

**IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY**

P4 of 2016

BETWEEN:

MARANOA TRANSPORT PTY LTD

(IN LIQ) (ACN 009 668 393)

First plaintiff

ANTONY LESLIE JOHN WOODINGS

Second plaintiff

**ANTONY LESLIE JOHN WOODINGS IN HIS CAPACITY AS
TRUSTEE UNDER A DEED OF SETTLEMENT DATED 17
SEPTEMBER 2013 IN RESPECT OF THE INTERESTS OF BELL
GROUP (UK) HOLDINGS LIMITED (IN LIQ) AND MARANOA
TRANSPORT PTY LTD (IN LIQ) (ACN 009 668 393)**

Third plaintiff

and

STATE OF WESTERN AUSTRALIA

First defendant

**THE BELL GROUP LIMITED (IN LIQ)
(ACN 008 666 993) AND THE OTHER COMPANIES
NAMED IN SCHEDULE A TO THE WRIT OF SUMMONS**

Second defendants

PLAINTIFFS' WRITTEN SUBMISSIONS – ANNOTATED

Part I: Suitability for Publication

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

Part II: Concise Statement of the Issues

2. But for s 51 and s 52 of the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Act 2015 (WA)*¹, are the provisions of the Bell Act directly inconsistent with the winding up provisions of the *Corporations Act 2001 (Cth)*² such that the Bell Act would be invalid by operation of s 109 of the *Constitution*?

¹ Referred to as the **Bell Act**.

² Referred to as the **Corporations Act**.

Date of filing: 3 March 2016
Filed on behalf of the Plaintiffs
Address for Service
Ashurst Australia
Level 10, Brookfield Place Tower 2
123 St Georges Tce, PERTH WA 6000

Tel: 61 8 9366 8000
DX: DX 388
Fax: 61 8 9366 8111
Email: Adrian.Chai@ashurst.com
Ref: ACSC/PAUW/09-3003-7797
Attention: Adrian Chai/Paul Walker

3. If there is such direct inconsistency, then, disregarding the effect of the Bell Act on the liquidation of Maranoa Transport:
 - (1) does the declaration in s 51(1) of the Bell Act that each WA Bell Company is an excluded matter for the purposes of s 5F of Corporations Act have the effect that the Corporations Act does not apply to each WA Bell Company such that the Bell Act is not invalid by operation of s 109?
 - (2) does the declaration in s 52(2) of the Bell Act operate under s 5G of the Corporations Act to displace provisions of the Corporations Act such that the Bell Act is not invalid by operation of s 109?
4. If the issue stated in paragraph 3(1) or 3(2) is answered in the affirmative, does the effect of the Bell Act on the liquidation of Maranoa Transport mean that the Bell Act is nevertheless invalid by operation of s 109?
5. If the Bell Act is not invalid by reason of direct inconsistency with the Corporations Act, is the Act nevertheless invalid by operation of s 109 by reason of inconsistency with Commonwealth taxation legislation?
6. If there is invalidating inconsistency, can the Bell Act be saved from invalidity by severance?

Part III: s 78B Notices

7. The plaintiffs have served notices under s 78B of the *Judiciary Act* 1903 (Cth).

Part IV: Judgments Below

8. This matter is brought in the Court's original jurisdiction pursuant to s 76(i) of the *Constitution* and s 30(a) of the *Judiciary Act* 1903 (Cth).

Part V: Facts

9. Various companies in the Bell Group are being wound up by orders made by the Supreme Court of Western Australia in the early to mid-1990s.³ Those companies include the first plaintiff, Maranoa Transport. The second plaintiff, Mr Woodings, is the liquidator or provisional liquidator of the various Bell Group companies that are in liquidation or provisional liquidation.⁴
10. The Commonwealth of Australia, through the Commissioner of Taxation, is a creditor of a number of the Bell Group companies⁵ in respect of tax-related liabilities founded on pre-liquidation income tax assessments.⁶

³ Amended Special Case (ASC) [15] (Special Case Book (SCB) 106); ASC Attachment A (SCB 136-138).

⁴ ASC [1C.1]-[1C.2] (SCB 104).

⁵ In particular Albany Broadcasters, Bell Bros, Bell Bros Holdings, BGF, Industrial Securities, Maradolf, Maranoa Transport, TBGL, Wanstead, WAON and Wigmores: ASC [21] (SCB 107-108).

⁶ ASC [71] (SCB 121-122); ASC Annex 2 (SCB 179-236).

11. Certain Bell Group companies, together with Mr Woodings and others, commenced and prosecuted proceedings against a number of banks.⁷ Various creditors of TBGL and BGF (being two of the Bell Group companies) indemnified the liquidators as to the costs of the proceedings.⁸ The Agreements for Indemnification contemplated orders under s 564 of the *Corporations Law* being sought by the liquidators in the event that the indemnified proceedings resulted in recovered amounts in the windings up of TBGL and BGF.⁹
12. The proceedings against the banks were successful at trial¹⁰ and on appeal.¹¹ Special leave to appeal to the High Court of Australia was granted.¹² The dispute with the banks was settled before the appeal was heard.¹³
13. The proceedings against the banks resulted in recoveries in the windings up of particular Bell Group companies of two types:
 - (1) amounts paid by the banks to certain Bell Group judgment creditors prior to the hearing of the special leave application in partial satisfaction of the judgment debts owed by the banks.¹⁴ (As at 27 November 2015 the proceeds of these amounts as held by the WA Bell Companies,¹⁵ together with interest, totalled approximately \$689.3 million¹⁶);
 - (2) an interest as beneficiary under a trust created by a Deed of Settlement¹⁷ in money held by Mr Woodings on trust for the Bell Group judgment creditors (that money being the proceeds of amounts received from the banks and interest thereon). The beneficiaries of the trust include Maranoa Transport.¹⁸ (As at 27 November 2015 the amount so held by Mr Woodings on trust totalled approximately \$1.038 billion.¹⁹)
14. In August 2014, Mr Woodings as liquidator of TBGL and BGF commenced proceedings in the Supreme Court of Western Australia seeking orders pursuant to s 564 of the *Corporations Law* (as applied by s 1408(1) of the Corporations Act) in favour of the creditors who had indemnified the liquidators as to the costs of the proceedings against the banks.²⁰

⁷ ASC [24] (SCB 108), [28] (SCB 110).

⁸ ASC [23]-[24] (SCB 108).

⁹ ASC [25A] (SCB 109-110).

¹⁰ *The Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* [2008] WASC 239; (2008) 39 WAR 1; *The Bell Group Ltd (in liq) v Westpac Banking Corporation (No 10)* [2009] WASC 107.

¹¹ *Westpac Banking Corporation v The Bell Group Ltd (in liq)[No 3]* [2012] WASCA 157;(2012) 44 WAR 1.

¹² *Westpac Banking Corporation & Ors v The Bell Group Ltd & Ors* [2013] HCA Trans 49.

¹³ ASC [28] (SCB 110); ASC [36] (SCB 113, line 26).

¹⁴ ASC [29] (SCB 110); ASC [31A] (SCB 111).

¹⁵ See ASC [16] (SCB 106); ASC Attachment A (SCB 136-138).

¹⁶ ASC [33] (SCB 111); ASC Attachment F (SCB 148-149).

¹⁷ ASC [36], [37.1] (SCB 113-114).

¹⁸ ASC [37.1] (SCB 114).

¹⁹ ASC [40.1] (SCB 115); ASC [40.2] (SCB 116).

²⁰ ASC [42] (SCB 118).

15. In August 2015, the Commissioner of Taxation issued post-liquidation assessments for income tax for the year ended 30 June 2014 to various Bell Group companies²¹ and also to Mr Woodings in his capacity as liquidator of TBGL (the assessment to Mr Woodings being issued under s 254 of the *Income Tax Assessment Act 1936* (Cth)²².) The assessments were alternate assessments for some \$298 million.²³ They remain unpaid.²⁴
16. The Bell Act was enacted by the Parliament of Western Australia on 26 November 2015. The operation of the Bell Act is described in detail below.
17. The Bell Act provides a legislative framework for the dissolution and administration of the property of TBGL and certain of its subsidiaries (described in the Act as the WA Bell Companies). The property of the WA Bell Companies, i.e. existing and deregistered Bell Group companies as registered in Western Australia,²⁵ purportedly transfers to and vests in an Authority established by the Bell Act.²⁶ So too does the property held on trust by Mr Woodings under the Deed of Settlement.²⁷ The property so transferred purportedly vests absolutely, freed from any trust, equity or interest of any kind.²⁸
18. Accordingly, even though Maranoa Transport is not a “WA Bell Company”, the Bell Act has the purported effect of extinguishing its interest in the property held on trust by Mr Woodings under the Deed of Settlement.

Part VI: Argument

The overall operation of the Bell Act

19. The Bell Act establishes an Authority, the “WA Bell Companies Administrator Authority” (s 7(1)), which is governed by an Administrator (s 7(5)). It also establishes a Fund administered by the Authority into which is to be credited all money transferred to or realised by the Authority (s 16).
20. The functions of the Authority include the collection and realisation of the property of the WA Bell Companies and the administration of the WA Bell Companies until their dissolution (s 9).
21. The Authority is the administrator of each WA Bell Company (s 27). The Authority controls and manages the property and affairs of the WA Bell Companies (s 28). Mr Woodings continues as liquidator of the WA Bell Companies. However, he may

²¹ In particular TBGL, Bell Bros, Bell Bros Holdings, Dolfinne Securities, Industrial Securities, Neoma Investments, Wanstead, Wanstead Securities, WAON and Wigmore: ASC [73] (SCB 125-126); ASC Annex 4 (SCB 299-332).

²² This is the available source of power for the Commissioner to issue an assessment to a liquidator.

²³ ASC [73] (SCB 125-126); ASC Annex 4 (SCB 299-332). That the assessments were alternate assessments is to be inferred from their terms.

²⁴ ASC [79] (SCB 127).

²⁵ ASC [17] (SCB 106-107). See also the definition in s 3(1) of the Bell Act and Sch. 1 of the Bell Act.

²⁶ Bell Act, ss 22(1) & (2).

²⁷ Bell Act, s 22(1)(b) & (c).

²⁸ Bell Act, s 22(10).

not perform or exercise any function or power as an officer of the WA Bell Companies unless with the Authority's written approval or in the exercise of a power or duty under the Bell Act (s 29).

22. The Bell Act purports to oust the ordinary winding up law that applied to the windings up of the WA Bell Companies. Each WA Bell Company is declared to be an "excluded matter" for the purposes of s 5F of the Corporations Act in relation to the whole of the Corporations legislation (as defined in the Bell Act) other than to the extent specified in ss 51(2) & (3) of the Bell Act (s 51). Relevant parts of the Bell Act are declared to be corporations legislation displacement provisions for the purposes of s 5G of the Corporations Act. The effectiveness of the Bell Act's purported invocation of the ss 5F and 5G "roll-back" and "displacement" provisions is critical to the determination of the issue of invalidity based on inconsistency with the provisions of the Commonwealth Corporations Act.
23. The Bell Act, consistently with its preamble and the objects in ss 4(a) & (b) of the Act, provides for a mechanism for the administration of property of Bell Group companies, namely the WA Bell Companies and Maranoa Transport, that is inconsistent with a winding up of those companies under the relevant Commonwealth corporations legislation (i.e., the Corporations Act or *Corporations Regulations 2001* (Cth) including, where relevant, the preserved provisions of the *Corporations Law*).

The scheme under the Bell Act for administration of property

24. From the "transfer day" (27 November 2015²⁹), property of the WA Bell Companies and Maranoa Transport³⁰ purportedly transfers to and vests in the Authority to form the Fund (ss 16(3)(a) & 22(1)). There are certain exceptions which are presently irrelevant (s 22(4) & (6)). The purported transfer applies to property whether situated in or outside of Western Australia (s 22(8)). The property vests absolutely freed from any encumbrance, trust, equity or interest (s 22(10)).
25. Creditors of the WA Bell Companies are entitled to prove their liabilities in accordance with Part 4 Div. 2 of the Bell Act, but not otherwise: (s 25). For this purpose, where property is freed from an encumbrance, trust, equity or interest that extinguishment may also be proved as a liability, i.e. the former interest holder will be able to prove under Part 4 Div. 2 as if a creditor of either one or all of the WA Bell Companies (ss 25(4) and 32(2)-(3) & (5)).
26. It is for the Authority, not the liquidator of the relevant WA Bell Company or a court, to determine the property and liabilities of each WA Bell Company (ss 35(a) & 37(1)). In doing so the Authority has an absolute discretion (s 37(3)).

²⁹ Bell Act, ss 3(1) & 2(1)(d).

³⁰ The property of Maranoa Transport that purportedly transfers to and vests in the Authority is restricted to its interest in the property held on trust by Mr Woodings under the Deed of Settlement.

27. The Authority must recommend to the Minister the amount, if any, to be paid to a person (or the property to be transferred to or vested in a person) in respect of the aggregate of all liabilities owed to that person by all the WA Bell Companies (s 39(1)). There is no requirement that the whole of the Fund be the subject of a recommendation (s 39(7)). Additionally, the Authority may make recommendations as to amounts to be paid to creditors as compensation for providing funding or indemnities in relation to the Bell litigation (s 40(2)). Recommendations are at the Authority's absolute discretion – including as to the priority to be afforded to payment in respect of a liability (ss 39(6) & 40(6)). No reasons are required (s 39(5) & 40(5)). Nothing in the provisions creates any rights in or for the benefit of a creditor (ss 39(8) & 40(9)).
28. The Minister is to submit the Authority's final report and recommendations, and may submit any interim report of the Authority, to the Governor (ss 38, 41(1) & 42(1)). The Governor may then determine the amount to be paid to, or property to be transferred to or vested in, any person (ss 41(2) & 42(2)). Insofar as the determination is a final determination the amount to be paid or transferred is in respect of the aggregate of all liabilities of all WA Bell Companies to that person as a creditor and may be by way of compensation for providing funding or an indemnity (s 42(3)).
29. The Governor is not required to determine that the whole of the property as transferred to the Authority be applied, i.e. property may remain in the Fund (s 43(2)). If that occurs the property that remains undistributed on closure of the Fund will be forfeited to the consolidated revenue of the State (s 46(2) – see also s 48). Further, nothing requires the Governor to determine that *any* amount be paid to, or property be transferred to, *any* person (s 43(1)). Therefore, one or more creditors may receive no payment. Nothing in Division 4 creates any rights in or for the benefit of a creditor or any other person (s 43(6)). No reasons are required for a determination (s 43(4)). In substance, the determination is at the Governor's absolute discretion (see also s 74(2)).
30. No person will be entitled to have payment made to them, or property transferred to them, unless the person gives to the Authority a deed that provides for the release or discharge of any person from any liability that the Minister considers appropriate (s 44(3)).
31. The Governor's determination, and subsequent payment out by the Authority, will have the effect of discharging and extinguishing every liability of every WA Bell Company (ss 43(8), 44(4)-(5) & 44(6)-(7)).
32. Decisions made by the Administrator, the Authority, the Minister or the Governor under the Act are final and conclusive without rights of appeal or review in any court (s 74(1)). Reference to the absence of any necessity to provide reasons has already been made. In addition, the rules of natural justice do not apply (s 74(3)). It

is only the Supreme Court's jurisdiction to grant relief for jurisdictional error that is not affected (s 74(4)).

33. The Governor may, by proclamation, dissolve a WA Bell Company, whereby it will cease to exist (ss 30(1) & (2)). On dissolution any liquidator of the WA Bell Company is discharged from all liability in performing their duties as liquidator (s 45).
34. The Bell Act provides for various offence provisions to support the regime introduced by the Act (ss 54 to 59). These include making it an offence to carry out any action for the purpose of defeating, avoiding, preventing or impeding the operation of the Bell Act or the achievement of its objects (s 54(2)) or to do any act for the purpose of defeating the effectiveness of the transfer or vesting of property in accordance with s 22 of the Bell Act (s 56(2)). This would apply if Mr Woodings, as liquidator, was to take proceedings to seek to recover the property purportedly transferred and vested in the Authority (see also, as to the WA Bell Companies, s 29(1)). Similarly, the Bell Act expressly provides that the State, the Authority and the Administrator are not liable to any action, liability or demand arising from the operation of the Act or the transfer to and vesting of property in the Authority under s 22 (s 72(2) – see also ss 68, 69, 71 & 73).

The applicable winding up laws absent the operation of the Bell Act

35. Absent the purported operation of the Bell Act, the winding up of the Bell Group companies³¹ is governed by Commonwealth laws. Two slightly different statutory regimes apply. This is because seven³² of the Bell Group companies were ordered to be wound-up before 23 June 1993.
36. The former *Corporations Law* winding up provisions in effect pre-23 June 1993 (known as the ‘old winding up law’³³) continue to apply for the purposes of a winding-up where the court ordered the winding up of a company before 23 June 1993. But they do so because they are applied by s 1408(1) of the Corporations Act.³⁴
37. For the windings up that commenced after 23 June 1993, the relevant provisions are those under the present Corporations Act.³⁵ This is with the notable exception of the Part 5.6 Div. 8 pooling provisions.³⁶ As the Bell Group companies were ordered to

³¹ Here excluding any reference to the non-Australian Bell Group companies which are subject to external administration, i.e. BGNV (the plaintiff in S248/2015) and BGUK.

³² TBGL, Albany Broadcasters, Bell Bros Holdings, BGF, BPG, Wigmores and W & J Investments: ASC [15] (SCB 106); ASC Attachment A (SCB 136-138).

³³ Relevantly Parts 5.4, 5.5 and 5.6 of the *Corporations Law* as in force before 23 June 1993. See *Corporations Law*, s 1383(1).

³⁴ *Re Emilco Pty Ltd (in liq)* [2002] NSWSC 1124; (2002) 43 ACSR 536, 537-539 [5]-[11]; *Re Bell Group Ltd (in liq)*; *Ex parte Woodings* [2015] WASC 88; (2015) 294 FLR 204, 208 [13]-[19].

³⁵ Corporations Act, ss 1399-1403.

³⁶ These were introduced to the Corporations Act with effect from 31 December 2007. Sections 571(1) and 579E(1), which are critical to the operation of the pooling provisions, only apply in relation to a group of two

be wound up by orders made before 31 December 2007, pooling under Part 5.6 Div. 8 is unavailable.³⁷

38. There is little material difference between the old winding up law and its current equivalent under the Corporations Act.
39. The essential characteristics of a winding up are collecting assets, realising them, dealing with proofs of creditors, and distributing the net proceeds after providing for expenses to the persons entitled.³⁸ A winding up is effected by determining the legal rights of creditors against the company and effecting a distribution of the net assets of the company according to those rights under an established order of priorities.
40. Those essential characteristics are entrenched in the winding up provisions contained in the Commonwealth corporations legislation. In particular:
 - (1) The liquidator must take the company's property into his or her custody or under his or her control (s 474(1)). To that end after the commencement of the winding up any disposition of the company's property, excepting a disposition made by the liquidator or other exempt disposition, is void unless the court orders otherwise (s 468(1)). So too is any attachment against the company's property (s 468(4)).
 - (2) The liquidator must cause the company's property to be collected and applied in discharging the company's liabilities (s 478(1)(a)³⁹). (There is a negative implication in s 478(1)(a) when read in context with the winding up provisions as a whole: in an insolvent winding up the company's property is *not* to be applied other than in meeting debts payable by or claims against the company.)
 - (3) The liquidator has extensive powers to effect collection and realisation of the company's property (s 477). To prevent interference in that process there is a statutory moratorium against proceedings against the company or in relation to the property of the company without leave (s 471B⁴⁰). So too, persons other than the liquidator cannot usually perform or exercise a power or function as an officer of the company (s 471A⁴¹).
 - (4) The company's liabilities are proved in accordance with Part 5.6 Div. 6. Debts and claims arising before the commencement of the winding up are

or more companies if the winding up of each company in the group begins on or after 31 December 2007: Corporations Act, s 1480(20).

³⁷ *Allen v Feather Products Pty Ltd* [2008] NSWSC 259; (2008) 72 NSWLR 597, 604 [37]-[39].

³⁸ *Re Crust 'N' Crumb Baker's (Wholesale) Pty Ltd* [1992] 2 Qd R 76, 78.

³⁹ As to the pre-23 June 1993 windings up see s 478(1)(c) of the *Corporations Law*.

⁴⁰ As to the pre-23 June 1993 windings up see s 471(2) of the *Corporations Law*.

⁴¹ The *Corporations Law* did not contain an express equivalent to s 471A of the Corporations Act. However, subject to the "residual powers" doctrine (which has no analogue in s 471A), it was clear that winding up meant that the company could no longer act by its directors: see e.g. *Anfrank Nominees Pty Ltd v Connell* (1989) 1 ACSR 365, 383.

admissible to proof (s 553). Specific rules apply as to computation and determination of value (ss 554, 554A, 554B & 554C⁴²). Admission or rejection of a proof of debt may be subject to an appeal to the court (s 1321).

- (5) A priority regime applies for the purpose of the ranking of debts and the distribution of the company's property. The primary rule is that debts are treated *pari passu* (s 555). However, some categories of debts or claims are afforded priority over the ordinary unsecured debts (ss 556 & 559⁴³). Also, where statutory pre-conditions are satisfied, the court may make orders as to the distribution of recovered property and expenses to give an advantage to creditors who have indemnified or paid money to the liquidator in relation to the recovery proceedings (s 564).

41. Winding up is a judicial process.⁴⁴ In a compulsory winding up the company is wound up *by* the court which for the purposes the liquidator is.⁴⁵ The court conducts the winding up.⁴⁶ A liquidator may be, and usually is, appointed to conduct the winding up on behalf of the court (s 472(1); c.f. s 474(1)(b) as to custody of property where there is no liquidator). It is the court that is invested with general powers under ss 483 and 485. The liquidator is an officer of the court, i.e. a representative of the court, subject to the control of the court and may be delegated with certain powers of the court (s 488). In exercising powers, the liquidator is subject to the control of the court (s 477(6)). The court has a supervisory role in the course of the winding up.⁴⁷ The liquidator may apply to the court for guidance (s 479(3)), the court may inquire into the liquidator's conduct (s 536) and a person aggrieved by an act, omission or decision of a liquidator may appeal to the court (s 1321).

The property in the Bell Group companies' windings up

42. The principal property in the Bell Group companies' windings up that is subject to the operation of the "transfer of property" provisions in s 22 of the Bell Act consists of:
- (1) various term deposits held by certain of the WA Bell Companies (in amounts totalling some \$689.3 million);⁴⁸ and
 - (2) other term deposits held by Mr Woodings on trust for certain of the WA Bell Companies and two non-WA Bell Companies, namely Maranoa

⁴² Section 554 is the only express equivalent in the *Corporations Law* provisions as apply to the pre-23 June 1993 windings up.

⁴³ The specific categories of priority are slightly different as between the old winding up law and the Corporations Act. For example c.f. *Corporations Law* s 556(1)(a) and Corporations Act ss 556(1)(a), (dd) & (de). Those differences are not material for the resolution of the issues in this proceeding.

⁴⁴ *Gould v Brown* [1998] HCA 6; (1998) 193 CLR 346, 387 [31].

⁴⁵ *Commissioner for Corporate Affairs v Harvey* [1980] VR 669, 696.

⁴⁶ *Hall v Poolman* [2009] NSWCA 64; (2009) 75 NSWLR 99, 121 [62].

⁴⁷ *BP Australia Ltd v Amann Aviation Pty Ltd* (1996) 62 FCR 451, 475 (adopted in *Gould v Brown* [1998] HCA 6; (1998) 193 CLR 346, 387-388 [33]).

⁴⁸ ASC [33] (SCB 111); ASC Attachment F (SCB 148-149).

Transport and BGUK, the trust having been created by the Deed of Settlement (in amounts totalling some \$1,038.3 million).⁴⁹

43. The term deposits are a chose in action⁵⁰ which constitute “property” for the purposes of the Corporations Act.⁵¹
44. The beneficiaries’ interest in respect of the property held on trust by Mr Woodings pursuant to the Deed of Settlement has two aspects. First is the chose in action to compel performance of the trust.⁵² That right to due administration is “property” for the purposes of the corporations legislation definition.⁵³ Second, having regard to the terms of the trust,⁵⁴ immediately before the transfer day the beneficiaries had a proprietary interest in the property which was subject to the trust under the Deed of Settlement.
45. By cl. 5(l) of the Deed of Settlement, Mr Woodings declared that he held the settlement sum (the proceeds of which were represented by the term deposits) on trust for the Bell Judgments Creditors (being certain of the WA Bell Companies, Maranoa Transport and BGUK) “in the proportions specified in Annexure R”.⁵⁵ Income thereon was held on the same trust, for the same parties and in the same proportions (cl. 5(m)).⁵⁶ The trust might have terminated on schemes of arrangement being approved. If so, Mr Woodings was to apply the beneficiaries’ proportions of the trust property (specified in Annexure R) as directed by the beneficiaries pursuant to the schemes (cl 5(p)(i)).⁵⁷ On termination otherwise than following approved schemes of arrangement the trust property was to be paid to the beneficiaries in accordance with the proportions specified in Annexure R (cl. 5(p)(ii))⁵⁸. The proceeds must be held and distributed; not converted into other investments.
46. Immediately before the transfer day each beneficiary had the right to require the administration of all of the trust assets in accordance with the terms of the trust during its currency; they had no separate or separable property in any particular subset of the assets the subject of the trust. The interest was in respect of the entire mass of the trust property. The beneficiaries, like a unit holder in a unit trust, had a

⁴⁹ ASC [40.1] (SCB 115); ASC [40.2] (SCB 116).

⁵⁰ *Parsons v The Queen* [1999] HCA 1; (1999) 195 CLR 619, 626-627 [17] (referring to *Croton v The Queen* [1967] HCA 48; (1967) 117 CLR 326, 330-331.)

⁵¹ The definition of “property” includes a thing in action: Corporations Act, s 9.

⁵² *DKLR Holdings Co (No 2) Pty Ltd v Commissioner of Stamp Duties* [1980] 1 NSWLR 510, 519.D & 520.C; *Re Transphere Pty Ltd* (1986) 5 NSWLR 309, 311.

⁵³ See by analogy *Official Receiver in Bankruptcy v Schultz* [1990] HCA 45; (1990) 170 CLR 306, 314.

⁵⁴ See ASC [37] (SCB 114-115); ASC Annex 1 (SCB 172-175, 176-177).

⁵⁵ ASC [37.1] (SCB 114); ASC Annex 1 (SCB 172).

⁵⁶ ASC [37.2] (SCB 114); ASC Annex 1 (SCB 172).

⁵⁷ ASC [37.3] (SCB 114-115); ASC Annex 1 (SCB 172).

⁵⁸ ASC [37.4] (SCB 115); ASC Annex 1 (SCB 172).

proprietary interest in all of the property which was subject to the trust under the Deed of Settlement.⁵⁹

Location of the property in the winding up

47. Section 22 of the Bell Act applies to property whether situated in or outside of Western Australia.⁶⁰ However, the question of the location of the property may be relevant for the purposes of s 5F of the Corporations Act; see below.⁶¹
48. A chose in action is situate where it is properly recoverable or can be enforced. A debt is generally situate where the debtor resides. Where a debtor has two or more places of residence and the creditor expressly or impliedly stipulates for payment at one of them the debt will be situate there. In the case of bank accounts, however, the bank's obligation to repay is performable primarily at the branch where the account is kept; and the debt is there situate. This might be seen as an implied stipulation as to the place for repayment. Where the debtor has more than one place of residence, but there is no express or implied promise to pay at any one of them, the debt is situate at the place of residence where it would be paid in the ordinary course of business.⁶²
49. The WA Bell Companies held term deposits with NAB and Westpac.⁶³ The NAB term deposits were held in a Western Australian branch and were payable, on maturity, into nominated accounts held with ANZ in Western Australia.⁶⁴ Those debts, totalling some \$187.5 million,⁶⁵ were located in Western Australia. So too were the term deposits held by TBGL and BGF with Westpac (totalling some \$430.4 million).⁶⁶ Although held in a New South Wales account the debts were payable, on maturity, into nominated ANZ accounts held in Western Australia.⁶⁷ But the remaining Westpac accounts, totalling around \$71.4 million,⁶⁸ had no instructions as to the place of repayment on maturity.⁶⁹ These accounts were held in New South Wales.⁷⁰ Accordingly, the Westpac term deposits of the WA Bell Companies (other than TBGL and BGF) were located in New South Wales.
50. The term deposits held on trust pursuant to the Deed of Settlement consisted of deposits with NAB and Westpac. The NAB term deposit, totalling approximately

⁵⁹ *Charles v Federal Commissioner of Taxation* [1954] HCA 16; (1954) 90 CLR 598, 609; *Read v The Commonwealth* [1988] HCA 26; (1988) 167 CLR 57, 61-62.

⁶⁰ Bell Act, s 22(8).

⁶¹ See paras 71-84 below.

⁶² *AssetInsure Pty Ltd v New Cap Reinsurance Corp Ltd (in liq)* [2006] HCA 13; (2006) 225 CLR 331, 352 [58]; *Societe Eram Shipping Co Ltd v Cie Internationale de Navigation* [2003] UKHL 30; [2004] 1 AC 260, 287-288 [72]-[73].

⁶³ ASC [32] (SCB 111).

⁶⁴ ASC [34.3], [34.4] (SCB 111-112).

⁶⁵ ASC [33] (SCB 111); ASC Attachment F (SCB 148).

⁶⁶ ASC [33] (SCB 111); ASC Attachment F (SCB 149).

⁶⁷ ASC [35.4.2] (SCB 113).

⁶⁸ ASC Attachment F (SCB 149).

⁶⁹ ASC [35.4.3] (SCB 113).

⁷⁰ ASC [35.3] (SCB 112).

\$300 million,⁷¹ was located in Western Australia; it was maintained in a Western Australian branch of NAB.⁷² But the Westpac term deposit, totalling \$738,359,018.21,⁷³ was held in a New South Wales account⁷⁴ and there were no instructions as to the place of repayment on maturity.⁷⁵ This debt, forming part of the trust property, was located in New South Wales.

51. In respect of the term deposits, the interest of the beneficiaries under the trust pursuant to the Deed of Settlement is located in the proper forum where the obligation to administer the Deed of Settlement may be enforced⁷⁶. Unless the trust is in respect of particular property,⁷⁷ the proper forum is determined by the place of residence of the trustee,⁷⁸ being Mr Woodings. That place is Western Australia.⁷⁹ In this case, the trust is in respect of the proceeds of the settlement which are to be held until distributed. Since they were received, some of the proceeds have been held in New South Wales.⁸⁰
52. So, the Bell Act purports to apply to property located in both Western Australia and New South Wales as at the time of commencement of the legislation.

Invalidity due to inconsistency of laws in terms of s 109 of the Constitution

53. Section 109 of the *Constitution* requires a comparison between Commonwealth and State laws which create rights, privileges or powers, and duties or obligations; and resolves any conflict in favour of the Commonwealth.⁸¹ It is applied after analysis of the laws in question to discern their true construction.⁸²
54. A State law is relevantly inconsistent with a Commonwealth law if the State law would alter, impair or detract from the operation of the Commonwealth law – in short undermine the Commonwealth law – in a “significant and not trivial” way giving rise to a “real conflict”.⁸³
55. A State law is also relevantly inconsistent: “if it appears from the terms, the nature or the subject matter of [the Commonwealth law] that it was intended as a complete statement of the law governing a particular matter or set of rights and duties” and

⁷¹ ASC [40.1] (SCB 115).

⁷² ASC [40.1.3] (SCB 116).

⁷³ ASC [40.2] (SCB 116).

⁷⁴ ASC [40.2.3] (SCB 117).

⁷⁵ ASC [40.2.6] (SCB 117).

⁷⁶ *Livingston v Commissioner of Stamp Duties (Qld)* [1960] HCA 94; (1960) 107 CLR 411, 453.

⁷⁷ As to which see *Livingston v Commissioner of Stamp Duties (Qld)* [1960] HCA 94; (1960) 107 CLR 411, 453.

⁷⁸ *Commissioner of Stamp Duties (NSW) v Perpetual Trustee Co Ltd* [1926] HCA 14; (1926) 38 CLR 12, 30.

⁷⁹ ASC [1C.4] (SCB 104).

⁸⁰ ASC [40.2], [40.2.3] (SCB 116-117).

⁸¹ *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* [2011] HCA 33; (2011) 244 CLR 508, 523 [37].

⁸² *Momcilovic v The Queen* [2011] HCA 34; (2011) 245 CLR 1, 112 [245] & 115-116 [259]-[261].

⁸³ *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* [2011] HCA 33; (2011) 244 CLR 508, 525 [41]-[42].

the State law seeks to “regulate or apply to the same matter or relation”.⁸⁴ There is inconsistency as the State law is regarded as a detraction from the full operation of the Commonwealth law.⁸⁵

56. These two ways of describing inconsistency – “direct” and “indirect” inconsistency respectively – are interrelated and may both apply to reach the same result.⁸⁶ That may be so because where a Commonwealth law is intended to be “a complete statement of the law” governing a particular relation or thing, there may be an “implicit negative proposition” that the law is only as contained within the Commonwealth law, such that any other provision on that topic in a State law will conflict with that proposition.⁸⁷

Inconsistency between the Bell Act and the relevant Corporations Legislation

57. Section 5E(1) of the Corporations Act provides that the “Corporations legislation” is not intended to exclude or limit the concurrent operation of any law of a State or Territory. The express provision that the Commonwealth law is not intended to be exclusive “make[s] 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.”⁸⁸ But the section does not apply if there is a direct inconsistency (s 5E(4)). Thus s 5E(1) does not eliminate a direct inconsistency or collision, e.g. where contradictory laws operate on the same topic so that it is impossible for both to be obeyed⁸⁹ or the two laws are not capable of “concurrent operation”.⁹⁰
58. The winding up provisions of the Commonwealth law deal in such a detailed and comprehensive way with the manner in which a liquidation is to occur that a State law which seeks to provide for a different form of administration of a corporation that has been ordered to be wound up will, in all likelihood, be directly inconsistent with the Commonwealth law. Put another way, the express provisions leave little, if any, room for another law as to the same subject matter that will be able to operate alongside the Commonwealth corporations legislation.
59. This is the case with the Bell Act. In seeking to provide for a radically different form of administration for the WA Bell Companies (and in providing for the property of Maranoa Transport to be dealt with in a way that is contrary to the requirements of the Commonwealth law that still apply to its liquidation) the Bell

⁸⁴ *Telstra Corporation Ltd v Worthing* [1999] HCA 12; (1999) 197 CLR 61, 76-77 [28]; *Dickson v The Queen* [2010] HCA 30; (2010) 241 CLR 491, 502 [13]; *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* [2011] HCA 33; (2011) 244 CLR 508, 524 [39].

⁸⁵ *Ibid.*

⁸⁶ *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* [2011] HCA 33; (2011) 244 CLR 508, 525 [42].

⁸⁷ *Momcilovic v The Queen* [2011] HCA 34; (2011) 245 CLR 1, 118 [264], 119 [266]; *Commonwealth v Australian Capital Territory* [2013] HCA 55; (2013) 250 CLR 441, 466 [52] & 468 [59].

⁸⁸ The often applied words of Mason J in *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation (Australia)* [1977] HCA 34; (1977) 137 CLR 545, 563. See also at 563-564.

⁸⁹ *Ibid* at 563.

⁹⁰ Corporations Act, s 5E(1).

Act is directly inconsistent with the Commonwealth law in many fundamental respects. The inconsistency is much more substantial than the operational inconsistency, and incapacity for concurrent operation, that was held to exist by the Victorian Court of Appeal in *Tat Sang Loo v Director of Public Prosecutions (Victoria)*.⁹¹

60. In particular:

- (1) A liquidation under Commonwealth law gives effect to legal claims, rights and obligations of all parties as at the time of liquidation whereas the Bell Act extinguishes all such claims, rights and obligations and instead provides for determinations by the Authority and the Governor with very limited rights of review.
- (2) The Bell Act provides for an administration which (unlike a liquidation under Commonwealth law) is not constrained by the right to resort to the courts to ensure determinations as to both the claims of creditors and the property of the WA Bell Companies are made according to the nature and extent of those claims, rights and obligations as recognised by the law at the time of liquidation.
- (3) Under the Bell Act property is distributed according to a determination by the Governor that is at large save that it must be made after receiving a recommendation from the Authority whereas the Commonwealth law has detailed provisions requiring the liquidator to give effect to legal rights in considering proofs of debt and making distributions to creditors. The discretion of the Governor applies both as to creditor claims and as to compensation for the risk assumed in funding and providing indemnities in relation to the Bell litigation both of which are matters that are not to be dealt with according to the discretion of the liquidator in a winding up under the Commonwealth law.
- (4) The Bell Act prevents a winding up in accordance with the scheme under the Commonwealth corporations legislation⁹² whereby the liquidator:
 - (a) takes all the property of the company into his or her custody or control (Corporations Act, s 474(1)(a)); and
 - (b) causes the property of the company to be collected, i.e. realised, and applied in discharging the company's liabilities (Corporations Act, s 478(1)(a)).

⁹¹ *Tat Sang Loo v Director of Public Prosecutions (Victoria)* [2005] VSCA 161; (2005) 12 VR 665, 687-688 [39]-[40], 689 [42], [43] & 691 [51]. The case concerned inconsistency between Victorian legislation providing for a charge over property the subject of a pecuniary penalty order and the winding up provisions of the Corporations Act.

⁹² For the reasons developed in this section of the plaintiffs' submissions and Annexure "A".

- (5) Rather than the windings up proceeding on a company-by-company basis,⁹³ under the Bell Act there will be a *de facto* aggregation of the assets and liabilities of the WA Bell Companies (together with the property the subject of the trust created by the Deed of Settlement). There is a *de facto* pooling as:
- (a) the Fund consists of the whole of the property that transfers to and vests in the Authority under s 22 of the Bell Act.⁹⁴ And it is the Fund that is available for distribution under the Act;
 - (b) the Governor's final determination as to the amount to be paid to a person is to be in respect of the aggregate of *all* liabilities of *all* WA Bell Companies to that person as a creditor.⁹⁵
- (6) Mr Woodings as liquidator will be prevented from exercising his functions or powers as an officer of the WA Bell Companies.⁹⁶ Instead the Authority is invested with control and management of the WA Bell Companies' property and affairs.⁹⁷
- (7) Admitted proofs of debt will not rank for distribution of dividends in accordance with established priorities.⁹⁸ The priorities in Sub-div. D of Div. 6 of Part 5.6 of the Corporations Act are only something that the Authority "may" have regard to in making a recommendation to the Minister.⁹⁹ Instead creditors' liabilities and distributions will be determined administratively in the Executive's absolute discretion.¹⁰⁰ Moreover, the Bell Act excludes proof of a debt or claim otherwise than in accordance with Part 4 Div. 2 of the Act.¹⁰¹ And the matters to which the Authority "may" have regard to in making recommendations to the Minister introduce matters which are foreign to the adjudication of proofs of debt under the Corporations Act; see Bell Act, s 39(2)(e)(iii)-(vii).
- (8) In assessing whether any amount is to be paid to a creditor by way of compensation for providing funding or an indemnity in relation to the Bell litigation neither the Authority nor the Governor will confer or adjust rights or interests in accordance with legal norms or standards whereas under s 564 of the *Corporations Law* a judgment must be made as to what is "just".¹⁰²

⁹³ As is implicit in s 478(1)(a) of the Corporations Act.

⁹⁴ Bell Act, s 16(3)(a).

⁹⁵ Bell Act, s 42(3)(a).

⁹⁶ Bell Act, s 29. C.f. Corporations Act, s 477.

⁹⁷ Bell Act, ss 27 & 28. C.f. Corporations Act, s 471A.

⁹⁸ See Corporations Act, ss 555, 556, 559.

⁹⁹ Bell Act, s 39(2)(d).

¹⁰⁰ Bell Act, ss 37(3), 39(6), 39(8), 41(2), 42(2) and 43(1)-(2).

¹⁰¹ Bell Act, s 25(5).

¹⁰² *State Bank of New South Wales v Brown* [2001] NSWCA 223; (2001) 38 ACSR 715, 720 [30].

(9) It is not necessary that all of the property transferred to the Fund be distributed among the creditors.¹⁰³ And, despite what appears elsewhere in the Bell Act, the Governor is not required to determine that any amount be paid to any person.¹⁰⁴ To the extent the Governor's determinations do not exhaust the Fund the remaining property will be credited to the State's consolidated revenue.¹⁰⁵ By contrast, in a winding up, under the relevant Commonwealth corporations legislation the company's property is to be applied in discharging the company's liabilities¹⁰⁶ (with any surplus being distributed to members).¹⁰⁷

61. In substance the winding up of the WA Bell Companies by the court, according to the relevant Commonwealth winding up laws, will cease in favour of an administrative process which bears no resemblance to any form of winding up and is fundamentally at odds with the Commonwealth law.

Fundamental inconsistency concerning dealing with property

62. There is fundamental inconsistency between s 22 of the Bell Act (which provides for the transfer to and vesting in the Authority of the WA Bell Companies' property) and ss 474(1) & 478(1) of the Commonwealth corporations legislation (which require the liquidator to get in and then apply the same property in discharge of the company's liabilities). The proper performance of the duties and obligations under ss 474(1) and 478(1) – one of the liquidator's core responsibilities – is not capable of concurrent operation with compulsory transfer of the WA Bell Companies' property to the Authority. Section 22 of the Bell Act interferes with and impairs or detracts from – by preventing performance of – the operation of ss 474(1) and 478(1).

63. There is a similar fundamental inconsistency between s 22 of the Bell Act and the void disposition provision in s 468(1) of the corporations legislation. Subject to certain presently irrelevant exceptions, a disposition of the company's property made after the commencement of the winding up is void. The purpose of s 468 is to ensure that a company's assets are divided rateably among creditors by preserving the property; it prevents the alienation and dissipation of the company's property.¹⁰⁸ The liquidator may cause the company to take recovery proceedings in relation to the property the subject of the void disposition.

64. Section 22(1) effects a transfer of the WA Bell Companies' property to the Administrator. For the purposes of s 468(1) of the corporations legislation the

¹⁰³ Bell Act, ss 39(7) & 43(2).

¹⁰⁴ Bell Act, s 43(1).

¹⁰⁵ Bell Act, s 46(2). See also Bell Act, s 48.

¹⁰⁶ Corporations Act, s 478(1)(a).

¹⁰⁷ Corporations Act, ss 478(1), (1A) & 485(2).

¹⁰⁸ *Re Wiltshire Iron Co; Ex Parte Pearson* (1863) 3 Ch App 443, 447; *Re Loteka Pty Ltd (In Liq)* [1990] 1 Qd R 322, 324.

words “disposition of property” are to be given a wide meaning.¹⁰⁹ The term covers, among other things, the transfer or alienation of a company’s property.¹¹⁰ The transfer of the WA Bell Companies’ property effected by s 22 of the Bell Act is a disposition of the companies’ property within the meaning, and for the purpose, of s 468(1). The transfer is void for the purposes of the Commonwealth corporations legislation; but it is to be given effect to by the Authority for the purposes of the Bell Act. The two laws are contradictory; it is impossible for both laws to be obeyed.

65. Consistently with the liquidator’s duties under ss 474(1) & 478(1) of the corporations legislation, it would ordinarily be expected that a liquidator of the WA Bell Companies would take recovery proceedings in relation to the void disposition effected by s 22 of the Bell Act. However, the Bell Act contains numerous provisions that have the effect of preventing such proceedings or interfering in the taking of such proceedings – thereby altering, impairing or detracting from the operation of ss 468(1), 474(1) & 478(1) and s 477(2)(a). In particular, s 29(1) (the prohibition on the liquidator exercising his functions and powers as an officer of the company), ss 54(2) & 56(2) (offence provisions), ss 68(2)(b)(ii) & 72(2)(a)&(b) (exoneration provisions) and s 73 (the moratorium provision) prevent or interfere with such proceedings.
66. In addition, there is a miscellany of other direct inconsistencies with specific provisions which are obvious on the face of the provisions. These are summarised in Annexure “A” to these submissions.

The operation of ss 50 to 52 of the Bell Act and ss 5F & 5G of the Corporations Act

67. The direct inconsistency between the Bell Act provisions and the Commonwealth winding up provisions is not avoided by Part 6 of the Bell Act and its purported invocation of ss 5F and 5G of the Corporations Act. There are two important aspects of the Commonwealth provisions that are relevant in this regard.
68. First, although the WA Bell Companies are taken to be registered in Western Australia,¹¹¹ they are incorporated (and thus have an indivisible existence) throughout the Commonwealth.¹¹²
69. Secondly, while the winding up orders were made in the Supreme Court of Western Australia, the courts with supervisory and other jurisdiction in relation to the windings up include *any* court that is a s 58AA “Court”, i.e. the courts with supervisory jurisdiction include the Federal Court of Australia and any State or

¹⁰⁹ *Re Dittmer Gold Mines Ltd (No 3)* [1954] St R Qd 275, 282.

¹¹⁰ *Re Mal Bower’s Macquarie Electrical Centre Pty Ltd (in liq)* [1974] 1 NSWLR 254, 257; *Re Loteka Pty Ltd (In Liq)* [1990] 1 Qd R 322, 325 – it is enough if there be “some change that takes out of the company at least the beneficial ownership in a corporate asset and passes it to someone else.”

¹¹¹ ASC [17.1] [17.2] (SCB 106-107). As to registration generally see Corporations Act, s 119A(2).

¹¹² Corporations Act, s 119A(1). (The term “this jurisdiction” is defined in s 9).

Territory Supreme Court.¹¹³ It is not the case that the windings up are administered by the specific court that made the winding up order. Each s 58AA “Court” has a concurrent jurisdiction and conducts the winding up. The windings up take place, and are conducted and supervised by courts, throughout the Commonwealth.

70. Therefore, there is no sense in which the status of the WA Bell Companies as corporations or their liquidations are matters that are confined to Western Australia.
- (a) *Section 5F*
71. Section 51 of the Bell Act purports to invoke s 5F of the Corporations Act by declaring each WA Bell Company to be an “excluded matter”.
72. Section 5F has a confined operation. If a matter is declared to be an excluded matter by the law of a State or Territory then provisions of the Corporations legislation specified in the declaration do not apply “in the State or Territory” making the declaration in relation to the matter.
73. Section 5F does not confer authority upon a State or Territory to declare that the provisions of the Corporations legislation do not apply in another State or Territory or throughout the Commonwealth. These remain matters for the Commonwealth or other States or Territories.
74. So, the effect of s 5F(2) is that the Corporations Act does not apply *in* the declaring State or Territory in relation to the particular matter.¹¹⁴ The section effects a dual concept of: (1) restriction of application to subject matter (here the WA Bell Companies); and (2) restriction of territorial application, i.e. the territorial operation of the Corporations Act is modified and restricted so that the application it would otherwise have had *in Western Australia* in relation to the matter is negated.¹¹⁵
75. Accordingly, s 5F(2) is ineffective to avoid inconsistency where the relevant Corporations Act provision has no clear territorial attributes in Western Australia.¹¹⁶ It is ineffective because the application that such a provision has in relation to the WA Bell Companies that cannot be characterised as application “in” Western Australia is not negated by s 5F(2).
76. Section 5F could be used to negate the application of a Corporations Act provision insofar as it applied to conduct in the State or Territory making the declaration. Such a declaration would not give rise to any direct inconsistency between the Corporations Act as it applies in say Western Australia (where the conduct was

¹¹³ *Re Macks; Ex parte Saint* [2000] HCA 62; (2000) 204 CLR 158, 223-224 [181]-[182]; *Sihota v Pacific Sands Motel Pty Ltd (In Liq)* [2003] NSWSC 119; (2003) 56 NSWLR 721, 725 [16]-[18]; *Maamari v Ringwood & Ply Pty Ltd* [2005] NSWSC 40; (2005) 187 FLR 477, 479 [8]-[10] & [12].

¹¹⁴ *HIH Casualty & General Insurance Ltd v Building Insurers' Guarantee Corp* [2003] NSWSC 1083; (2003) 188 FLR 153, 193 [87].

¹¹⁵ *HIH Casualty & General Insurance Ltd v Building Insurers' Guarantee Corp* [2003] NSWSC 1083; (2003) 188 FLR 153, 193 [88].

¹¹⁶ *HIH Casualty & General Insurance Ltd v Building Insurers' Guarantee Corp* [2003] NSWSC 1083; (2003) 188 FLR 153, 193 [88]-[89]. See also at 194 [91]-[92].

excluded from the Act) and the rest of Australia (where the Act continued to apply to such conduct).

77. However, the Bell Act purports to exclude the application of provisions of the Corporations Act that are concerned with the liquidation of the WA Bell Companies. Under the Corporations Act, neither the incorporation nor the liquidation of a company is territorially confined to the place of registration of the company in liquidation or the place where the order for winding up was made.¹¹⁷ The WA Bell Companies, and their windings up, are matters that are not confined to the State of Western Australia; the companies exist and their windings up operate territorially throughout the Commonwealth.
78. Further, the key Commonwealth corporations legislation provisions relied on as to inconsistency are those as to control and protection of the insolvent company's property (e.g. ss 468, 474(1) & 478(1)), the liquidator's exclusive powers (ss 471A & 477), the proof and ranking of creditors' claims (e.g. ss 553, 553D, 554, 554A, 554C, 555, 556 & 559), the application of the company's property (e.g. ss 478(1), 555, 556 & 559) and the supervision of the court (ss 477(6) & 1321). Those provisions direct how the winding up of the company is to proceed. Those directions apply in the whole of the Commonwealth in a way that is geographically indiscriminate. The Commonwealth corporations legislation provision relied on for inconsistency do not apply in a territorially defined or territorially ascertainable way and thus stand outside the purview of s 5F(2).
79. Nothing in s 5F(2) of the Corporations Act can eliminate the inconsistency between the Bell Act provisions and the operation of the Commonwealth winding up provisions outside Western Australia. What would be the position were Mr Woodings, as liquidator of Maranoa Transport or a relevant WA Bell Company, to take proceedings in, say, the Queensland Registry of the Federal Court under s 468 to recover property purportedly transferred by operation of s 22 of the Bell Act? Or proceedings in, say, New South Wales for orders requiring the Westpac Sydney term deposits to be administered by Mr Woodings in accordance with the winding up provisions of the Corporations Act?
80. As the liquidation is undertaken throughout Australia (being the place of incorporation), and reliance on s 5F in the Bell Act could only result in the liquidation provisions of the Corporations Act not applying "in" Western Australia, there would be an ongoing direct inconsistency between the Corporations Act and the Bell Act outside of Western Australia.
81. The issue is not whether there is sufficient connection to Western Australia for the Parliament of Western Australia to be able to make laws about the insolvent administration of the WA Bell Companies or the property of Maranoa Transport. No doubt it has that legislative power in respect of corporations that are registered

¹¹⁷ Indeed, a winding up in the country of incorporation will usually be given extra-territorial effect: *Re International Tin Council* [1987] Ch 419, 446-447.

in Western Australia. However, the WA Bell Companies (indeed all corporations incorporated under the provisions of the Corporations Act) are also incorporated outside Western Australia. Therefore, Western Australia cannot make such a law without there being direct inconsistency with those parts of the Corporations Act that concern the status of corporations.

82. Western Australia has referred power to the Commonwealth to make laws in the terms expressed in the Corporations Act.¹¹⁸ Those laws provide for corporations to have a status as being incorporated throughout Australia. Winding up is an activity fundamental to the status of a corporation. Under the Corporations Act that activity occurs throughout Australia even in respect of corporations that are registered in Western Australia. The incorporation throughout Australia can only be brought to an end by an exercise of power or authority that applies throughout Australia. The Parliament of Western Australia lacks that legislative power. Section 5F does not confer a power to that effect.
83. Excluding the application “in” Western Australia of the winding up provisions in the Corporations Act insofar as they would otherwise apply to each WA Bell Company does not exclude their operation outside Western Australia to those corporations. As a result there is direct inconsistency.
84. In addition, s 5F(2) does not exclude the application of the winding up provisions to Maranoa Transport in Western Australia or elsewhere (see below).

(b) *Section 5G*

85. Section 5G deals with cases of direct inconsistency (s 5G(2)). It provides for a series of conflict resolution measures which may eliminate any inconsistency by moulding the operation of the Commonwealth law. The measures which are potentially relevant are ss 5G(4), (8) & (11).
86. Section 5G(11) should immediately be disregarded. It only disapplies the operation of the Corporations legislation “in” the State that has enacted the inconsistent law. Accordingly, it adopts the same territorial approach as s 5F(2)¹¹⁹ and is ineffective for the same reasons as s 5F(2) is ineffective.
87. The scope of s 5G(4) is limited. A specific authority or requirement of a State law is accommodated to the extent of removal of any prohibition or liability that would otherwise apply or arise under the Corporations legislation. As a first step, however, it must be possible to identify a provision of the State law which, in terms of s 5G(4), “*specifically* authorises or requires the *doing of [an] act*”. Section 5G(4) is conditioned by the “if” that appears after sub-paras (a) & (b).

¹¹⁸ *Corporations (Commonwealth Powers) Act 2001* (WA).

¹¹⁹ *HIH Casualty & General Insurance Ltd v Building Insurers Guarantee Corp* [2003] NSWSC 1083; (2003) 188 FLR 153, 195 [94].

88. On its proper construction the “doing of an act” in terms of s 5G(4) requires something more than an event occurring by operation of law. An act which is done is different to an event which simply occurs. Accordingly, some of the key provisions in the Bell Act – e.g. ss 22 (transfer), s 25 (prohibition on proving), s 27 (appointment of Administrator as administrator of the WA Bell Companies), s 29 (prohibition on exercising functions and powers as liquidator), ss 43(8), 44(4)-(5) & 44(6)-(7) (release of creditor claims), s 45 (release of liquidator), s 46 (vesting of property in the State), ss 68(2)(a), (b) & 72(2)(a), (b) (immunity from liability) and s 73 (stay of proceedings) – cannot be sustained on the basis of s 5G(4). Those provisions do not specifically authorise or require the doing of an act; they instead deem a particular result to have occurred or state of affairs to be the governing position – they provide for an event or outcome rather than authorising or requiring the doing of an act.
89. Section 5G(8) of the Corporations Act may result in winding up provisions of the Corporations legislation yielding to particular State or Territory provisions. It provides:
- “The provisions of Chapter 5 of this Act do not apply to *a* scheme of arrangement, receivership, winding up or other external administration of a company to the extent to which *the* scheme, receivership, winding up or administration is carried out in accordance with a provision of a law of a State or Territory.” (Emphasis added)
90. Section 5G(8) thus excludes the application of Chapter 5 of the Corporations Act to a winding up to the extent the winding up is carried out in accordance with a provision of a State law. Relevantly it requires:
- (1) first, identification of *a* winding up to which the provisions of Chapter 5 would otherwise apply; and
 - (2) second, a State law which provides for *the* winding up (i.e. that winding up as identified under the first step) to be carried out in accordance with that provision.
91. For present purposes it is the application of the winding up provisions of Chapter 5 of the Corporations Act that is in issue. Accordingly, it is not possible to invoke s 5G(8) outside of an existing winding up. As Barrett J observed in *HIH Casualty & General Insurance Ltd v Building Insurers Guarantee Corp*¹²⁰: “The object upon which this part of s.5G(8) fixes is the winding up of a company”.
92. To avoid inconsistency, s 5G(8) must disapply the relevant winding up provisions in relation to the WA Bell Companies’ windings up. Relevantly the provisions of Chapter 5 are only disapplied to *a* winding up and are only so disapplied “to the extent to which *the* ... winding up ... is carried out in accordance with” the State

¹²⁰ *HIH Casualty & General Insurance Ltd v Building Insurers Guarantee Corp* [2003] NSWSC 1083; (2003) 188 FLR 153, 196 [97].

law. That is, s 5G(8) only applies if there is a State law winding up to replace the winding up under the Corporations Act.

93. The reference to “winding up” in s 5G(8) should be understood¹²¹ as referring to the application of a procedure containing the essential characteristics of a process “that consists of collecting the assets, realising and reducing them to money, dealing with proofs of creditors by admitting or rejecting them, and distributing the net proceeds, after providing for costs and expenses, to the persons entitled”.¹²² A winding up provides a mechanism of collective execution against the property of a debtor by creditors whose rights are admitted or established.¹²³
94. Accordingly, the State law must provide for the *winding up* that would otherwise be carried out under Commonwealth law to be carried out under State law. Section 5G(8) does not authorise disapplication where another process – foreign in character to a winding up – is imposed as a substitute for the winding up. The State law may modify the winding up regime. It may even provide for another regime that incorporates the key features of a winding up. But the collection of activities introduced by the State law must be one capable of being recognised as a winding up within the contemplation of s 5G(8). There may be a substituted winding up process; but something that is not recognisable as a winding up is not within the contemplation of s 5G(8).
95. Properly analysed, the Bell Act does not provide for a winding up. To the contrary the Bell Act establishes an administrative scheme – one foreign to the conception of a winding up – for the dissolution of the companies and the distribution of their property.
96. The issue is one of substance rather than form. The regime under the Bell Act cannot be characterised as a winding up simply because of the nomenclature adopted in the Act.¹²⁴ Even so, s 4(b) of the Bell Act does not adopt the language of winding up; the relevant object is said to be to provide a “form of external administration” of the WA Bell Companies. The term external administration is understood as something different to a winding up. See e.g. s 5G(8)’s reference to “scheme of arrangement, receivership, winding up or other external administration”. See also s 39(2)(d) of the Bell Act.
97. For reasons already described when addressing the inconsistencies between the Bell Act and the Commonwealth winding up provisions, the Bell Act effects an arrangement which is outside the conception of a “winding up”.¹²⁵ Importantly:
- (1) The amounts to be paid to creditors in respect of their debts or claims is essentially determined by the Governor as a matter of discretion – the

¹²¹ *Mier v FN Management Pty Ltd* [2005] QCA 408; [2006] 1 Qd R 339, 347 [16].

¹²² *Re Crust 'N' Crumb Baker's (Wholesale) Pty Ltd* [1992] 2 Qd R 76, 78.

¹²³ *Singularis Holdings Ltd v PricewaterhouseCoopers* [2014] UKPC 36; [2015] AC 1675, 1687 [11].

¹²⁴ C.f. Bell Act, Part 4 Heading “Completion of winding up ...”.

¹²⁵ Refer to paras 58 to 66 above.

distribution is arbitrary (in the sense that it is unconstrained by the nature and extent of claims of creditors that would be recognised in courts of law) and need bear no relationship to the creditors' actual debts or claims. Nor is there any requirement of a *pari passu* distribution as is fundamental to a mechanism of collective execution. The "pooling" approach of the Bell Act is also antithetical to a winding up.

- (2) The Act contemplates property of the companies being forfeited to the State in particular circumstances. Those circumstances are at the discretion of the State. A winding up cannot override existing proprietary rights, create substantive obligations or sanction the release of funds to persons who have no legal entitlement to them.¹²⁶

The operation of the Bell Act in relation to Maranoa Transport

98. It is common ground that the Bell Act's invocation of the ss 5F and 5G "roll-back" and "displacement" provisions do not apply to Maranoa Transport's winding up and the Commonwealth corporations legislation that governs that winding up.¹²⁷ Sections 51 and 52 of the Bell Act are confined in their operation to the WA Bell Companies; and Maranoa Transport is not a WA Bell Company.¹²⁸
99. Accordingly, inconsistency between a Bell Act provision and the operation of the Commonwealth winding up provisions as they concern Maranoa Transport cannot be eliminated through resort to ss 5F and 5G.
100. It will be recalled that Maranoa Transport is one of the beneficiaries under the trust created by the Deed of Settlement.¹²⁹ Immediately before the transfer date under the Bell Act, Maranoa Transport held an interest in the term deposits held by Mr Woodings on trust for the Bell Group judgment creditors pursuant to the Deed of Settlement.¹³⁰
101. Section 22 of the Bell Act purports to have the effect of: (1) transferring to and vesting in the Authority the property held by Mr Woodings in trust for the WA Bell Companies *and* Maranoa Transport (ss 22(1)(b) & (c)); and (2) freeing that property from, among other things, Maranoa Transport's equitable interest as beneficiary (s 22(10)).
102. By the mechanism described, s 22 brings about a transfer and alienation of Maranoa Transport's equitable interest as beneficiary. This constitutes a void disposition

¹²⁶ See e.g. the cases considering the court's power under s 601EE(2) to make orders for the winding up of an unregistered managed investment scheme, namely: *ASIC v Tasman Investment Management Ltd* [2006] NSWSC 943; (2006) 59 ACSR 113, 119 [22]; *ASIC v Piggott Wood & Baker (No 3)* [2008] FCA 1547; (2008) 172 FCR 257, 261 [13]; *ASIC v Edwards* [2009] QSC 360 [7]-[8]; *ASIC v Idyllic Solutions Ltd* [2009] NSWSC 1306; (2009) 76 ACSR 129, 132 [6].

¹²⁷ Statement of claim, paras 77 & 83; Defence, paras 62 & 64.

¹²⁸ ASC [16] (SCB 106).

¹²⁹ ASC [37] (SCB 114-115); ASC Annex 1 (SCB 172-173, 176-177).

¹³⁰ Refer to paras 44 to 46 and 50 to 51 above.

within the meaning and for the purpose of s 468(1) of the Corporations Act.¹³¹ So, there is a direct inconsistency in relation to Maranoa Transport's winding up between s 22(1)(b) & (c) of the Bell Act and the operation of s 468(1) of the Corporations Act (an inconsistency that grounds further inconsistency with ss 54(2), 56(2), 68(2)(b)(ii) & 72(2)(a) & (b) of the Bell Act).

103. Additionally, as with the WA Bell Companies, there is a direct inconsistency between s 22(1)(b) & (c) of the Bell Act and ss 474(1) and 478(1) of the Corporations Act. Insofar as the Bell Act purports to effect a transfer of the trust property, and extinguishment of Maranoa Transport's interest in it, the Act interferes with – thus altering, impairing or detracting from – Mr Woodings' performance of his obligations and duties to maintain Maranoa Transport's property in his custody or control, collect it, and apply the proceeds of the property in discharge of Maranoa Transport's liabilities.

Inconsistency between the Bell Act and the relevant Taxation Legislation

104. If the Bell Act is not invalid for direct inconsistency with Commonwealth corporations legislation then there is still inconsistency with Commonwealth taxation legislation.
105. Commonwealth taxation legislation as to the assessment, payment, collection and recovery of Commonwealth income tax applies to the relevant Bell Group companies in the following manner:
- (1) The Commissioner may make (ss 166 to 168 ITAA36) and amend (s 170 ITAA36) income tax assessments.
 - (2) A notice of assessment is conclusive evidence of the due making of the assessment and, other than in proceedings under Part IVC of the TAA53, that the amount and particulars of the assessment are correct (s 177(1) ITAA36¹³² or TAA53, Sch 1 s 350-10(1) item 2¹³³.)
 - (3) The assessment is a debt due and payable at a certain time (s 204 ITAA36¹³⁴ or s 5-5(2) ITAA97¹³⁵).

¹³¹ Refer to para 64 above and the authorities there cited. See also *Re Selmar Pty Ltd (In Liq)* [1978] VR 531, 533 (where the predecessor to s 468(1) was held to extend to an equitable as well as a legal disposition.)

¹³² The relevant provision for the pre-liquidation assessments. Section 177(1) has been repealed with effect from 1 July 2015: *Treasury Legislation Amendment (Repeal Day) Act 2015* (Cth), Sch. 2 item 24. However, the repeal of s 177(1) is disregarded in relation to assessments made before the repeal in relation to any act done or omitted to be done before the repeal: *Treasury Legislation Amendment (Repeal Day) Act 2015* (Cth), Sch. 2 item 97.

¹³³ The relevant provision for the post-liquidation assessments.

¹³⁴ The relevant provision for the pre-liquidation assessments. Although repealed the provision continues in force for financial years up to those ended 30 June 2010: *Tax Laws Amendment (Transfer of Provisions) Act 2010* (Cth), Sch. 1 Part 3 item 56.

¹³⁵ The relevant provision for the post-liquidation assessments.

- (4) An assessment that is due and payable is a debt due to the Commonwealth and is payable to the Commissioner (s 208 ITAA36¹³⁶ or s 255-5(1) TAA53, Sch 1¹³⁷).
- (5) The Commissioner may sue for and recover any unpaid tax in a court of competent jurisdiction (s 209 ITAA36¹³⁸ or s 255-5(2) TAA53, Sch 1¹³⁹).
106. Some of these provisions, e.g. the power to sue for and recover a tax-related liability, might ordinarily have lesser relevance in a winding up context. See Corporations Act, ss 5A(2) and 471B. But that presupposes that the corporations legislation winding up provisions remain operative in respect of the WA Bell Companies. The Bell Act purports to operate in circumstances where the Chapter 5 provisions of the Corporations Act do not apply. Therefore, the question of inconsistency with Commonwealth taxation legislation should be determined without regard to the fetters on those rights that would otherwise exist by virtue of the Commonwealth corporations legislation provisions.
107. There are special provisions in the taxation legislation that affect Mr Woodings as the liquidator of the Bell Group companies. The relevant provisions are s 215 ITAA36¹⁴⁰ (the successor to which is s 260-45 TAA53, Sch 1¹⁴¹) and s 254 of the ITAA36.
108. Section 215 of the ITAA 36 (and now s 260-45 TAA53, Sch 1) operates by:
- (1) requiring that a liquidator give notice of his or her appointment to the Commissioner (s 215(1));
 - (2) the Commissioner thereupon notifying the liquidator of the amount sufficient to provide for the tax payable by the company (s 215(2));
 - (3) requiring that the liquidator not, without the Commissioner's leave, part with any of the company's assets until notified by the Commissioner of the amount sufficient to provide for the company's tax (s 215(3)(a)); and requiring further that the liquidator set aside out of assets available for payment of ordinary debts the proportionate amount that would be payable in respect of the tax debt (s 215(3)(b), all subject to payment of secured or priority debts (s 215(3B) & (3C));

¹³⁶ The relevant provision for the pre-liquidation assessments. Although repealed the provision continues in force for amounts due and payable before 1 July 2000: *Tax Laws Amendment (Repeal of Inoperative Provisions) Act 2006* (Cth), Sch. 6 item 7(b).

¹³⁷ The relevant provision for the post-liquidation assessments.

¹³⁸ As with footnote 136.

¹³⁹ The relevant provision for the post-liquidation assessments.

¹⁴⁰ Although repealed, the provision continues to apply insofar as it applied to Mr Woodings as a liquidator of a Bell Group company just before its repeal on 13 September 2006: *Tax Laws Amendment (Repeal of Inoperative Provisions) Act 2006* (Cth), Sch. 6 item 12.

¹⁴¹ This is the relevant provision in relation to Albany Broadcasters. Mr Woodings was not appointed liquidator of Albany Broadcasters until 11 December 2013: ASC [15] (SCB 106); ASC Attachment A (SCB 136). Section 215 ITAA36 does not apply to a person who becomes the liquidator of a company on or after 1 July 2000: s 215(7)(a) ITAA36.

- (4) providing that the liquidator is, to the extent of the value of the assets that the liquidator is so required to set aside, liable as liquidator to pay the tax (s 215(3)(c)).
109. If the liquidator does not comply with a provision of the section, or fails as liquidator to duly pay tax for which he or she is liable, the liquidator is – to the extent of the assets he or she is required to set aside – personally liable to pay the tax, and guilty of an offence (s 215(4)).
110. The evident purpose of s 215 is to restrain the distribution of the funds of a company in liquidation in aid and protection of the revenue.¹⁴² The section does not create any right of priority upon the Commissioner.¹⁴³ The liquidator must hold certain funds until the proper application of the funds may be ascertained or determined.¹⁴⁴
111. Section 254 of the ITAA36 applies to trustees who, by s 6(1), are defined to include liquidators. It deals, among other things, with income derived by a company as principal by virtue of the liquidator’s agency (being income in respect of which the liquidator is made answerable as taxpayer for the payment of tax thereon (s 254(1)(a)). As to that:
- (1) the liquidator must in respect of that income make returns and be assessed thereon, but in his representative capacity only (s 254(1)(b));
 - (2) the liquidator is *authorised* and *required* to retain from time to time out of any money which comes to the liquidator in his or her representative capacity so much as is sufficient to pay tax which is or will become due in respect of the income (s 254(1)(d)). The retention obligation under s 254 arises on the making of an assessment in respect of the income;¹⁴⁵
 - (3) the liquidator is made personally liable for the tax payable in respect of the income to the extent of any amount that the liquidator has retained or should have retained (s 254(1)(e)); and
 - (4) to ensure the payment of tax, the Commissioner has the same remedies against any attachable property vested in or under the control and management or in the possession of the liquidator as he would have against the property of any other taxpayer (s 254(1)(h)).

¹⁴² *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd (in liq)* [1940] HCA 13; (1940) 63 CLR 278, 297 & 326-327 (referring to a statutory predecessor to s 215).

¹⁴³ *Ibid* at 289-290, 297 & 327. See also *Uther v Federal Commissioner of Taxation* [1947] HCA 45; (1947) 74 CLR 508, 526 and *Bank of New South Wales v Federal Commissioner of Taxation* [1979] HCA 64; (1979) 145 CLR 438, 451-452.

¹⁴⁴ *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd* [1940] HCA 13; (1940) 63 CLR 278, 289, 296 & 327; *Uther v Federal Commissioner of Taxation* [1947] HCA 45; (1947) 74 CLR 508, 517 & 526; *The Commonwealth v Cigamatic Pty Ltd* [1962] HCA 40; (1962) 108 CLR 372, 379; *Bank of New South Wales v Federal Commissioner of Taxation* [1979] HCA 64; (1979) 145 CLR 438, 452.

¹⁴⁵ *Commissioner of Taxation v Australian Building Systems Pty Ltd (In Liq)* [2015] HCA 48; (2015) 326 ALR 590, 602 [43], 605 [58] & 606 [64].

112. Section 254(1) is both a liability imposing provision (s 254(1)(e)) and a collection provision (s 254(1)(d), (e) & (h)). As an aid to the collection of tax s 254(1) imposes a personal liability on the liquidator, albeit one that is ancillary to that of the principal company. The liability of the liquidator is in addition to but not in substitution for the assessment of the company.¹⁴⁶ The retention obligation – and correlative authorisation – under s 254(1)(d) aids in the collection of the tax liability (from the perspective of the Commissioner) and provides the means to satisfy the tax liability (from the perspective of the liquidator). As to the authorisation component see also the indemnification as to payments by the liquidator in s 254(1)(f) of the ITAA36.
113. The Bell Act, in purporting by s 22 to transfer all property of relevant WA Bell Companies – some of which may be required to be set aside or retained by the liquidator in order to meet tax debts – operates in a way which is inconsistent with ss 215(1) & 254(1) of the ITAA36. The Bell Act impairs the operation of the Commonwealth law insofar as ss 215 and 254 provide for special rules about collection and recovery of Commonwealth income tax debts where a liquidator is appointed to a company. That is all the more so given the release under s 45 of the Bell Act that is afforded to Mr Woodings on dissolution.
114. As to s 254 of the ITAA36 (and in respect of those WA Bell Companies that have received post-liquidation assessments¹⁴⁷), s 22(1)(a) of the Bell Act – by transferring to and vesting in the Authority the property of the WA Bell Companies – alters, impairs and detracts from the Commonwealth taxation legislation by preventing Mr Woodings from:
- (1) enjoying his right (by s 254(1)(d)'s authorisation); and
 - (2) observing his duty and obligation (by s 254(1)(d)'s requirement),
- to retain from the money which comes to him in his representative capacity so much as is sufficient to pay the tax which is or will become due. The money which Mr Woodings was authorised and required to retain, but which is purportedly transferred by s 22(1)(a) of the Bell Act, totals some \$56.15 million.¹⁴⁸
115. Also, s 22(1) of the Bell Act impairs and detracts from the Commissioner's rights under s 254(1)(h) of the ITAA36. But for the purported transfer effected by the Bell Act the term deposits held by those WA Bell Companies in receipt of a post-liquidation assessment would remain available "attachable property" under the

¹⁴⁶ *Commissioner of Taxation v Australian Building Systems Pty Ltd (In Liq)* [2015] HCA 48; (2015) 326 ALR 590, 602 [41], 606 [64], 614 [104], 627 [171]-[172] & 628 [174]-[177]. And see Davies J in the Full Court: *Federal Commissioner of Taxation v Australian Building Systems Pty Ltd (In Liq)* [2014] FCAFC 133; (2014) 226 FCR 263, 274 [34]; c.f. at [25] & [28].

¹⁴⁷ In particular: TBGL, Bell Bros, Bell Bros Holdings, Dolfinne Securities, Industrial Securities, Neoma Investments, Wanstead, Wanstead Securities, WAON and Wigmore: ASC [73] (SCB 125-126).

¹⁴⁸ The balances of the term deposits held as at the transfer day by TBGL, Dolfinne Securities, Industrial Securities, Neoma Investments and Wanstead Securities: ASC [32], [33] (SCB 111); ASC Attachment F (SCB 148-149).

control or management or in the possession of Mr Woodings. The Commissioner would be able to look to that property to obtain payment of the post-liquidation assessments. That is relevant to Mr Woodings. He has a parallel liability for the post-liquidation assessments due to the operation of s 254(1)(e) of the ITAA36. So far as Mr Woodings' liability is ancillary to that of the companies' he has an interest in the Commissioner's rights under s 254(1)(h) not being impeded by the operation of the Bell Act.

116. Finally as to s 254 of the ITAA36, s 45 of the Bell Act – which provides for the liquidator's automatic release from all liability – undermines the Commissioner's rights, and Mr Woodings' correlative obligations, insofar as s 254(1)(e) provides for a liquidator to be made personally liable for certain tax payable to the extent of any amount that has or should have been retained under s 254(1)(d). Section 45 of the Bell Act is also inconsistent with s 254(1)(d) of the ITAA36. By purporting to give the liquidator a release, s 45 of the Bell Act undermines s 254(1)(d) by removing the incentive that s 254(1)(e) provides to comply with s 254(1)(d).
117. As to former s 215 of the ITAA36 (in respect of those WA Bell Companies that have pre-liquidation assessments and available assets in their windings up¹⁴⁹), inconsistency arises in a similar manner to the way in which inconsistency arises in relation to s 254. Former s 215 provides a special collection regime to assist the Commissioner in recovering tax-related liabilities. The Commonwealth Parliament considered it necessary to impose such a scheme where, among other things, a company was being wound up. The scheme is grafted on to, but is compatible with, the liquidator's general duties in relation to the distribution of the insolvent company's property.
118. The scheme that former s 215 of the ITAA36 provides for the collection of tax-related liabilities in respect of companies that are being wound up is undermined by the Bell Act. There is a direct inconsistency. In particular:
- (1) The transfer to and vesting in the Authority of the property of the WA Bell Companies under s 22 of the Bell Act impairs and detracts from Mr Woodings' obligation: (a) not to part with the assets of the company pending the Commissioner's notification (s 215(3)(a)); and (b) to set aside certain assets after the Commissioner's notification (s 215(3)(b)). The operation of the Bell Act puts it beyond Mr Wooding's power to comply with his obligations under former s 215 of the ITAA36.
 - (2) The release provided to the liquidator by s 45 of the Bell Act may have the effect of rendering nugatory, and thereby impairing or detracting from, the imposition of personal liability by former s 215(3)(c) of the ITAA36. In addition the release undermines the obligations under former s 215(3) of the

¹⁴⁹ In particular: TBGL, BGF and Industrial Securities: ASC [32] (SCB 111); ASC Attachment F (SCB 148-149); ASC [71] (SCB 121-122).

ITAA36 by removing the consequence for failure to observe the Commonwealth statutory requirements.

119. More generally, the scheme of former s 215 of the ITAA36 proceeds on a basis which cannot accept the concurrent operation of the Bell Act. The provision assumes the existence, external to the ITAA36, of laws governing the liquidation of companies pursuant to which:
- (1) the property of companies in liquidation is and will remain under the control of the liquidator such that, in providing for the collection of tax owing by those companies, it is sufficient to impose upon the liquidator the duties identified in s 215(3)(a) and (3)(b) of the ITAA36 and the associated civil and criminal liability for non-compliance (c.f. Bell Act, ss 22, 27-29, 68, 69, 71 & 72(2) of the Bell Act); and
 - (2) there is an orderly and predictable priority scheme for the payment of ordinary debts of such companies from their property, with which the tax is understood to rank equally, enabling one to determine in advance what amounts should properly be paid to the Commissioner out of that property and thus what assets must be “set aside” to facilitate collection of that tax from the property (c.f. Bell Act, ss 25, 35-44).
120. Section 215 of the ITAA36 contains an implied negative proposition that the law governing company liquidations may not be adjusted by the Bell Act, as State law, in these fundamental respects, since it detracts from the full force of the Commonwealth taxation law.

Standing & Justiciable Controversy as to the Taxation Legislation Inconsistency

121. The State denies that the plaintiffs have standing to seek relief as to the invalidity of the Bell Act on the basis of inconsistency with aspects of the Commonwealth taxation legislation (i.e. those provisions other than s 254(1)(d) & (e) of the ITAA.¹⁵⁰ The State also asserts that no justiciable controversy arises insofar as the grounds for inconsistency rely on those provisions.¹⁵¹
122. The question of “standing” to seek a declaration as to invalidity is subsumed within the constitutional requirement of a “matter”.¹⁵²
123. An applicant has standing if he or she has some “special” or “sufficient interest” in the subject matter of the action, or in having “his or her legal position clarified”, so as to warrant the relief sought.¹⁵³ That includes a plaintiff who “is, or in the immediate future probably will be, affected in his person or property” by legislation

¹⁵⁰ Amended Defence, para 56.1 (SCB 99).

¹⁵¹ Amended Defence, para 56.2 (SCB 99-100).

¹⁵² *Pape v Federal Commissioner of Taxation* [2009] HCA 23; (2009) 238 CLR 1, 68 [152].

¹⁵³ *Australian Conversation Foundation Inc v Commonwealth* [1980] HCA 53; (1980) 146 CLR 493, 511, 527-528; *Kuczborski v Queensland* [2014] HCA 46; (2014) 254 CLR 51, 106 [175].

alleged to be unconstitutional.¹⁵⁴ A justiciable controversy or “matter” is shown to arise if there is a subject of controversy which is amenable to judicial determination in a proceeding or action.¹⁵⁵ That will be the case if a person with standing (in the sense described before) seeks a declaration that legislation is invalid relying on s 109 of the *Constitution*. Such a “matter” arises under the *Constitution*; the law being administered is the constitutional law which determines validity.¹⁵⁶

124. The plaintiffs in this proceeding include Mr Woodings. He has standing to seek relief. Manifestly a justiciable controversy arises as to the validity of the Bell Act. There is nothing hypothetical about Mr Woodings needing to know whether the Bell Act or its provisions are invalid on the relevant grounds – for then he must comply with the duties and obligations provided for under former s 215 and s 254 of the ITAA36, and may despite the Bell Act provisions assert the rights provided for under s 254.
125. Mr Woodings is the liquidator of the WA Bell Companies. If for that reason s 22 of the Bell Act, or the Bell Act as a whole, is invalid, Mr Woodings remains subject (or potentially remains subject) to the duties and personal liability imposed by former s 215 and s 254 of the ITAA36 in respect of the property of the WA Bell Companies purportedly taken out of his custody and control. Mr Woodings is entitled to know whether, by reason of invalidity, the purported transfer under s 22 of the Bell Act is ineffective and he must continue to comply with former s 215 and s 254 of the ITAA36.¹⁵⁷
126. Section 45 of the Bell Act purports to provide Mr Woodings with a release on dissolution. If, due to inconsistency with former s 215 and s 254 of the ITAA36, the provision purportedly providing a release is invalid, that is of significance to Mr Woodings.

Severance

127. Section 7 of the *Interpretation Act* 1984 (WA) will, in some circumstances, permit the severing of a particular provision of a written law of the State of Western Australia where it is invalid. An Act may be valid to the extent to which it is not in excess of the legislative power of the State (in the present case, to the extent to which it is not inconsistent with a Commonwealth law).
128. There are accepted limits to the power of a Parliament, by provisions such as s 7, to direct the Court to remake a legislative scheme. Where the challenged law is intended “to operate fully and completely according to its terms, or not at all,” the

¹⁵⁴ *Toowoomba Foundry Pty Ltd v Commonwealth* [1945] HCA 15; (1945) 71 CLR 545, 570; *Croome v Tasmania* [1997] HCA 5; (1997) 191 CLR 119, 125-126 & 137; *Kuczborski v Queensland* [2014] HCA 46; (2014) 254 CLR 51, 87-88 [99].

¹⁵⁵ *Fencott v Muller* [1983] HCA 12; (1983) 152 CLR 570, 603; *Crouch v Commissioner for Railways (Qld)* [1985] HCA 69; (1985) 159 CLR 22, 37.

¹⁵⁶ *Croome v Tasmania* [1997] HCA 5; (1997) 191 CLR 119, 126; *Kuczborski v Queensland* [2014] HCA 46; (2014) 254 CLR 51, 59 [3].

¹⁵⁷ *University of Wollongong v Metwally* [1984] HCA 74; (1984) 158 CLR 447, 458.

Court ought not, under the guise of interpretation and severance, uphold what would effectively be a new and different law.¹⁵⁸ The question of whether the law was intended to operate fully and completely according to its terms or not at all directs a comparison between the legal and practical operation of the Act according to its terms and its legal and practical operation as severed.¹⁵⁹

129. An intention that a law is to operate fully and completely according to its terms is manifested where partial invalidation of it would change the operation of the remaining parts. That is, where the law would not apply in “the same way and with the same consequences to the persons and things affected” as it did before severance.¹⁶⁰ Another way of expressing the idea is that the Court ought not perform “judicial plastic surgery”, but may undertake “amputation and excision”.¹⁶¹
130. Similarly, where an invalidation is substantial and would strike down key provisions of a comprehensive and integrated legislative measure, the invocation of statutory or constitutional principles of severance is inappropriate.¹⁶²
131. The invalid provisions of the Bell Act cannot be severed without the remainder having a different legal and practical operation from what they had before severance. That necessarily follows from the Bell Act’s attempt to deal comprehensively and exclusively with the administration of the property recovered as a consequence of the Bell proceedings against the banks. The Bell Act is a “comprehensive and integrated legislative measure” which must fail where one or more of its core provisions is invalid. The point may be demonstrated by analysing the effect of s 22’s invalidity in the context of Maranoa Transport due to inconsistency with ss 468, 474 & 478 of the Corporations Act.¹⁶³
132. The inconsistency in relation to Maranoa Transport means that s 22 of the Bell Act cannot validly operate to transfer to and vest in the Authority the trust property under the Deed of Settlement. That affects both s 22(1)(b) (the property is held on trust for the WA Bell Companies as well as Maranoa Transport) and s 22(1)(c) (Mr Woodings holds the property on trust in a capacity that does relate to the liquidation of a number of WA Bell Companies.)

¹⁵⁸ *Pidoto v Victoria* [1943] HCA 37; (1943) 68 CLR 87, 108; *Victoria v Commonwealth (The Industrial Relations Act Case)* [1996] HCA 56; (1996) 187 CLR 416, 502.

¹⁵⁹ *Pape v Federal Commissioner of Taxation* [2009] HCA 23; (2009) 238 CLR 1, 132 [389].

¹⁶⁰ *Vacuum Oil Company Pty Ltd v Queensland (No 2)* [1935] HCA 9; (1935) 51 CLR 677, 692. See also *Bank of NSW v Commonwealth (The Bank Nationalisation Case)* [1948] HCA 7; (1948) 76 CLR 1, 371-372; *Strickland v Rocla Concrete Pipes Pty Ltd* [1971] HCA 40; (1971) 124 CLR 468, 493; *Re Dingjan; ex parte Wagner* [1995] HCA 16; (1995) 183 CLR 323, 348.

¹⁶¹ *Bank of NSW v Commonwealth (The Bank Nationalisation Case)* [1948] HCA 7; (1948) 76 CLR 1, 372.

¹⁶² *New South Wales v Commonwealth (The Work Choices Case)* [2006] HCA 52; (2006) 229 CLR 1, 241 [598].

¹⁶³ Refer to paras 98 to 103 above. The use of this illustration is not intended to limit the plaintiffs’ contention as to severance. The contention holds good as to each case of invalidity of a key provision of the Bell Act, e.g. ss 22 (both as to Maranoa Transport and generally as to the WA Bell Companies); 25, 27-29; 30; 35, 37-44; 45, 54, 56, 68(2)(b)(ii), 72(2)(a) & (b) and s 73. Space does not permit the plaintiffs to address separately the effect of each such invalidity on the operation of the remainder of the Bell Act.

133. The invalid operation of ss 22(1)(b) & (c) cannot be severed from the balance of s 22 or the Bell Act as a whole.
134. First, s 22 cannot be read down or severed so as to bring about on the transfer day a transfer to the Authority of only the legal interest in the trust property – or otherwise to preserve Maranoa Transport’s equitable interest in the property (e.g. by only transferring the WA Bell Companies’ interest in the trust property). The Authority was to acquire all of the legal interest freed of any other interest which might previously have been engrafted thereto (ss 22(10) & (11), 25(4) and 32(2), (3) & (4).) The Authority was not to become a trustee for others under s 22 or the beneficiary of an otherwise ongoing trust.
135. Second, s 22 cannot be severed so as to completely remove from its scope the trust property under the Deed of Settlement. That would result in the Bell Act as a whole having a substantially different legal and practical operation than was intended. Contrary to the “objects” of the Bell Act as provided for in s 4(a) of the Act some 60%¹⁶⁴ of the “Bell litigation funds” would stand outside the Bell Act’s “mechanism ... for the distribution of funds ... received by the liquidator of TBGL and certain of its subsidiaries ... as a consequence of the Bell litigation and the settlement of it in 2013”.

Part VII: Applicable Provisions

136. The applicable constitutional and statutory provisions in this matter are voluminous. It would be impracticable to reproduce them in or annex them to these submissions. The plaintiffs are conferring with the first defendant to this matter and the parties to S248 of 2015 and P63 of 2015 as to production of a single booklet, to be provided to the Court separately, reproducing the relevant provisions across the three related matters.

Part VIII: Orders Sought

137. The questions for the Court’s opinion¹⁶⁵ should be answered as follows:
- (1) Yes (as to both (a) & (b)).
 - (2) Yes (as to both (a) & (b)).
 - (3) Yes; all of them.
 - (4) The Bell Act is invalid in its entirety.
 - (5) The first defendant.

¹⁶⁴ The trust property the subject of the Deed of Settlement consists of term deposits of some \$1.038 billion of the total approx. \$1.727 billion that is purportedly captured by the Bell Act. Refer to para 42 above.

¹⁶⁵ ASC [85B] (SCB 130-131).

Part IX: Oral Argument

138. The plaintiffs apprehend that their oral argument in chief and reply will follow that of the plaintiffs in S248 of 2015 and the plaintiff in P63 of 2015. The parties will confer to avoid duplication in the respective oral arguments. On that basis the plaintiffs estimate that 1 hour will be required for presentation of their oral argument in chief.

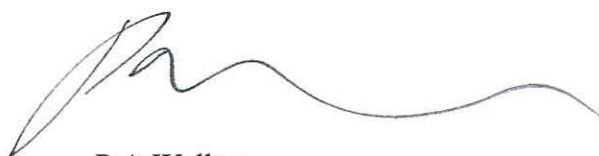
DATED: 3 March 2016



C G Colvin
P. 08 9220 0444
F. 08 9325 9111
E. ccolvin@francisburt.com.au



J C Vaughan
P. 08 9220 0555
F. 08 9325 9111
E. jvaughan@wabar.com.au



P A Walker
P. 08 9366 8719
F. 08 9366 8111
E. paul.walker@ashurst.com

Annexure "A": Direct Inconsistencies

Bell Act		Corporations Act		Additional Submission
No.	Effect	No.	Effect	
22 9(1)(a)	<p>Subject to exceptions transfers to and vests in the Authority the property of the WA Bell Companies (and also the property the subject of the trust created by the Deed of Settlement).</p> <p>The Authority's functions include the collection and realisation of the property of the WA Bell Companies.</p>	474, 478 & 468	<p>A liquidator must take the company's property into his or her custody or control (s 474(1)). The liquidator must collect the company's property and apply it in discharging the company's liabilities (s 478(1)). After winding up a disposition or attachment of the Company's property, other than an "exempt disposition", is void unless the court orders otherwise (s 468).</p>	<p>The purported transfer to and vesting in the Authority of each company's property prevents the liquidator meeting his duties and obligations (1) to maintain the property in his custody or control; and (2) to realise and apply the property in discharge of the relevant company's liabilities. Also, as explained at paras 63 to 65 above, the operation of s 22 of the Bell Act effects a void disposition or attachment.</p> <p>The direct inconsistency is all the more so given the terms of:</p> <ul style="list-style-type: none"> Part 4 Div. 3, 4 & 5 of the Bell Act. These mean that: (1) the property of one WA Bell Company may be applied in discharging liabilities of another WA Bell Company (Bell Act, s 42(3)(a)); (2) there is an absolute discretion as to what amount, if any, a creditor will be paid (refer to para 29 above); and (3) the Governor may determine that <i>no</i> amount is paid to <i>any</i> creditor (Bell Act, s 43(1) & (2)) which would see the Fund, on closure, essentially being forfeited to the State (Bell Act, s 46(2)).

Bell Act		Corporations Act		Additional Submission
No.	Effect	No.	Effect	
				<ul style="list-style-type: none"> Section 72(2)(b) of the Bell Act, which – together with s 29 of the Bell Act – prevents the liquidator taking proceedings to recover the property as transferred and vested in the Authority by s 22 of the Bell Act. (See also ss 54(2), 56(2), 68(2)(b)(ii) & 73 of the Bell Act – discussed further below.)
25, 35, 37, 38, 39, 40, 41, 42, 43, 44 & 74	<p>Provides for:</p> <ul style="list-style-type: none"> proof of liabilities of the WA Bell Companies (ss 25, 35, 37, 38 & 39); determination by the Governor as to amounts to be paid to creditors in respect of their liabilities (ss 41, 42 & 43). <p>Creditors have no rights in respect of a determination affecting them (ss 39(8), 40(9) & 43(6)). The Authority and the Governor have an absolute discretion (ss 37(3), 39(6), 40(6), 42(2) & 43(1)-(2)).</p> <p>The determinations are final and conclusive and cannot be</p>	553, 553D, 554, 554A, 554C, 555, 556, 559 & 1321	<p>Provide for proof and ranking of creditors' debts payable by and claims against a company in liquidation (ss 553, 553D, 554, 554A, 554C, 555, 556 & 559). The determinations are as to each creditor's rights and entitlements. The property in the winding up is applied to meet the liabilities, as so determined, strictly in accordance with the statutory priorities. Any aggrieved person has a right of appeal to the court (s 1321). See generally paras 39 to 41 above.</p>	<p>The Bell Act provisions provide for a scheme whereby creditors' claims and distributions are determined administratively, in the Executive's absolute discretion, rather than as a matter of the creditors' respective rights and entitlements at law.</p> <p>This approach is evident in the objects of the Bell Act. The objects confirm that the legislation is only:</p> <ul style="list-style-type: none"> to make <i>reasonable</i> provision for the distribution of the property of the WA Bell Companies (Bell Act, s 4(e); and to make <i>reasonable</i> provision for the satisfaction of liabilities owed to creditors (Bell Act, s 4(f)). <p>By reason of the operation of s 22 of the Bell Act the property of the WA Bell Companies (and also the property the subject of the trust created by the Deed of Settlement) ceases to be available</p>

Bell Act		Corporations Act		Additional Submission
No.	Effect	No.	Effect	
	<p>appealed or reviewed in any court (s 74).</p> <p>See generally paras 25 to 32 above.</p>			<p>property in the respective windings up. In that circumstance the Bell Act's alternate scheme for proof of liabilities and distribution of property to creditors alters, impairs or detracts from the rights of creditors under the Commonwealth winding up provisions.</p>
25(2), 25(3), 41(2) & 42(2)	<p>Permit a WA Bell Company liquidator to prove for, and receive out of the Fund, certain liabilities incurred in the course of the winding up.</p>	473(2) 473(3)	<p>Provide for determination of a provisional liquidator or liquidator's remuneration.</p>	<p>The Bell Act provisions allow the liquidator to receive payment by way of remuneration other than in accordance with the requirements of ss 473(2) & (3).</p>
27 & 28 9(1)(b)	<p>The Authority is the administrator of the WA Bell Companies (s 27(1)). It controls and manages the companies' property and affairs, including the power to dispose of each company's property, and may perform and exercise any power or function that the company or its officers could have performed or exercised (s 28).</p> <p>The Authority's functions include the administration of</p>	471A 474, 478 & 468 477	<p>While a company is being wound up persons other than the liquidator cannot usually perform or exercise a power or function as an officer of the company (s 471A).</p> <p>As to ss 474, 478 & 468 see the first row in the table.</p> <p>As to s 477 see row immediately below.</p>	<p>By granting the Authority powers to control & manage, and to dispose of property of the WA Bell Companies, the Bell Act provisions conflict with and undermine:</p> <ul style="list-style-type: none"> • the prohibition on persons other than the liquidator exercising and performing functions and powers as an officer of the company (s 471A); • the liquidator's duties and obligations (1) to maintain the property in his custody or control; and (2) to realise and apply the property in discharge of the relevant company's liabilities; • the terms of s 468(1) – which make such a disposal void; and • the conferral of like powers on the liquidator

Bell Act		Corporations Act		Additional Submission
No.	Effect	No.	Effect	
	each WA Bell Company.			(s 477). The exercise of the liquidator's powers will be impaired and detracted from by the exercise of the Authority's powers.
29	Powers of officers of the WA Bell Companies, including the liquidator, are suspended.	477	Extensive powers are conferred on the liquidator for the purpose of carrying out the winding up.	Section 29 of the Bell Act purports to prevent the liquidator of the WA Bell Companies exercising his powers as liquidator under s 477.
33(7)	The liquidator of the WA Bell Companies must give the Authority the books of each company and the liquidator that are relevant to the affairs of the company.	530B, 531, 542(2) & reg. 5.06.02	Subject to irrelevant exceptions no person is entitled to retain possession of the company's books as against the liquidator (s 530B). The liquidator must keep proper books (s 531) which must be available at the liquidator's office for inspection (reg. 5.6.02). Further, the books of the company and the liquidator must be retained for a certain period (s 542(2)).	Insofar as s 33(7) of the Bell Act requires that the liquidator deliver the books to the Authority it undermines: <ul style="list-style-type: none"> • the liquidator's right to possession of the companies' books; and • the liquidator's duties and obligations to keep and retain his and the companies' books.
40, 41(2) & 42(3)(b)	Provides, following the Authority's recommendation, for the Governor to make a determination as to an amount to be paid to a person by way of compensation for providing funding or an indemnity in relation to the	564	Where certain statutory pre-conditions are satisfied the court may make orders, as deemed just, with respect to the distribution of recovered property or expenses with a view to giving assisting creditors an advantage over others in	The Authority has an absolute discretion in relation to its recommendation (Bell Act, s 40(6)). So too the Governor. See para 29 above. By contrast: <ul style="list-style-type: none"> • there are statutory pre-conditions that must be satisfied under s 564; and • s 564 confers a discretion, to be exercised

Bell Act		Corporations Act		Additional Submission
No.	Effect	No.	Effect	
	Bell litigation.		consideration of the risk assumed by the creditors who have indemnified or paid money to the liquidator in relation to the recovery proceedings.	<p>judicially, to make a “just” order to advantage a creditor “in consideration of the risk assumed”.</p> <p>The Bell Act’s conferral of an absolute power to determine an amount to be paid by way or compensation, and to do so irrespective of the statutory preconditions under s 564, alters, impairs or detracts from the court’s control – as and by way of supervision of the winding up – as to whether to give assisting creditors an advantage over others.</p> <p>This is all the more so given the <i>de facto</i> “pooling” effected by s 42 of the Bell Act. Under the Bell Act the compensation determination is not confined to the property recovered in the individual winding up; a creditor who indemnified or funded only in relation to company A might nevertheless obtain the benefit of the Governor’s determination as to property recovered in the windings up of companies X, Y & Z.</p>
42(3)(a)	The amount to be paid pursuant to the Governor’s determination is in respect of the aggregate of <i>all</i> liabilities of <i>all</i> WA Bell Companies to that person as a creditor.	478 553 555	Debts or claims are proved, and distributions by way of a dividend in the windings up are paid in discharge of liabilities, on company-by-company basis. (The “pooling” provisions are unavailable. Refer to para 37	<p>The Bell Act effects a <i>de facto</i> pooling of the WA Companies’ property (and that property the subject of the trust created by the Deed of Settlement).</p> <p>Accordingly, the Bell Act provision undermines the rights of a creditor of an individual WA Bell Company to receive a dividend <i>pari passu</i> out of</p>

Bell Act		Corporations Act		Additional Submission
No.	Effect	No.	Effect	
	Refer also to s 39(1).		above.)	the available property in the winding up of that company.
45	On dissolution under s 30 the liquidator of the relevant WA Bell Company, among others, is discharged from all liability in performing his duties as liquidator.	480 481	Where statutory pre-conditions are satisfied, a liquidator may apply for a release (s 480). The court may grant or withhold the release (s 481).	The Bell Act's automatic release undermines: <ul style="list-style-type: none"> • the liquidator's obligation to satisfy the statutory pre-conditions under s 480 before applying for a release; and • the rights of a creditor to object to the liquidator's release (s 481(1)(b)); and the court's control – as and by way of supervision of the conduct of the winding up – as to whether to grant or withhold the release (see s 481(1) & (2)).
54(2), 56(2), 68(2)(b)(ii) & 72(2)(a) & (b)	It is an offence to carry out any action for the purpose of defeating, preventing or impeding the operation of the Bell Act or the achievement of its objects (s 54(2)). It is an offence to do any act for the purpose of defeating the effectiveness of the transfer or vesting of property in accordance with s 22 of the Bell Act (s 56(2)). The Authority and the Administrator are not liable	468 474, 478 & 477(2)(a)	As to ss 468, 474 & 478 see the first row in the table. Section 477(2)(a) empowers a liquidator to take legal proceedings in the name and on behalf of the company.	The Bell Act offence provisions (ss 54(2) & 56(2)) are calculated, and have the tendency, to prevent proceedings being taken to recover the property as transferred to and vested in the Authority by operation of s 22 of the Act. So too the exoneration provisions (ss 72(2)(a) & (b) and 68(2)(b)(ii) are calculated, and have the tendency, to prevent civil recovery proceedings being taken – and provide a defence if in fact taken – to recover the property as transferred to and vested in the Authority (in an action against the Authority) or for debt or money had and received (in an action against the banks holdings the various term deposits).

Bell Act		Corporations Act		Additional Submission
No.	Effect	No.	Effect	
	<p>to any action, liability or demand arising from the operation of the Bell Act or the transfer of property to and vesting of property in the Authority by s 22 of the Act (s 72(2)(a) & (b)).</p> <p>The transfer of property to and vesting of property in the Authority by s22 is not to be regarded as placing any person in breach of or as constituting a default under the general law (s 68(2)(b)(ii)).</p>			<p>The Bell Act provisions thus undermine:</p> <ul style="list-style-type: none"> • the liquidator’s duties and obligations (1) to maintain the property in his custody or control; and (2) to realise and apply the property in discharge of the relevant company’s liabilities; • the terms of ss 468(1) & (4) – which make the transfer void; and • the conferral of powers on the liquidator to take the necessary recovery proceedings in relation to the transfer and the term deposits (s 477(2)(a)).
73(1)	A person may not, without leave of the Supreme Court of Western Australia, begin or proceed with proceedings in a court with respect to property that was property of a WA Bell Company.	471B	A person may not, without leave of a “Court” as defined in s 58AA (which includes the Federal Court of Australia and other State and Territory Supreme Courts), begin or proceed with proceedings in a court in relation to property of the company.	The Bell Act alters, impairs or detracts from the operation of s 471B by ousting the jurisdiction of “Courts” (other than the Supreme Court of Western Australia) to grant leave to begin or proceed with proceedings in a court with respect to property that was property of a WA Bell Company.