IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

No S248 of 2015

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

GARRY TREVOR AS LIQUIDATOR OF BELL GROUP N.V. (IN LIQUIDATION)
Second Plaintiff

THE STATE OF WESTERN AUSTRALIA
Defendant

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No P63 of 2015

W.A. GLENDINNING & ASSOCIATES PTY LTD
Plaintiff

THE STATE OF WESTERN AUSTRALIA
Defendant

No P4 of 2016

MARANOA TRANSPORT PTY LTD (IN LIQ)
First Plaintiff

20 **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 LTD (IN LIQ) AND MARANO TRANSPORT PTY LTD (IN LIQ)
Third Plaintiff

THE STATE OF WESTERN AUSTRALIA
First Defendant

30 **THE BELL GROUP LIMITED (IN LIQ) AND THE OTHER COMPANIES NAMED IN SCHEDULE A**
Second Defendant

ANNOTATED SUBMISSIONS ON BEHALF OF ATTORNEY GENERAL FOR STATE OF NEW SOUTH WALES, INTERVENING

Date of document: 23 March 2016
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PART I: FORM OF SUBMISSIONS

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

PART II: BASIS FOR INTERVENTION

2. The Attorney-General for the State of New South Wales ("**NSW**") intervenes pursuant to s 78A of the Judiciary Act 1903 (Cth).

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

PART IV: RELEVANT PROVISIONS

4. The applicable constitutional provisions and statutes are set out in a separate volume.

PART V: SUBMISSIONS

Overview

5. NSW makes the following submissions:

   (a) section 5F(2) and 5G(11): the Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Act 2015 (WA) ("**Bell Act**") is not inconsistent with the Corporations Act 2001 (Cth) ("**Corporations Act**") insofar as it applies "in" the State of Western Australia. The Bell Act applies "in" Western Australia insofar as it is directed to acts, matters, circumstances and things within the geographical area of the State of Western Australia. For an act, matter, circumstance or thing to be "in" Western Australia, it is unnecessary for it to have a "distinct and separate territorial operation" in that State.

   (b) section 5G(8): the Bell Act is not inconsistent with Chapter 5 of the Corporations Act (or the "old winding up law") because:

      (i) the Bell Act provides a "scheme of arrangement, receivership, winding up or other external administration" within the meaning of s 5G(8) of the Corporations Act;

      (ii) s 5G(8) of the Corporations Act provides that the provisions of Chapter 5 of that Act do not apply to such a scheme, receivership, winding up or administration;

      (iii) by force of s 1405 of the Corporations Act, the reference in s 5G(8) of that Act to "Chapter 5 of [the Corporations] Act" is taken to include a reference to the "old winding up law".

6. NSW makes no submissions on the remainder of the issues raised by the Special Cases.

The relationship between the Bell Act and the Corporations Act

7. The Bell Act:

   (a) declares each WA Bell Company to be an excluded matter for the purposes of s 5F of the Corporations Act in relation to the whole of the Corporations legislation (subject to the presently irrelevant exceptions in ss 51(2) and (3) of the Bell Act): Bell Act s 51; and

   (b) declares Parts 3, 4 and 5 and ss 55 and 56(3) of the Bell Act to be Corporations legislation displacement provisions for the purposes of s 5G of the Corporations Act: Bell Act s 52(2).

8. As a result, if and to the extent that the Corporations Act and the Bell Act are not capable of operating concurrently without "direct inconsistency" (see Corporations Act s 5E):

   (a) the "Corporations legislation" (which includes the Corporations Act: see Corporations Act s 9; Bell Act: s 50) does not apply "in" Western Australia in relation to any WA Bell Company (subject to the limited exceptions referred to in ss 51(2) and (3) of the Bell Act and to any regulations under the Corporations Act): Corporations Act ss 5F(2)(d), 5F(3);

   (b) the provisions of Chapter 5 of the Corporations 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 the Bell Act: Corporations Act s 5G(8);

   (c) the Corporations legislation does not apply "in" WA to the extent necessary to ensure that there is no inconsistency between a provision of the Corporations legislation and Parts 3, 4 and 5 and ss 55 and 56(3) of the Bell Act: Corporations Act s 5G(11).

9. These propositions are (or, at least, should be) uncontroversial. They do, however, raise the following questions:

   (a) what does it mean to say that the Corporations legislation does not apply "in" Western Australia?; and

   (b) does an administration of the kind contemplated by the Bell Act amount to a "scheme of arrangement, receivership, winding up or other external administration" for the purposes of s 5G(8) of the Corporations Act?

10. For the reasons developed below, NSW submits that the answers to these questions are as follows:

(a) where s 5F(2) or s 5G(11) of the Corporations Act is engaged, the Corporations legislation does not apply to certain acts, matters, circumstances or things which can be characterised as being "in" (that is, within) the relevant State or Territory. Contrary to the Plaintiffs' submissions, the operation of ss 5F(2)(a) and 5G(11) are not impliedly limited to matters which have "clear territorial attributes" or a "distinct and separate territorial operation";

(b) the administrations contemplated by the Bell Act constitute a "winding up" or "other external administration" for the purposes of s 5G(8) of the Act.

When the Corporations legislation is disapplied by s 5F(2) or 5G(11) of the Corporations Act, the Corporations legislation does not apply to acts, matters, circumstances or things in the geographical area of the relevant State or Territory

11. It is necessary to construe the word "in" in ss 5F(2) and 5G(11) of the Corporations Act in its legislative and historical context.

12. As is well known, the Corporations Act was part of the legislative response to the decisions of this Court in Re Wakim; ex parte McNally (1999) 198 CLR 511 and R v Hughes (2000) 202 CLR 535. According to the explanatory memorandum for the bill which became the Corporations Act (at 5), the intention of that bill was to, "for practical purposes", "restore the regulatory environment which existed before the High Court's decisions in *Hughes* and *Wakim*".

13. As noted in s 3 of the Corporations Act, that Act relies (in part) on referrals under s 51(xxxvii) of the Constitution for its "Constitutional basis". Consistent with this, the Corporations Act generally only applies "in" States which have made a relevant referral to the Commonwealth under s 51(xxxvii) of the Constitution as well as "in" Australia's internal Territories: Corporations Act ss 5(1) and (3). The geographical area consisting of each "referring State" and each internal Territory is referred to in the Corporations Act as "this jurisdiction" (for certain limited purposes, an external Territory may also be part of "this jurisdiction"): Corporations Act s 9.

14. Subsection 5(3) of the Corporations Act provides that (emphasis added):

> Each provision of [the Corporations] Act applies in this jurisdiction.

15. In light of that subsection, it is tolerably clear that the Commonwealth Parliament contemplated that each and every provision of the Corporations Act could and (subject to that Act) would be regarded as applying "in" "this jurisdiction" (that is, "the whole of Australia" other than any State that is not a "referring State": see Corporations Act s 9(2)).

16. Subsection 5(3) defeats any suggestion that there are a class of provisions of the Corporations Act (for example, provisions without "clear territorial attributes") which should be regarded as being incapable of applying "in" "this jurisdiction" for the purposes of s 5 of the Corporations Act.

17. Consistent with this, things which have no "distinct and separate territorial operation" or existence (such as the Internet) may nevertheless be regarded as operating or existing "in" "this jurisdiction" for the purposes of the Corporations Act. For example, publishing statements on a website may amount to misleading or deceptive conduct "in" this jurisdiction even though the Internet has no "distinct and separate territorial operation" or existence: see, eg, Re Vault Market Pty Ltd [2014] NSWSC 1641 at [35]-[39].

18. There is no reason to read the word "in" in ss 5F(2) and 5G(11) differently from the way in which that word is to be read in s 5(3) or the other provisions of the Corporations Act which use the word "in" as part of a territorial limitation.

19. Subsections 5F(2) and 5G(11) effectively preserve the ability of a "referring State" to prevent the Corporations Act from applying "in" that State in relation to particular matters or provisions without having to terminate or modify that State's referral under s 51(xxxvii) of the Constitution.

20. When either of those subsections are invoked, provisions of the Corporations Act which (by force of s 5(3) of the Act) would ordinarily apply "in" a particular State (as part of "this jurisdiction") cease to so apply. In that event, the relevant State is in a position similar to that which it would be if it was not a "referring State" (in relation to the particular matter or provision concerned) with the result that the State is generally free to legislate in relation to facts, matters, circumstances or things "in" the State without the risk of inconsistency with the Corporations Act.

21. In other words, ss 5F(2) and 5G(11) operate to, for practical purposes, retain "the regulatory environment which existed before the High Court's decisions in *Hughes* and *Wakim*" by preserving the ability of States to "opt out" of particular aspects of the Corporations Act in a similar way to that which was possible under the predecessor Corporations Law.

22. This is not to say that the phrase "in the[/a] State" in ss 5F(2) and 5G(11) has no work to do. Rather, that qualifier makes it clear that – even if s 5F(2) or 5G(11) is invoked by a particular State – the Corporations Act might nevertheless still have a role to play "in" another part of "this jurisdiction". Whether or not that will be so will depend on an analysis of the circumstances of the particular case. The point for present purposes is that there is no warrant for reading ss 5F(2) and 5G(11) as being subject to an implied limitation to the effect that they can only apply to provisions of the Corporations Act which have a "distinct and separate territorial operation".

23. It is accepted that, at least at the level of theory, this construction could lead to practical difficulties in that it could permit different laws to apply in different parts of "this jurisdiction" with respect to related subject matter.

24. To at least some extent, this possibility is an inevitable consequence of the scheme of the Corporations legislation. As noted above, that scheme relies in part on referred power for its "Constitutional basis" but also preserves the ability of States to "opt out" of that legislation in particular respects. The ability for States to "opt out" of the Corporations legislation is properly seen as one of the conditions on which those States agreed to become and remain "referring States". That being so, the possibility that different laws might apply "in" different States with respect to related subject matter is properly seen as a possibility that is inherent to the scheme of the Corporations Act.

25. In any event, the Corporations Act contains a number of mechanisms for avoiding practical inconveniences which could be caused by a "referring State" "opting out" of the Corporations legislation in particular respects. These include:

(a) subsection 5F(3) which empowers the Commonwealth to make regulations which override (in part or whole) the displacing effect of a declaration made by a State under s 5F;

(b) subsections 5F(2) and 5G(11) themselves which could be invoked by a State if another State's invocation of those subsections caused practical difficulties; and

(c) subsection 5I of the Corporations Act which empowers the Commonwealth to make regulations which modify the operation of the Corporations legislation so as to avoid inconsistencies between that legislation and State law.

26. These features of the Corporations Act suggest that any practical difficulties arising from different laws applying "in" different States were intended to be resolved through legislative action rather than by imposing an artificial limitation on the word "in".

27. For these reasons, the phrase "in the[/a] State" in ss 5F(2) and 5G(11) of the Corporations Act should not be read as being limited to matters which have a "distinct and separate territorial operation". The decision of a single judge of the Supreme Court of New South Wales in HIH Casualty and General Insurance Ltd (in liq) v Building Insurers' Guarantee Corporation (2003) 202 ALR 610 should not be followed to the extent that it held to the contrary.

28. It follows that the Bell Act is not inconsistent with the Corporations Act insofar as it deals with acts, matters, circumstances and things in Western Australia.

The Bell Act constitutes or involves a scheme or arrangement, receivership, winding up or other external administration for the purposes of s 5G(8) of the Corporations Act

29. Subsection 5G(8) of the Corporations Act provides that:

> The provisions of Chapter 5 of [the Corporations] 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.

30. Thus, the provisions of Chapter 5 of the Corporations Act do not apply to the form of administration contemplated by the Bell Act provided that it amounts to "a scheme of arrangement, receivership, winding up or other external administration".

31. NSW contends that the form of administration contemplated by the Bell Act constitutes a "winding up" or "other external administration" for the purposes of s 5G(8) of the Corporations Act.

32. "Winding up" was described by McPherson SPJ in Re Crust 'n' Crumbs Bakers (Wholesale) Pty Ltd [1992] 2 Qd R 76 as:

> 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.

33. The form of administration contemplated by the Bell Act is such a process. It involves (inter alia):

    (a) the collection of assets: Bell Act ss 22, 24;

    (b) dealing with proofs of creditors: Bell Act ss 34, 37; and

    (c) distributing net proceeds to persons entitled after providing for costs and expenses: Bell Act ss 16(4), 44.

34. This analysis is not defeated by the fact that the Bell Act contemplates that the property of WA Bell Companies will be transferred to the WA Bell Companies Administrator Authority ("**Authority**") before being distributed to creditors (rather than being directly distributed to creditors as would ordinarily occur in a winding up under Chapter 5 of the Corporations Act): see Bell Act s 22.

35. The transfer of property to the Authority under the Bell Act is not an end in itself. Rather, it is an administrative mechanism aimed to facilitate the collection of the property of the WA Bell Companies as part of, and in aid of, the winding up of those companies.

36. In this regard, the approach taken in the Bell Act is not dissimilar to that which ensues when a Court appoints a receiver to facilitate the winding up of a managed investment scheme or partnership (although, of course, in such a case property does not actually vest in the receiver) or where a Court makes an order under s 474(2) of the Corporations Act vesting company property in the liquidator. In all of those cases, a third party plays a central role in bringing in and preserving the property of the scheme, partnership or company. The Authority and its Administrator play a similar role under the Bell Act.

37. In this way, although the form of administration contemplated by the Bell Act is different to that which would ensue under Parts 5.4, 5.5B and 5.5 of the Corporations Act, it is nevertheless properly characterised as a process of "winding up" for the purposes of s 5G(8).

38. In any event, even if the form of administration contemplated by the Bell Act cannot be characterised as a "winding up", it is nevertheless a form of "other external administration" within the meaning of s 5G(8).

39. The term "external administration" as used in s 5G(8) is a term of wide import. It encompasses a diverse range of forms of administration including schemes of arrangement, receiverships and windings up.

40. Contrary to the Plaintiffs' submissions, there is no reason to read the residuary category of "other external administration" in s 5G(8) as being limited to a form of external administration of the kind contemplated by Part 5.3A of the Corporations Act ("administration of a company's affairs with a view to executing a deed of company arrangement") or to any other particular form of "external administration". If s 5G(8) of the Corporations Act was intended to be limited in that fashion, it easily could have said so.

41. Rather, the correct view of s 5G(8) is that it applies to any State or Territory law which involves the administration of a company "external[ly]" (that is, other than through "internal" administrators such a board of directors appointed by the members of the company). It would therefore encompass, for example, a State law which sought to make available a process of "official management" of the kind that was available under Part IX of the Companies Act 1961 (NSW) even though such a form of external administration is no longer generally available to Australian companies. Similarly, s 5G(8) encompasses the form of external administration contemplated by the Bell Act (see, in particular, Bell Act s 27) even though that form is different to those presently available under Chapter 5 of the Corporations Act.

42. In this way, "[t]he provisions of Chapter 5 of [the Corporations] Act" do not apply to the extent to which the winding up or external administration of the WA Bell Companies is carried out in accordance with the provisions of the Bell Act.

43. Pursuant to s 1405(1) of the Corporations Act, the reference to "Chapter 5 of [the Corporations] Act" in s 5G(8) includes a reference to Parts 5.4, 5.5 and 5.6 of the Corporations Law as in force before 23 June 1993 (the "**old winding up law**").

44. Accordingly, neither Chapter 5 of the Corporations Act nor the "old winding up law" applies to the extent to which the winding up or external administration of any WA Bell Company is carried out in accordance with the provisions of the Bell Act.

10 **Conclusion**

45. If it be necessary to decide, the Court should hold that the Bell Act is not inconsistent with the Corporations Act insofar as it applies "in" the State of Western Australia and is not inconsistent with Chapter 5 of the Corporations Act (or the "old winding up law").

PART VI: TIME ESTIMATE

46. The Attorney General for New South Wales estimates that no more than fifteen minutes will be required for the presentation of his oral argument.

Date: 23 March 2016

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