintiffs will gain an advantage by the outcome of the s.109 argument. The plaintiffs are "entitled to know"[39] whether they are obliged to observe the Bell Act or whether they are free to ignore it. They have a real and immediate interest in the determination of that question which is not hypothetical or abstract. It follows that S248 of 2015 gives rise to a "matter" arising under the Constitution and that the plaintiffs have standing to seek a declaration that the Bell Act is invalid.

Issue 2: justiciability

22. The defendant raises the issue of justiciability in a peculiar way. The defendant only denies that a justiciable controversy arises in S248 of 2015 because it says that a <u>different</u> plaintiff (Mr Woodings) in a <u>different</u> action (P4 of 2016) has failed to allege in that (other) proceeding that he had received a s.215(2) notice.[40] The defendant's approach is misconceived.

23. The requirement that a matter be justiciable means that the matter must be capable of judicial determination on some recognised principle of law.[41] In the present action the plaintiffs, supported by authority, contend that the Commissioner issued the requisite notice under former s.215(2) by, amongst other things, lodgment of the proofs of debt based on the pre-liquidation assessments.[42] The defendant joins issue with this allegation.[43] The dispute between the parties (was a notice given to Mr Woodings under

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[34] PS at [87].
[35] PS at [134]-[136] and [139]-[145].
[36] *Croome* at 129 (Gaudron, McHugh and Gummow JJ) and *McBain* at [69] (Gaudron and Gummow JJ).
[37] PS [146].
[38] DS [18].
[39] *Croome* at 138 (Gaudron, McHugh and Gummow JJ).
[40] See defence [56.2] and DS [21].
[41] *The State of South Australia v The State of Victoria* (1911) 12 CLR 667 at 708 (O'Connor J) applied in *CGU Insurance Ltd v Blakeley* [2016] HCA 2 at [26] (French CJ, Kiefel, Bell and Keane JJ).
[42] PS [55].
[43] DS [22].

former s.215(2)?) is capable of judicial determination applying recognised principles of law. The dispute thus gives rise to a justiciable controversy between the plaintiffs and the defendant in S248 of 2015. Whether that same, different or no justiciable controversy arises in P4 of 2016 is irrelevant to the question whether such a controversy arises in S248 of 2015.

Issue 3: Corporations Act inconsistency

24. The defendant now concedes that there is inconsistency between the Bell Act and the Corporations Act and the real issue is whether that inconsistency is saved by ss.5F or 5G of the Corporations Act.[44]

Issue 4: ss.5F and 5G

25. The defendant contends that the words "in the/a State or Territory" in ss.5F(2)/5G(11) mean that a law of Western Australia can dis-apply the Corporations Act in any State or Territory and not simply in Western Australia.[45] The defendant's extra-territorial construction is supported by South Australia and Tasmania.[46] However, it is disputed by the Commonwealth, New South Wales, Queensland and Victoria who contend that the Bell Act can only dis-apply the Corporations Act within the geographical area of the State of Western Australia and not elsewhere.[47] This also reflects the plaintiffs' alternative argument in the event that its primary argument, based on the judgment of Barrett J in *HIH*,[48] is not accepted. On this alternative argument, the Corporations Act, in particular Chapter 5, continues to apply to the WA Bell Companies in every other State and Territory, thereby giving rise to s.109 inconsistency and invalidity of the Bell Act.[49] The plaintiffs' primary case is set out in paragraphs 94 to 97 of its submission in chief. This reply deals only with its alternative argument and explains why the State's extra-territorial construction should be rejected.

26. Section 5F(2) only applies if a law of a State or Territory declares a matter to be an excluded matter.[50] Section 5F(2) then dis-applies the relevant provisions of the Corporations legislation *"in the State or Territory in relation to the matter"*. The reference to "the State or Territory" in s.5F(2) is plainly a reference to s.5F(1) and the State or Territory that enacted the law declaring the matter to be an excluded matter. The reference is not, as the defendant contends,[51] a reference to the State(s) where the matter "is". Thus to determine "in" which State or Territory the Corporations legislation or any of its provisions is dis-applied, you must look to find the State or Territory that has enacted a law invoking s.5F(1). Section 5F(2) then dis-applies the Corporations legislation in that State and that State alone.

27. The dis-application of the Corporations legislation occurs, as the terms of s.5F(2) make clear, by force of a Commonwealth law, s.5F(2). It does not occur by force of State law. The terms of s.5F(2) mean that a provision of the Corporations legislation can only be dis-applied in two or more States or Territories by force of s.5F(2) if the requirements of that section are complied with. This means that before a provision of the Corporations legislation will be dis-applied in State A and State B, each of State A and State B must have passed a law for the purpose of s.5F(1) declaring the matter to be an excluded matter.

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[44] DS [196].
[45] DS [151]-[153].
[46] See submissions of South Australia at [7ia] and [30] and Tasmania at [25], [27], [35] and [36].
[47] See submissions of the Commonwealth at [9]-[14], New South Wales at [5(a)], [10(a)], [22]-[24] and [28], Queensland at [39] and [48] and Victoria at [13], [15] and [32].
[48] *HIH v Building Insurers* (2003) 202 ALR 610.
[49] See PS [98].
[50] Section 5F(1).
[51] DS [151].

Only then will s.5F(2) operate of its own force to dis-apply the relevant provisions of the Corporations legislation in both State A and State B. It follows that State A could not dis-apply the Corporations legislation in State B by purporting to legislate extra-territorially to achieve this outcome. This is because the dis-application of the Commonwealth Corporations legislation in State B can only occur by force of s.5F(2) which requires State B (and not State A) to have enacted a law invoking s.5F(1). If State B has not enacted such a law, s.5F(2) does not operate to dis-apply the Corporations legislation in State B. In other words, each State and Territory (not another State or Territory) determines if, and the extent to which, provisions of the Corporations legislation are dis-applied within their territory.

28. It follows that if, contrary to the plaintiffs' primary argument, the Bell Act has successfully invoked s.5F(2), the Corporations Act is only dis-applied in Western Australia and not elsewhere. As a result, the Corporations Act continues to apply in every other State and Territory to the windings up of the WA Bell Companies. Accordingly, s.5F does not avoid the inconsistency between the Bell Act and the Corporations Act.

29. Section 5G(8), if it applies, only dis-applies the provisions of Chapter 5 of the Corporations Act. In answer to the plaintiffs' contention that s.5G(8) therefore cannot avoid invalidity between the Bell Act and s.1408 of the Corporations Act, (a provision in Part 10 which picks up, as provisions of the Corporations Act, the provisions of Parts 5.4 to 5.6 of the Corporations Law in respect of those WA Bell Companies ordered to be wound up before 23 June 1993) the defendant invokes s.1405 of the Corporations Act. The defendant's reliance on that section is mis-placed for the reasons explained in paragraph 34 of the plaintiffs' submissions in chief dealing with the defendant's reliance on s.11(5) of the *Corporations (Ancillary Provisions) Act 2001* (WA). Section 1405 has no work to do because it does not apply to events after 15 July 2001.

30. The balance of the defendant's submissions concerning ss.5G(4) and (8) do not seek to respond to the substance of the plaintiffs' arguments.[52] Instead, the defendant either attacks a straw man or engages in bald denial. An example of the former is the defendant's mis-characterisation of the plaintiffs' s.5G(8) argument to the effect that a State law can only displace Chapter 5 of the Corporations Act to the extent that the State replaces the Commonwealth's regime with an identical regime.[53] That is not the plaintiffs' case. Rather, the plaintiffs' case is that a State can only displace the winding up provisions of Chapter 5 if the replacement State law can itself be characterised as providing for a "winding up".[54] An example of the latter is found in paragraph 181 of the defendant's submission. That paragraph responds to paragraph 102 of the plaintiffs' submission and their reliance on the observations of Starke J in *Wolfson v Registrar-General (NSW)* (1934) 51 CLR 300 at 311-312 that statutory vesting of the kind found in s.22 of the Bell Act does not involve the doing of an "act", an essential requirement for the operation of s.5G(4). The defendant simply asserts, without analysis, that statutory vesting does involve the doing of an act and asserts, without explanation, that s.5G(4) applies to various sections of the Bell Act.

Issues 5 and 6: Judiciary Act inconsistency and Ch III repugnancy

31. The defendant accepts that s.25(5) of the Bell Act imposes a restriction on the bringing of claims.[55] However, the defendant says, relying on *The Commonwealth of Australia v Rhind* (1966) 119 CLR 584, that such a law does not remove jurisdiction (which the

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[52] Victoria supports the plaintiffs' construction of ss.5G(4) and 5G(8). See Victoria's submission at [30] and [31].
[53] DS [161].
[54] See PS [110].
[55] DS [197].

defendant accepts would be impermissible), it merely prohibits a person from resorting to the jurisdiction of the Court (which the defendant says is permissible).[56] This contention is wrong for the reasons explained in paragraphs 15 and 16 of the Commonwealth's submission.

32. In *Rhind*, s.2A of the *Landlord and Tenant Act 1899-1965* (NSW) prevented a landlord from commencing an action of ejectment in the Supreme Court. Thus, like s.25(5) of the Bell Act, it denied certain persons in the specified circumstances a right of access to the Supreme Court.[57] A question arose as to whether s.2A was invalid because it denied the Commonwealth access to the Supreme Court exercising federal jurisdiction. It was not necessary to determine this question. However, Barwick CJ, with whom McTiernan J agreed, noted at 592, that if s.2A denied the Commonwealth access to the Supreme Court exercising federal jurisdiction then it impermissibly trenched upon the legislative power of the Commonwealth to determine in what cases, in what courts and at whose behest federal judicial power should be exercised. The Chief Justice went on, at 599, to observe that if s.2A had sought to deny to the Commonwealth access to the Supreme Court it would *"have been plainly attempting to do something beyond the power of the State legislature, namely, to determine who should have access to a court invested with federal jurisdiction"*. The same is true of the Bell Act's attempt to prevent the exercise of federal jurisdiction by the Supreme Court in COR 146 of 2014 and COR 179 of 2014.

33. The defendant also contends that *Duncan*,[58] *Bachrach*[59] and the *BLF Case*[60] stand in the way of the plaintiffs. *Duncan* is irrelevant to the present case. In that case three grounds of invalidity were relied upon:[61] (a) the Act was not a "law"; (b) the Act was a legislative exercise of judicial power contrary to an implied limitation derived either from an historical limitation on colonial legislative power or from Ch III; and (c) certain provisions of the Act were inconsistent with provisions of the *Copyright Act 1968* (Cth). The plaintiffs do not advance any such arguments in this case. *Bachrach* is equally irrelevant: the litigation pending in that case did not involve the exercise of federal jurisdiction.[62] The *BLF Case* is also distinguishable for two reasons. First, the legislation in that case did not deal with any aspect of the judicial process (see at 96). In contrast, the Bell Act does for the reasons explained in the plaintiffs' submission in chief. Secondly, the legislation was Commonwealth, not State, legislation. Whether or not a Commonwealth law can impair the exercise of the judicial power of the Commonwealth says nothing about whether a State law can do so.

Issue 7: severance

34. The defendant does not identify, as an issue arising in this case, any question of severance.[63] Indeed, the defendant contends that only one provision of the Bell Act, s.55, can be severed in the event of invalidity.[64] Instead, the defendant contends for a wholesale "reading down" of the Bell Act to preserve validity.[65]

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[56] DS [199]-[200].
[57] At 598 (Barwick CJ).
[58] *Duncan v Independent Commission Against Corruption* (2015) 324 ALR 1.
[59] *HA Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547.
[60] *Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth* (1986) 161 CLR 88.
[61] See at [3].
[62] See at [13].
[63] See DS [2]-[12].
[64] DS [194].
[65] See, for example, DS [75]-[79].

35. There are three reasons why such reading down cannot occur. First, the defendant's reliance on s.7 of the *Interpretation Act 1984* (WA)[66] is misplaced. That section is directed to giving a partial operation to State law where there is a lack of legislative power. It is not concerned with a case, as here, of s.109 inconsistency.[67] Secondly, as the defendant accepts,[68] reading down is not available where the legislation was designed to operate fully and completely according to its terms or not at all. The Bell Act was designed to operate in this way. Thirdly, the task that the defendant is asking this Court to engage in goes beyond reading down provisions of the Bell Act. The defendant is in fact asking the Court to engage in a legislative task and redraft the Bell Act. Two examples illustrate the point. The first concerns s.16(2) of the Bell Act. The defendant asks the Court to re-draft that section so that it reads (with the reading down underlined):[69]

The Fund is to be administered by the Authority. There shall be set aside in the Fund an amount as notified by the Commissioner pursuant to s.215 of the ITAA, until final distribution pursuant to Part 4 Division 5 of the Act. The Authority shall retain in the Fund $298,190,348.70 or such other amount notified by the Commissioner pursuant to s.254 of the ITAA, until final distribution pursuant to Part 4 Division 5 of the Act.

36. The second example is s.37(1) of the Bell Act. The defendant asks the Court to re-draft that section so that it reads (with the reading down underlined):[70]

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

37. The defendant contends that corresponding amendments should be made to ss.25(1), 34(1), 35, 37(3) and 39(6).[71] This list is incomplete. On the defendant's logic, at least ss.38(7), 39(8), 39(10), 41(2), 42(2), 43(1), 43(6), 43(8), 44(3), 44(5) and 44(7) would also need to be read down in the same manner. To effect such a "reading down" would require the Court to engage in a legislative, not judicial task, recasting the Bell Act to give it a meaning and effect very different from what it now has. To adopt the words of Kirby J in *APLA Ltd v Legal Services Commissioner* (2005) 224 CLR 322 at [370]: *"To attempt surgery on its language would be to create a law different from that now appearing. ... To attempt to convert a blunderbuss into a precision rifle is not a judicial task"*.

Bret Walker
Phone: (02) 8257 2527
Fax: (02) 9221 7974
Email: maggie.dalton@stjames.net.au

Anthony D'Arcy
Phone: (02) 9376 0696
Fax: (02) 8239 0299
Email: anthony.darcy@banco.net.au

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66 DS [75].
67 *Sportsbet Pty Ltd v New South Wales* (2012) 249 CLR 298 at [13] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
68 DS [75].
69 DS [77]-[78].
70 DS [79].
71 DS [79].