

IN THE HIGH COURT OF AUSTRALIA  
SYDNEY REGISTRY

NO S248 OF 2015

**BELL GROUP N.V. (IN LIQUIDATION)**  
**ARBN 073 576 502**

First Plaintiff

and

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

Second Plaintiff

**THE STATE OF WESTERN AUSTRALIA**  
Defendant

NO P63 OF 2015

**W.A. GLENDINNING & ASSOCIATES**  
**PTY LTD (ACN 008 762 721)**

Plaintiff

AND

**THE STATE OF WESTERN AUSTRALIA**  
Defendant

NO P4 OF 2016

**MARANOA TRANSPORT PTY LTD**  
**(IN LIQ) (ACN 009 668393)**

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)**

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Filed on behalf of the Federal Commissioner of Taxation by:

The Australian Government Solicitor  
4 National Circuit Barton ACT 2600  
DX5678 CANBERRA

Date of this document: 8 March 2016

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18708222

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**

Second Defendants

**SUBMISSIONS OF THE FEDERAL COMMISSIONER OF TAXATION**

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Filed on behalf of the Federal Commissioner of Taxation by:

The Australian Government Solicitor  
4 National Circuit Barton ACT 2600  
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## PART I FORM OF SUBMISSIONS

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1. The Submissions are in a form suitable for publication on the internet.

## PART II BASIS OF INTERVENTION

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- 10 2. The Commissioner of Taxation (the **Commissioner**) seeks leave to intervene for the purpose of making written and oral submissions in certain defined and limited respects in support of the plaintiffs in each of *Bell Group NV (In Liq) & Anor v State of Western Australia (S248/2015) (BGNV Proceedings)*; *WA Glendinning & Associates Pty Ltd v State of Western Australia (P63/2015) (WA Glendinning Proceedings)* and *Maranoa Transport Pty Ltd (In Liq) & Ors v State of Western Australia & Ors (P4/2016) (Maranoa Transport Proceedings)*.
- 20 3. In each case, the Commissioner seeks leave to intervene primarily in respect of the question of inconsistency within the meaning of s 109 of the Constitution between the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Act 2015 (WA) (Bell Act)* and certain provisions of the *Income Tax Assessment Act 1936 (Cth) (1936 Act)*, the *Income Tax Assessment Act 1997 (Cth) (1997 Act)* or the *Taxation Administration Act 1953 (Cth) (Administration Act)* (collectively, the **Tax Legislation**), within what is described as "Issue 1" and "Issue 7" of the plaintiffs' annotated submissions dated 3 March 2016 in the BGNV Proceedings (**BGNV Submissions**). As will appear below, not every argument put by the plaintiffs in the BGNV Proceedings and the Maranoa Transport Proceedings is embraced by the Commissioner. The Commissioner does not yet have the benefit of the plaintiff's submissions in the Glendinning Proceedings.

## PART III WHY LEAVE TO INTERVENE SHOULD BE GRANTED

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4. The Commissioner relies on an affidavit of Andrew Mills, Second Commissioner of Taxation, sworn on 8 March 2016 in support of the application to intervene.
- 40 5. The Commissioner is a statutory officer established by s 4 of the Administration Act and appointed by the Governor-General. Pursuant to s 8 of the 1936 Act, s 3A of Administration Act, and s 1-7 of the 1997 Act, the Commissioner has general administration of those Acts. In respect of that responsibility:
  - a) it is the duty of the Commissioner, from the returns and other information in his possession, to make an assessment of the amount of taxable income of a taxpayer and the amount of tax payable thereon;<sup>1</sup>
  - 50 b) income tax the subject of an assessment is due and payable;<sup>2</sup>

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<sup>1</sup> See 1936 Act, s 166.

- c) income tax when it becomes due and payable is a debt due to the Commonwealth payable to the Commissioner who can sue for and recover any unpaid tax in any Court of competent jurisdiction;<sup>3</sup>
- d) a notice of assessment is conclusive evidence of the due making of the assessment and, except in proceedings under Part IVC of the Administration Act challenging that assessment, that the amount and all the particulars of the assessment are correct.<sup>4</sup>

- 10 6. As more particularly explained from [16] below, the Commissioner is a substantial creditor of certain companies identified as “WA Bell Companies” in the Bell Act, in respect of taxation liabilities arising both prior to liquidation, and in respect of liabilities incurred after liquidation. Under Issues 1 and 7, the Court is asked to pronounce on whether the Commissioner retains his rights under the Tax Legislation in respect to these taxation liabilities, or whether his position has been reduced to a mere expectancy or possibility under the Bell Act.
- 20 7. In those circumstances, the outcome of these proceedings will directly affect the Commissioner’s legal interests: *Roadshow Films Pty Ltd v iiNet Ltd (No 1)* (2011) 248 CLR 37 (*Roadshow*) at 38 [2]; *Levy v Victoria* (1997) 189 CLR 579 (*Levy*) at 602.
- 30 8. Moreover, in each proceeding, the defendant has challenged the standing of the plaintiffs to raise the alleged inconsistency of the Bell Act with the Tax Legislation.<sup>5</sup> If there is merit to that challenge (a challenge which has not so far been elaborated on by the defendant and which is not admitted by the Commissioner), the Commissioner would nonetheless have a sufficient interest to be joined to the proceedings to enable the real issues to be determined.<sup>6</sup> To the extent that it arises, the Commissioner would rely upon the intervention as curing any real question on Issue 2.
- 40 9. Further, as the statutory officer with administration of the Tax Legislation, the Commissioner is well placed to address the proper construction of the relevant provisions and their operation in insolvency in a way that travels beyond the plaintiffs’ submissions. The Commissioner’s submissions are therefore likely to assist the Court in reaching a correct determination: *Roadshow* at 39 [6]. That assistance will outweigh any delay or increase in costs caused by the

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<sup>2</sup> For financial years ended 30 June 2010 or earlier, this is provided for by former s 204 of the 1936 Act (as continued in force by item 56 of Part 3 of Schedule 1 to the *Tax Laws Amendment (Transfer of Provisions) Act 2010* (Cth)). For financial years ended 30 June 2011 and later, this is provided for in s 5-5(2) of the 1997 Act.

<sup>3</sup> For amounts due and payable before 1 July 2000, this is provided for by former ss 208 and 209 of the 1936 Act (as continued in force by item 7 of Schedule 6 of the *Tax Laws Amendment (Repeal of Inoperative Provisions) Act 2006* (Cth)). For amounts due and payable after 1 July 2000, this is provided for by s 255-5(1) and 255-5(2) of Schedule 1 to the Administration Act.

<sup>4</sup> Prior to 1 July 2015, this is provided for by s 177 of the 1936 Act. After 1 July 2015, this is provided for by Item 2 of s 350-10(1) of Schedule 1 to the Administration Act.

<sup>5</sup> Amended Defence in BGNV Proceedings at [56.1] (Special Case Book p 141); Defence in WA Glendinning at [56.1]; Amended Defence in Maranoa Transport Proceedings at [56.1].

<sup>6</sup> See also R21.05.01 *High Court Rules 2004* (Cth).

Commissioner's involvement, which it is submitted would be minimal: see *Roadshow* at 39 [4]; *Levy* at 604-5.

**PART IV APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS**

10. The plaintiffs in the BGNV Proceedings have set out applicable legislative provisions in a document entitled "Plaintiffs' Authorities Index".

10 **PART V ARGUMENT**

**Summary of submissions**

11. The Commissioner is a substantial creditor of a number of WA Bell Companies. By operation of certain provisions of the Tax Legislation, in particular former s 215 of the 1936 Act (now s 260-45 of Schedule 1 to the Administration Act) and s 254 of the 1936 Act, the liquidator has certain duties to retain funds to meet those tax liabilities and to pay them.
- 20 12. The Bell Act transfers and vests all WA Bell Company property in the WA Bell Companies Administrator Authority (**Authority**), with the result that no funds are retained or available to meet the tax liabilities (or the proportionate share of them) of the companies, or the liquidator in that capacity. Further, the Bell Act prevents and prohibits the liquidator from complying with his obligations to retain funds and pay or cause the companies to pay tax debts pursuant to the Legislation.
- 30 13. The Bell Act substitutes for the Commissioner's rights under the Tax Legislation a mere expectancy or possibility of the payment of an uncertain amount resting in the discretion of the Authority and ultimately the Governor of the State.
14. The result is that the Bell Act is wholly inconsistent with the federal tax regime as it applies to insolvent companies and their liquidators, and their obligations with respect to payment of tax liabilities.
- 40 15. While the ultimate result contended for by the Commissioner is the same as that contended for by the various plaintiffs in respect of the Issues 1 and 7, certain important differences between the plaintiffs' and Commissioner's legal arguments are particularly noted at [27] and [47]-[52] below. There is also a reserved matter identified at [19] and [37] below.

**Summary of material facts**

16. The essential facts can be shortly stated:
- 50 a) the Commissioner has substantial sums owing to him in respect of tax liabilities;<sup>7</sup>

<sup>7</sup> BGNV Special Case, Annexure 11 (p 175ff), Annexure 12 (p 233ff).

b) those liabilities include both pre-liquidation debts, and liabilities incurred after liquidation commenced;<sup>8</sup>

c) all the tax liabilities were due and payable by (at the latest) the day before the “transfer day” under the Bell Act, namely, 26 November 2015.<sup>9</sup>

17. The table below summarises the position for WA Bell Companies, arranged by date of the order for winding up.<sup>10</sup>

	Date	WA Bell Company	Pre Liquidation Assessments	Proof of debt	Post Liquidation Assessments
1	24/07/91	The Bell Group Ltd	Annx 11, p217	\$936,980.90	Annx 12, p233
2	16/10/91	Bell Publishing Group	-	0.00	-
3	04/11/92	Bell Bros Holdings	Annx 11, p189	\$5,870,299.38	Annx 12, p241
4	09/12/92	Albany Broadcasters	Annx 11, p175	\$27,100,843.03	-
5	13/01/93	Wigmores Tractors	Annx 11, p228	\$7,243,328.58	Annx 12, p257
6	03/03/93	Bell Group Finance	Annx 11, p207	\$15,142,358.51	-
	23/06/93				
7	21/06/95	Bell Equity Management	-	\$0.00	-
8	29/11/95	Ambassador Nominees	-	\$0.00	-
9	29/11/95	Belcap Enterprises	-	\$0.00	-
10	29/11/95	Dolfinne	-	\$0.00	-
11	29/11/95	Harlesden Finance	-	\$0.00	-
12	01/12/95	Industrial Securities	Annx 11, p211	\$24,533,337.45	Annx 12, p245
13	06/12/95	Bell Bros	Annx 11, p179	\$43,906,281.10	Annx 12, p237
14	21/12/95	Dolfinne Securities	-	\$0.00	Annx 12, p261
15	21/12/95	TBGL Enterprises	-	\$0.00	-
16	14/12/95	Wanstead	Annx 11, p218	\$13,498,963.44	Annx 12, p249
17	21/12/95	Neoma Investments	-	\$0.00	Annx 12, p262
18	21/12/95	WAON Investments	Annx 11, p223	\$27,291,790.49	Annx 12, p253
19	21/12/95	Wanstead Securities	-	\$0.00	Annx 12, p263
				<b>\$165,524,182.88</b>	<b>\$298,190,348.70</b>

18. Overall, the position is that:

a) following assessment, the Commissioner has lodged proofs of debt indicated in the table above, which total \$165,524,182.88, which sums are due and remain unpaid;

b) in respect of taxation liabilities incurred after liquidation (in effect, incurred by the companies in respect of activities during the liquidation process), the Commissioner has issued the assessments referred to in the final column in the table above for a total of \$298,190,348.70.<sup>11</sup> In all respects that liability remains unpaid; and

<sup>8</sup> BGNV Special Case, [71]-[77].

<sup>9</sup> See BGNV Proceedings Special Case at [73]-[79]; WA Glendinning Proceedings Special Case at [73A]-[79]; Maranoa Transport Proceedings Special Case at [73]-[79].

<sup>10</sup> The references are to the Annexures to the Special Case in the BGNV Proceedings. The row shaded grey refers to the date identified by the plaintiffs in the BGNV Submissions from [6]ff in respect of the operation of transitional provisions on proofs of debts.

<sup>11</sup> As a result of certain group consolidation steps taken by the liquidator, alternative assessments were issued to the liquidator, and to certain WA Bell Companies in the same amount.

c) interest charges are also accruing on the sums in (a), which are substantial.

19. The Special Cases do not say anything about whether the property of the WA Bell Companies remains with the liquidator or whether it has been transferred to the Authority. If the arguments of the plaintiffs on Issues 1 and 7, supported in large measure but not entirely by the Commissioner, are correct, sufficient of that property to meet the taxation liabilities should currently remain with the liquidators of the WA Bell Companies. The Commissioner is seeking assurances in this respect.<sup>12</sup> The Commissioner reserves his position to seek affirmative relief in the event that appropriate assurances are not given.

**Table of inconsistent provisions**

20. The following table summarises the principal provisions of the Bell Act which the Commissioner says are inconsistent with provisions of the Tax Legislation and as explained further below.

Bell Act	Provision	Tax Legislation
s 22	Transfer of property to Authority	(formerly) s 208, 215 of 1936 Act s 254 of 1936 Act s 255-5, Sch 1, Admin Act
s 25(5)(c), (d)	No claim may be made against company or liquidator.	(formerly) s 208 of 1936 Act s 255-5, Sch 1, Admin Act
s 27	Administration transferred to Authority.	s 254 of 1936 Act
s 28	Authority has control and management of property.	s 254 of 1936 Act
s 29	Officer of company (including liquidator) may not exercise power/function of company.	(formerly) s 215 of 1936 Act s 254 of 1936 Act
s 37(1), (3)	Authority has absolute discretion to determine liabilities.	(formerly) s 177 of 1936 Act Item 2, s 350-10(1), Sch 1, Admin Act
s 39(1), (6)	Authority has absolute discretion to quantify liabilities.	(formerly) s 177 of 1936 Act Item 2, s 350-10(1), Sch 1, Admin Act
s 41(2)	Governor's interim determination of payments.	(formerly) s 177, 215 of 1936 Act Item 2, s 350-10(1), Sch 1, Admin Act
s 42(2)	Governor's final determination of payments.	(formerly) s 177, 215 of 1936 Act Item 2, s 350-10(1), Sch 1, Admin Act
s 43(1), (6)	Nothing in the Act requires the Governor to determine that any amount be paid to any person; nothing in the Division creates rights for any person.	(formerly) s 177 of 1936 Act Item 2, s 350-10(1), Sch 1, Admin Act
s 43(8)	Governor's determination extinguishes liabilities.	(formerly) s 177, 208 of 1936 Act s 255-5, Sch 1, Admin Act Item 2, s 350-10(1), Sch 1, Admin Act
s 44	Payee to execute deed before payment, otherwise every liability owed to payee is extinguished.	(formerly) s 177, 208 of 1936 Act s 255-5, Sch 1, Admin Act Item 2, s 350-10(1), Sch 1, Admin Act
s 45(1)	Liquidator discharged from all liabilities.	(formerly) s 208, 215 of 1936 Act s 254 of 1936 Act s 255-5, Sch 1, Admin Act
s 54(1), (2)	Person must not enter scheme for purpose of defeating operation of the Act.	(formerly) s 215 of 1936 Act s 254 of 1936 Act

<sup>12</sup> Affidavit of Andrew Mills, 8 March 2016, Exhibit AVM 2.

## Inconsistency: s 215 of the 1936 Act (Pre-Liquidation Tax)

21. The Commissioner supports [55]-[57] of the BGNV Submissions and supplements them as follows.

22. **Commonwealth origins of s 215.** Section 215 of the 1936 Act traces its origin in Federal income tax legislation to s 45A of the *Income Tax Assessment Act 1915 (1915 Act)*.<sup>13</sup> That section later became s 59 of the *Income Tax Assessment Act 1922 (Cth) (1922 Act)*. Its modern successor is s 260-45 of Schedule 1 to the Administration Act. In all of its modern and historical manifestations, the section has been directed to *pre-appointment* tax-related liabilities of companies in liquidation.<sup>14</sup>

23. **Early judicial consideration.** Speaking of s 59 of the 1922 Act, in *Federal Commissioner of Taxation v Official Liquidator of EO Farley Limited* (1940) 63 CLR 278 (*Farley*), Dixon J described its purpose as facilitating the enforcement of the tax liabilities of the company in liquidation and to ensure actual recovery of the debt. Dixon J went on to say that it did this by requiring “a liquidator to set aside assets to answer a debt due to the Commonwealth for tax so that the claim of the Treasury will not be defeated”.<sup>15</sup> To the same effect, Rich J in *Farley* described s 59 of the 1922 Act as “concerned with prevention of the escape of funds from the claims of the Commonwealth treasury”.<sup>16</sup> While s 45A of the 1915 Act and s 59 of the 1922 Act imposed obligations on a liquidator to set aside amounts in relation to the pre-liquidation tax debts of the company, they did not impose any obligation on the liquidator to pay. When s 215 of the 1936 Act was enacted, in addition to the obligation to set aside assets to answer the company’s tax debts, a *duty* was imposed on the liquidator “as trustee” to pay the tax to the extent of the value of the assets set aside: ss (3)(b).<sup>17</sup>

<sup>13</sup> Introduced into the 1915 Act by s 28 of the *Income Tax Assessment Act 1918 (Cth)*.

<sup>14</sup> *Federal Commissioner of Taxation v Australian Building Systems Pty Limited (in liq)* (2015) 90 ALJR 151 (*FCT v ABS*) at 186 [204] per Gordon J (speaking of s 260-45 of Schedule 1 to the Administration Act).

<sup>15</sup> *Federal Commissioner of Taxation v Official Liquidator of EO Farley Limited* (1940) 63 CLR 278 (*Farley*) 315. See also, Evatt J at 325. It was held in *Farley* that s 59 of the 1922 Act did not create any priority for the Crown in right of the Commonwealth: 289 per Latham CJ, 292 per Rich J, 297 per Starke J, 316 per Dixon J.

<sup>16</sup> *Farley* 292.

<sup>17</sup> The addition of the obligation to pay in the cognate provision of s 32 of the *Sales Tax Assessment Act 1930 (Cth) (STA Act)* led Dixon J in *In re Richard Foreman & Sons Pty Limited; Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508 (*Uther*) at 533 to doubt the correctness of the view in *Farley* that provisions of that kind did not give a priority to the Crown in right of the Commonwealth. However, a majority of the Court in *Uther* adhered to the views expressed in *Farley*: 517 per Latham CJ, 526 per Starke J, 537 per Williams J; cf. 536 per McTiernan J. While *Uther* was overruled on other grounds in *Commonwealth v Cigamic Pty Limited (in liq)* (1962) 108 CLR 372 and the doubts of Dixon J in *Uther* concerning the operation of s 32 of the STA Act were repeated, *Uther’s* conclusion in that respect was not overruled: 379 per Dixon CJ, 385-388 per Taylor J, 389 per Menzies J. In *Bank of New South Wales v Federal Commissioner of Taxation* (1979) 145 CLR 438 at 452 Gibbs J (with the agreement of six other members of the Court) also declined to depart from *Uther* in this respect.



24. **Operation up until 1980 amendments.** Section 45A of the 1915 Act, s 59 of the 1922 Act and s 215 of the 1936 Act until its amendment by the *Taxation Debts (Abolition of Crown Priority) Act 1980* (Cth) (**1980 Act**), were directed to the recovery of the *whole* of a company's tax liabilities. In so doing, they assumed the operation of the Crown prerogative to priority of its debts over ordinary creditors.<sup>18</sup> In terms, s 45A of the 1915 Act and s 59 of the 1922 Act did not contemplate a deficiency in the assets of the company available to pay its tax debts.<sup>19</sup> Section 215 of the 1936 Act when first enacted did make provision for a deficiency in the assets of the company to pay its tax debts. It required the liquidator to set aside assets sufficient to pay and pay the whole of the company's pre-liquidation tax liabilities and, if the assets of the company were insufficient to pay the whole of the company's pre-liquidation tax liabilities, all of the available assets of the company were required to be paid in satisfaction of the tax debt.

25. **Present 'proportionate' system.** By s 4 of the 1980 Act, s 215 of the 1936 Act was amended to introduce what the Court in *Bruton Holdings Pty Limited (in liq) v Federal Commissioner of Taxation* (2009) 239 CLR 346 (**Bruton**) at 354-4 [20] described as a "proportionate system". The "proportionate system" was carried through into s 260-45 of Schedule 1 to the Administration Act. By the "proportionate system" the protective purpose of s 215 of the 1936 Act remained, but was qualified so that the amount the liquidator of a company was obliged to set aside and pay in satisfaction of the tax debt was no more than an amount equal to, in effect, the proportion of the value of the assets available to meet the ordinary debts of the company which is equal to the proportion the notified tax debts of the company bore to the sum of all the ordinary debts of the company (including tax debts). As the Court observed in *Bruton* at 351 [10], 352-3 [16] and 354 [21] the "proportionate system" which s 215 enacted (and was carried through to s 260-45 of Schedule 1 to the Administration Act) aligned with the general scheme for the distribution of the assets of a company in liquidation as reflected in ss 501 and 555 of the *Corporations Act 2001* (Cth) (**Corporations Act**).

26. **The effect of the Bell Act.** The effect of the Bell Act is to alter, impair or frustrate the operation of s 215 of the 1936 Act in relation to the pre-liquidation tax liabilities of the WA Bell Companies. The Commissioner (and through him the Commonwealth revenue) is denied the protection, which is the very purpose of that section. In particular:

- a) the liquidator of the WA Bell Companies is prevented from discharging his obligation under s 215 to *set aside* from the assets of the company available to pay ordinary creditors an amount equal to the proportion required by s 215(3) (see ss 215(3)(b), (3B) and (3C)). This is because under the Bell Act the WA Bell Companies are divested of their property, that property is vested in the Authority (s 22) and the liquidator is proscribed from performing or exercising any function or power in relation to those

<sup>18</sup> *Farley* 311 per Dixon J.

<sup>19</sup> *Farley* 311 per Dixon J.

companies (s 29). Indeed, the effect of ss 54(1) and (2) of the Bell Act appear to make it an offence for the liquidator to comply with his obligations under s 215 of the 1936 Act. This is because to do so would be a "scheme" (an "action, course of action or course of conduct": s 54(1)(a)) for the purpose of directly or indirectly defeating, avoiding, preventing or impeding operation of the Bell Act or achievement of its objects (see s 54(2));

10 b) for the same reasons, the liquidator of the WA Bell Companies is prevented from discharging his liability under s 215(3)(c) to pay the tax liability of the companies in the amount which the liquidator is required to set aside under s 215(3)(b). Further, the Bell Act purports to release the liquidator from all liability for anything done in performing his duties and complying with obligations under the Bell Act (s 45). This would include the personal liability in s 215(4) of the 1936 Act which arises upon a failure of the liquidator to comply with the obligations in s 215; and

20 c) the entitlement of the Commissioner to have the tax debts of the WA Bell Companies paid by the liquidator in the amount required to be set aside under s 215(3)(b) of the 1936 Act is frustrated by the matters in (a) and (b) above. Instead, the Commissioner's recovery of the pre-liquidation tax debts of the WA Bell Companies is left to the discretion of the WA Governor (ss 41 and 42). Under the Bell Act the Commissioner (like any other creditor) has no right to insist that the WA Governor exercise his discretion to make a determination that an amount be paid to him *at all or in any amount* (ss 43(1) and (6)). The Governor's discretion follows (but need not conform with) a recommendation from the Authority to the Minister as to the amount to be paid to the creditor. That recommendation, having regard to  
30 the matters in s 40(3) of the Bell Act, and the Governor's determination which comes after it, need not follow the proportionate approach mandated in s 215 of the 1936 Act.

27. Finally for these purposes, the question raised between the parties whether the Commissioner in fact issued notices pursuant to s 215<sup>20</sup> is unnecessary to explore in resolving the question of inconsistency. Subject to presently irrelevant exceptions, unless and until a notice is received the liquidator must not part with *any* of the assets of the company (s 215(3)(a)). If or when a notice is received, then the liquidator must set aside assets *sufficient to satisfy the notified amounts* (s 215(3)(b)).<sup>21</sup> In either case — and there are only two cases — the duty on the liquidator is to retain funds for tax purposes. The effect of the Bell Act is to alter, frustrate or impair that Federal legislative obligation irrespective of whether s 215 notices have been issued.

28. Accordingly, for the reasons above, the Bell Act is inconsistent with s 215 of the 1936 Act and, to the extent of that inconsistency, is inoperative by reason of s 109 of the Constitution.

50 <sup>20</sup> See Amended Defence at [53.5] in BGNV Proceedings and Reply.

<sup>21</sup> Plainly, if the immediate duty not to dispose of any assets was a cause of substantial inconvenience, the liquidator would be seeking or requiring a notice from the ATO.

**Inconsistency: s 254 of the 1936 Act (Post-Liquidation Tax)**

29. The Commissioner supports [50]-[54] of the BGNV Submissions and supplements them as follows.

30. As Gordon J demonstrated in *Commissioner of Taxation v Australian Building Systems Pty Limited (in liq)* (2015) 90 ALJR 151 (*FCT v ABS*) at 185-7 [200]-[205], s 254 of the 1936 Act (in its application to liquidators) is concerned with post-liquidation tax liabilities. Like s 215 of the 1936 Act, s 254 has as its object the protection of the revenue by imposing on (relevantly) liquidators obligations (inter alia) of retention and payment of amounts received by them in a representative capacity to ensure that the tax on income, profits or gains (IPG) they derive in their representative capacity is paid to the Commissioner.<sup>22</sup>

31. Thus, s 254 of the 1936 Act:

a) makes a liquidator (who is within the definition of “trustee” in s 6 of the 1936 Act) “answerable as taxpayer” for the doing of all such things as are required to be done by virtue of the 1936 Act in respect of the taxation of IPG and for the payment of tax thereon: ss (1)(a);

b) in respect of the IPG, requires the liquidator in his or her representative capacity to make the returns and be assessed thereon: ss (1)(b);

c) following an assessment for tax on the IPG,<sup>23</sup> authorizes and requires the liquidator to retain from time to time out of such moneys as come to the liquidator in their representative capacity, so much to pay the tax which is or will become due in respect of the IPG: ss (1)(d); and

d) makes the liquidator personally liable for tax payable in respect of the IPG to the extent of any amount that the liquidator retained or should have retained (ss (1)(e)) and indemnifies the liquidator for all payments made in pursuance of the 1936 Act or of any requirement of the Commissioner: ss (1)(f).

32. Accordingly, any suggestion to the effect that s 254 of the 1936 Act is merely an administrative procedure, and is not concerned with substantive rights and liabilities cannot be accepted.

33. The effect of the Bell Act is to frustrate the operation of s 254 of the 1936 Act in relation to the post-liquidation tax liabilities of the WA Bell Companies. In particular:

a) because the administration of the WA Bell Companies is transferred to the Authority (s 27) and the liquidator prevented from performing or exercising

<sup>22</sup> *FCT v ABS* 169 [84] and 176 [130]-[131] per Keane J; 182 [174], 182 [176], 183 [186] and 183-4 [187] per Gordon J.

<sup>23</sup> *FCT v ABS* 160-3 [27]-[43] per French CJ and Kiefel J; 166 [58]-[63] per Gageler J.

any function or power (s 29), the liquidator is unable to discharge his obligation under s 254(1)(a) of being "answerable as taxpayer" for IPG derived in a representative capacity, including the making of returns and being assessed thereon. As a further consequence, the liquidator's indemnity granted by s 254(1)(f) is emptied of content;

10 b) because the property of the WA Bell Companies is divested from those companies and vested in the Authority, the liquidator is prevented from discharging his obligations following an assessment under s 254(1)(d) of retaining sufficient funds to pay the tax which is due in respect of IPG. Equally, the liquidator is prevented from discharging his obligation under s 254(1)(a) to pay the tax due in respect of that IPG. On the contrary, for the same reasons as given above, ss 54(1) and (2) of the Bell Act would appear to make it an offence for the liquidator to comply with his obligations under s 254(1) of the 1936 Act;

20 c) also by reason of the matters in sub-paragraph (b) above, the effect of the Bell Act would be to expose the liquidator of the WA Bell Companies to personal liability under s 254(1)(e) of the 1936 Act. However, s 45 of the Bell Act purports to release the liquidator from that liability; and

30 d) the entitlement of the Commissioner to have the liquidator pay from the amounts retained by him or her the tax due in respect of the IPG under s 254(1)(a) (as expenses of the liquidation under ss 556(1)(a) or (dd) of the Corporations Act<sup>24</sup>) is frustrated by the matters in (a) and (b) above. Once again, the entitlement of the Commissioner under s 254(1) is converted into a mere ability to seek a discretionary payment from the WA Governor made following (but not necessarily complying with) a recommendation by the Authority. The recommendation of the Authority and the Governor's determination need not conform to the amount the Commissioner would be entitled to under an application of s 254(1) together with ss 556(1)(a) and (dd) of the Corporations Act.

40 34. For these reasons, the Bell Act is inconsistent with s 254 of the 1936 Act and, to the extent of that inconsistency, is inoperative by reason of s 109 of the Constitution.

**Inconsistency: ss 215 and 254 of the 1936 Act viewed together**

50 35. Being obligations imposed in order to protect the Commonwealth revenue, the obligations of liquidators under s 215 and s 254 of the 1936 Act to retain sums of money in satisfaction of the taxation obligations to which those sections apply are statutory rights which equity, acting in its auxiliary jurisdiction, would act to protect by issuing injunctions on suit of the Commissioner to prevent and remedy their apprehended or continuing breach. This is so whether or not those obligations are construed as creating proprietary rights in the

<sup>24</sup> See *FCT v ABS* 186-7 [205]-[207] per Gordon J.

Commissioner.<sup>25</sup> Consequently, any attempt by Western Australia to avoid the inconsistency of the obligations in s 215 and s 254 of the 1936 Act with the Bell Act by asserting that the latter statute does no more than remove from the control of the liquidator the pool of assets necessary for him to satisfy his obligations under s 215 and s 254 of the 1936 Act, without impairing those obligations themselves, cannot be accepted. The Bell Act alters, impairs or frustrates the operation of s 215 and s 254 of the 1936 Act by not only contradicting their express terms, but by destroying the efficacy of such remedies as would be available to vindicate the rights and obligations created by those provisions.

36. Insofar as the Bell Act purports to destroy the efficacy of remedies available to uphold ss 215 and 254 of the 1936 Act, it would impermissibly destroy a range of causes of action otherwise available to vindicate the Tax Legislation, such as the knowing receipt of funds the subject of ss 215 and 254 obligations, money had and received, tracing, or potentially account and trust type remedies. On the liquidator's part, there would also be the personal liability to satisfy debts if funds have not been retained that the Bell Act purports to destroy.

37. In pointing to this aspect of inconsistency at [35] and [36], the Commissioner puts the submission at a level of generality at this point in time. Whether that submission needs to be made more specific depends on the reserved matter noted at paragraph [19] above.

**Inconsistency: Purported determination of liabilities (assessment and conclusive evidence)**

38. The Commissioner supports [61] of the BGNV Submissions and supplements them as follows.

39. Leaving aside circumstances of deliberate failure to administer the law in accordance with its terms, s 177 of the 1936 Act (and now, Item 2 of s 350-10(1) of Schedule 1 to the Administration Act) provide to the effect that the production of a notice of assessment is *conclusive evidence* of the due making of the assessment and, outside of proceedings under Part IVC of the Administration Act, that the amount and all the particulars of the assessment are correct. This reflects "a long-standing legislative policy to protect the interests of the revenue"<sup>26</sup> and facilitate proceedings for the recovery of the tax.<sup>27</sup> Proceedings for the recovery of tax may be debt recovery proceedings, but in the case of a company in liquidation, will ordinarily take the form of the lodgement of proofs of debt with a liquidator. In the latter circumstance, the

<sup>25</sup> *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27, 66–8 per Brennan J; *King v Gousssetis* (1985) 5 NSWLR 89, 93 per McHugh JA.

<sup>26</sup> *Deputy Commissioner of Taxation v Broadbeach Properties Pty Limited* (2008) 237 CLR 473 (*FCT v Broadbeach*) at 492 [44] per Gummow A-CJ, Heydon, Crennan and Kiefel JJ.

<sup>27</sup> *Commissioner of Taxation v Futuris Corporation Limited* (2008) 237 CLR 146, 166 [64] per Gummow, Hayne, Heydon and Crennan JJ.

liquidator is obliged to accept a proof of debt lodged by the Commissioner proving for assessed tax of the company.<sup>28</sup>

10 40. In its presently relevant respects, the Bell Act provides that the Authority is to determine the property and liability of each WA Bell Company (s 37(1)) and gives the Authority an absolute discretion in doing so (s 37(3)). The liabilities which the Authority is given power to "determine" include assessed tax liabilities. The Authority is then to report to the Minister on the property and liabilities of each WA Bell Company (s 38(1)). Whether and how much of the property of the WA Bell Companies is to be transferred to a creditor is determined in the effectively uncontrolled discretion of the WA Governor (ss 41(2), 42(2) and 43(1), (4), (6) and (7)) after a recommendation from the Authority (s 39). If the WA Governor determines that nothing is to be paid to the creditor, the liability to that creditor is discharged and extinguished (s 43(8)). If the Governor determines an amount is to be paid to the creditor, that payment can only be made on condition that the liability is otherwise released or discharged (s 44(3)) and, if that condition is not met within 3 months of the determination, the liability is discharged or extinguished: s 44(5).

20 41. The result is that the Bell Act operates to deny and frustrate the application of the conclusive evidence provisions in s 177 of the 1936 Act and Item 2 of s 350-10(1) of Schedule 1 to the Administration Act in relation to the assessed income tax debts of the WA Bell Companies. Under the Bell Act, the determination of tax debts which Federal law provides are conclusively proved by the production of a notice of assessment is left to the discretion of the Authority. The recognition of the existence of those tax debts and the determination of the amounts to be paid from the property of the WA Bell Companies in satisfaction of them is vested in the Governor and left to his uncontrolled discretion. The Governor is given the power to extinguish those tax debts by making no determination in respect of them. Where he does make a determination, he is empowered to effectively require the release of liabilities of the WA Bell Companies to the extent that they exceed any determination he makes.

30 42. For these reasons, the Bell Act is inconsistent with s 177 of the 1936 Act and Item 2 of s 350-10(1) of Schedule 1 to the Administration Act and, to the extent of that inconsistency, is inoperative by reason of s 109 of the Constitution.

40 **Inconsistency: Purported extinguishment of debts (Debts due to Commissioner)**

43. The Commissioner supports [58]-[60] of the BGNV Submissions, in part, and supplements them as follows.

50 44. Assessed income tax is due and payable (in the case of persons who are not self-assessment entities) 21 days after the lodgement of the return by the taxpayer or 21 days after the issue of a notice of assessment or amended

<sup>28</sup> *Commonwealth of Australia v Duncan* [1981] VR 879, 882-3 per Lush J.

assessment.<sup>29</sup> Assessed income tax is a debt due to the Commonwealth and may be recovered by (inter alia) the Commissioner in a court of competent jurisdiction suing in his official name.<sup>30</sup> Such debts are debts created by Federal statute to which have been attached special incidents or characteristics, in particular, the conclusive evidence provisions referred to above (s 177 of the 1936 Act and Item 2 of s 350-10(1) of Schedule 1 of the Administration Act) and the ability of the Commissioner to proceed to recover them even though proceedings seeking review of, or appeal from, the assessments founding those tax debts are on foot: see ss 14ZZM and 14ZZR, Administration Act.<sup>31</sup>

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45. The Bell Act alters, impairs and detracts from the provisions of the Federal income tax regime creating tax debts and attaching to them the special characteristics referred to above in at least the following respects:

20  
a) first, under s 37(1) of the Bell Act the Authority is given the power and duty to "determine" the liabilities of the WA Bell Companies, including the tax debts created by Federal statute law;

b) secondly, by s 43(8) a determination by the Governor to pay nothing to a creditor of the WA Bell Company has the effect of discharging and extinguishing that creditor's liability. This (under the Act) includes Federal tax debts;

30  
c) thirdly, where a determination by the Governor that an amount be paid to a creditor which is not accepted by the creditor and a deed of release is not executed within 3 months, the debt is extinguished by force of s 44(5) of the Bell Act. Again, this has the capacity to apply to Federal tax debts; and

d) fourthly, by s 25(5) of the Bell Act any recovery action of any type against (inter alia) the WA Bell Companies for what would otherwise be a provable debt is effectively stayed. This again purports to apply to Federal tax debts.

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46. In summary, the Bell Act creates a scheme by which Federal tax debts are subjected to the effectively uncontrolled discretion of the WA Governor as to their recognition and recovery, stripped of their "special characteristics" as assigned to them by Federal law and emptied of enforceable content. For this reason, the Bell Act is inconsistent with the laws of the Commonwealth and, to that extent, inoperative pursuant to s 109 of the Constitution.

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<sup>29</sup> Section 204(1) of the 1936 Act until 30 June 2010; From 1 July 2010, ss 5-5(5), (6) and (7) of the 1997 Act.

<sup>30</sup> Sections 208 and 209 of the 1936 Act until 1 July 2000; From 1 July 2000, s 255-5 of Schedule 1 of the Administration Act.

<sup>31</sup> *FCT v Broadbeach* at 493-4 [51] and 495 [56] per Gummow A-CJ, Heydon, Crennan and Kiefel JJ.

### **Inconsistency: Transitional provisions of Part 10.1 of the Corporations Act**

47. The plaintiffs argue for an additional inconsistency in respect of liabilities owed to the Commissioner relating to companies wound up prior 23 June 1993 (**23 June 1993 Debts**), namely that the Commissioner's debts under the Tax Legislation are replaced with a scheme under which it cannot even prove under State law, by reason of the requirements of s 25(1) of the Bell Act.

10 48. The Commissioner contends that it is unnecessary for the Court to resolve the correctness of this (rather technical) transitional provisions argument. First, it does not apply to all of the Commissioner's debts and this cannot of itself provide a complete proof of inconsistency. Secondly, even as far as it applies, namely to the 23 June 1993 Debts, it is neither necessary nor sufficient to establish inconsistency that this argument be correct. Even if the 23 June 1993 Debts cannot be proved under s 25 of the Bell Act, there *might* be scope for the Authority to take them into account (see s 37, for example) in its absolute discretion and for the Governor ultimately to authorise a payment in respect to them under ss 41 and 42. The problem, however, remains the deeper one  
20 developed above, and elsewhere by the plaintiffs: namely that the Bell Act purports to destroy the rights which the Commissioner has under the Tax Legislation and replace them with a mere expectation or possibility that the Authority *might* recommend some payment in respect of them (not necessarily their correct value under the Tax Legislation) and the Governor *might* accept that recommendation.

### **Inconsistency: Purported prevention of the use of carried forward losses**

30 49. The Commissioner does not adopt [63] of the BGNV Submissions.

50. Section 22(6) of the Bell Act excludes from the transfer of the property of the WA Bell Companies the right to make a taxation objection or the right or capacity to seek the review of or to appeal against a decision of the Commissioner in relation to a taxation objection.

40 51. Where a taxation objection is made by a WA Bell Company which is a head company of a consolidated group, that taxation objection will be determined in accordance with the proper application of Part 3-90 of the 1997 Act. This will include the proper application of the single entity rule in s 701-1 such that subsidiary members of a consolidated group for any period are taken to be parts of the head company, rather than separate entities, for the purposes of working out the head company's liability for income tax or the amount of the head company's loss. It will also include the loss transfer provisions in Sub-  
50 division 707-A of the 1997 Act such that losses which a subsidiary member of a consolidated group has at the time of joining a consolidated group, and which it could have utilised had it not become a member of the consolidated group, will be treated as losses of the head company from the time of joining. Nothing in the Bell Act will affect the proper application of Part 3-90 of the 1997 Act to any taxation objections made by any WA Bell Company.



## The extent of inconsistency ('Severability')

52. Section 109 provides that the State law is only invalid "to the extent of the inconsistency". The application of s 109 therefore requires consideration of whether a "separation" can be made "of the inconsistent parts from the consistent parts" of the State law: *Wenn v Attorney-General (Vic)* (1948) 77 CLR 84 (*Wenn*) at 122 per Dixon J. Contrary to the plaintiffs' submissions in the Maranoa Transport Proceedings at [127], this consideration is enlivened by the words of s 109 itself as opposed to s 7 of the *Interpretation Act 1984* (WA): See *Sportsbet Pty Ltd v New South Wales* (2012) 249 CLR 298 at 317 [13].

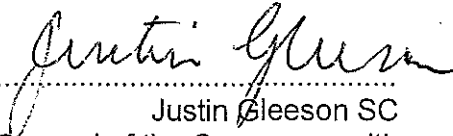
53. Section 109 "does not intend the separation to be made where division is only possible at the cost of producing provisions which the State Parliament never intended to enact": *Wenn* at 122 per Dixon J. The Commissioner submits that the inconsistent provisions of the Bell Act, which are summarised in the table at [20] above, cannot be severed without producing an Act which is fundamentally different to that which the WA Parliament intended and is in any event plainly unworkable. That is so even if only s 22 of the Bell Act is found to be inconsistent, for the reasons given in the BGNV Submissions at [146]. Further, nothing has been said by the defendant in its defence or revealed in the Parliamentary material that could support an argument that would enable the inconsistent provisions to be read down in some fashion so as to preserve some operation of the Bell Act, for example by interpreting them so as to avoid particular impacts on the liabilities owed to the Commissioner. The evident purpose of the Bell Act is to provide a comprehensive regime for dealing with all the property of WA Bell Companies and to give the Authority and the Governor complete discretion as to how liabilities are to be determined and paid.

54. The basic problem is that the drafter of the Bell Act has either forgotten the existence of the Tax Legislation, or decided to proceed blithely in disregard of its existence. No mechanism has been provided for in the Bell Act to allow for the continued operation or paramountcy of the Tax Legislation.

## PART VI ESTIMATE OF TIME REQUIRED FOR ORAL ARGUMENT

55. The Commissioner estimates 45 minutes will be required for the presentation of oral argument.

Dated: 8 March 2016

  
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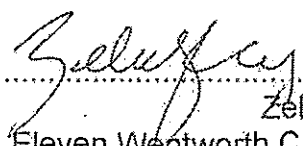
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