IN THE HIGH COURT OF AUSTRALIA
SYDNEY AND PERTH REGISTRIES

No S248 of 2015
No P63 of 2015
No P4 of 2016

BETWEEN:

BELL GROUP NV & ANOR

Plaintiffs in No S248 of 2015

AND:

10 **STATE OF WESTERN AUSTRALIA**

Defendant

AND:

WA GLENDINNING & ASSOCIATES PTY LTD (ACN 008 762 721)

Plaintiff in No P63 of 2015

AND:

STATE OF WESTERN AUSTRALIA

Defendant

AND:

MARANOA TRANSPORT PTY LTD (IN LIQ) (ACN 009 668 393)

20 Plaintiff in No P4 of 2016

AND:

STATE OF WESTERN AUSTRALIA & ANOR

Defendants

ANNOTATED SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (INTERVENING)

Date of document: 23 March 2016
Filed on behalf of: Attorney-General for the State of Victoria

Prepared by:
Peter Stewart
Victorian Government Solicitor
Level 25, 121 Exhibition Street
Melbourne VIC 3000

DX 300077
Tel: No. (03) 8684 0444
Fax No. (03) 8684 0449
Direct tel.: (03) 8684 0223
Ref: 1518836 (Jonathan Bayly)

PART I: CERTIFICATION

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

PARTS II & III: INTERVENTION

2. The Attorney-General for the State of Victoria intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) (***Judiciary Act***), in support of the defendant in the Bell and WA Glendinning proceedings and the defendants in the Maranoa proceeding.

PART IV: APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS

3. The applicable constitutional and statutory provisions are set out in a separate volume in the Bell proceeding.

PART V: ARGUMENT

A. Introduction

4. These submissions address the following questions that arise in the proceedings:

   (1) Are ss 5F and 5G(11) of the *Corporations Act 2001* (Cth) (***Corporations Act***) subject to any territorial restrictions?

   (2) Is the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Act 2015* (WA) (the **Bell Act**) inconsistent with s 39(2) of the *Judiciary Act*?

   (3) Does the Bell Act offend Ch III of the Constitution?

5. In summary, Victoria makes the following submissions:

   (1) Section 5F enables a State to exclude a corporation (being an entity that falls within the definition of "matter" in s 5F), from all of the provisions of the *Corporations Act* and not just those provisions that have some inherent and necessary territorial limitation. *HIH Casualty & General Insurance Ltd v Building Insurers' Guarantee Corporation* (***HIH***)[1] was wrongly decided.

---

1 [2003] NSWSC 1083; (2003) 188 FLR 153; (2003) 202 ALR 610.

Provisions of the *Corporations Act* apply to such an excluded matter outside of the declaring State according to their tenor.

(2) To the extent that s 5G(11) has a territorial application, its operation is the same as that applying in relation to s 5F.

(3) Section 109 is not engaged in relation to s 39(2) of the *Judiciary Act*. The terms of s 39(2) require that an investiture of federal jurisdiction changes with any modifications of jurisdiction effected by State law.

(4) There is no breach of the requirements of Ch III.

B. Operation of ss 5F and 5G of the *Corporations Act*

10 **Section 5F of the *Corporations Act***

6. In addressing the proper construction of s 5F and its interrelationship with State laws, it is first necessary to ask whether the provision is subject to any territorial restriction (and, if so, what is the scope of that restriction?). Textual and contextual considerations are relevant in this respect.

Textual considerations

7. As a starting point, the following textual features are of note:

(1) By s 5F(1)(a), subsection (2) applies "if a provision of a law of a State or Territory declares a matter to be an excluded matter for the purposes of this section in relation to … the whole of the Corporations legislation".

20 (2) "Matter" is defined in subsection (6) of s 5F as including "act, omission, body, person or thing".

(3) In the circumstances in which s 5F(1)(a) (and its counterpart, s 5F(2)(a)) applies none of the provisions of the *Corporations Act*[2] apply "in the State" in relation to the declared matter. As a matter of ordinary language:

(a) if any of the provisions of the *Corporations Act* are to apply to a declared matter, they can only do so outside of the relevant State; and

---

2 Other than s 5F itself.

(b) once a declaration is made in respect of a matter, it is not possible to identify any provision of the *Corporations Act* that continues to apply in the State in relation to the matter.

(4) Section 5F(2)(d) further provides "the provisions of the Corporations legislation (other than this section and the specified provisions) do not apply in the State or Territory in relation to the matter if the declaration is one to which paragraph (1)(d) applies". Subsection (2)(d) is relevant here because s 51(1) of the Bell Act has declared the relevant matter to be an excluded matter in relation to the whole of the Corporations legislation, otherwise than to a specified extent.

8. The construction advanced by Maranoa and the Bell Plaintiffs is inconsistent with the text of s 5F. A key concept within s 5F is the "matter". A declaration made under s 5F(1) is in respect of a "matter". By subsection (2)(d), the provisions of the Corporations legislation (other than s 5F and otherwise than to the specified extent) do not apply in the State or Territory "in relation to the matter". Contrary to the construction relied upon by Maranoa and the Bell Plaintiffs, the legislation does not require that the *Corporations Act* had some pre-existing territorial connection to the declared matter. Rather, once the matter is declared to be an excluded matter, the Corporations legislation does not apply in the State or Territory "in relation to the matter". That is the territorial connection; the making of the declaration by the State or Territory and the subsequent operation of s 5F(2) in relation to the State or Territory.

9. As is explained at paragraph 26 below, the plain meaning of s 5F cannot be defeated by treating some provisions as not applying in the State because they apply diffusely throughout the Commonwealth. The proposition that there are some provisions that have no inherent territorial connection and which fall outside the operation of s 5F(1) underpins the reasoning and conclusion in *HIH* on which the plaintiffs' argument depends. That proposition is inconsistent with the text of s 5F and would frustrate the purpose of the provision, leaving it with no – or no meaningful – work to do.

Contextual considerations

10. Beyond its plain language, the construction of s 5F needs to take into account its broader context. Part of that context is the legislative history that gave rise to its enactment. Western Australia deals with that history in its submissions.

11. More immediate contextual features are found in other provisions in Pts 1.1 and 1.1A. Section 5 of the *Corporations Act* is particularly important.

(1) That section provides, in s 5(3), that "each provision of this Act applies in this jurisdiction". The term "this jurisdiction" consists of:

(a) the whole of Australia, if all of the States are referring States; or

(b) Australia, other than a non referring State, if less than all of the States are referring States.

There is no warrant to read s 5, which refers to a provision applying in the jurisdiction, as only applying to provisions that have "clear territorial attributes". It is s 5(3) which confers the territorial attribute, rather than the content of any particular provision.

(2) Section 5(3) (which makes the provisions apply *in* the jurisdiction) may be contrasted with s 5(7), which deals with provisions that apply according to their tenor to natural persons and bodies corporate and unincorporated bodies. Thus, the *Corporations Act* can apply "according to its tenor" to any bodies corporate, whether formed or carrying on business in "this jurisdiction" or not.

(3) The operation of s 5 can be seen acutely in the provisions dealing with registration and incorporation.

(a) By s 117, an application to register a company under the *Corporations Act* is to be lodged with the Australian Securities and Investments Commission (**ASIC**). As the legislative history reveals, the *Corporations Act* simply continues on and acts upon companies that were registered under earlier State-based regimes.

(b) By s 118, ASIC has the power to register and, on registration, a company comes into existence as a body corporate.

(c) By s 119A, a company so registered is "incorporated in this jurisdiction" and is taken to be registered in a particular State or Territory. By reason of the territorial expanse of "this jurisdiction", the incorporation is not confined to a particular location within Australia but extends indivisibly across the jurisdiction. It does so not because of any inherent character of the body corporate but simply because of the combined operation of ss 119A and 5(3).

12. To put s 5F in its more immediate factual setting (and putting to one side the operation of the impugned legislation for a moment), all of the provisions of the *Corporations Act* apply in relation to each WA Bell Company and they apply to them in this jurisdiction. "This jurisdiction" relevantly means the whole of Australia. Accordingly, all of the provisions of the *Corporations Act* apply across the jurisdiction whether or not a particular provision has some territorial operation internal to the provision itself.

13. The effect of a declaration in relation to each WA Bell Group Company is to disapply the provisions in relation to the company in Western Australia. Whether there are provisions of the *Corporations Act* that would continue to apply in relation to an excluded matter according to their tenor outside of the State depends on the purpose and content of the relevant provision. What is clear is that:

(1) The provisions of the *Corporations Act* in relation to which a declaration may be made under s 5F are not limited to express territorial provisions; and

(2) Where the State regulates the matter under State law in the applicable State, the *Corporations Act* does not "reach in" to regulate the same subject matter. For example, if, following a declaration for the purposes of s 5F(1)(a) a State law regulates, for example, the constitution, composition, share structure or capital requirements of a State registered company, the Corporations legislation would not apply to those matters because it could

only do so if the Corporations legislation applied in the relevant State and s 5F provides that it does not.

(3) Any contrariety between the State law and the provisions of the Corporations legislation covering the same matter would not arise for s 109 purposes, notwithstanding that some of the provisions of the Corporations legislation might apply in relation to the company outside of the declaring State.

14. Where the specified matter is a company, the operation of s 5F(1)(a) is analogous to the position where the declaring State ceases to be part of "this jurisdiction". If Western Australia ceased to be a referring State, the area of Western Australia would fall outside the territorial area of "this jurisdiction". Section 5(3) would not apply in relation to Western Australia. Thus, the extent to which the *Corporations Act* applied to matters in Western Australia would depend on the construction of the *Corporations Act* and the tenor of particular provisions. The structure of the *Corporations Act* demonstrates that its reach into the States is achieved through the conceptual device of "this jurisdiction".

15. Section 5F produces a similar effect to the example given above, but with a narrower operation. If a State declares that none of the provisions of the *Corporations Act* apply in relation to a declared corporation in that State, then the *Corporations Act* has no reach into the State in relation to the corporation. An issue will arise as to whether any provisions apply, according to their tenor, to the body corporate outside of the State. Whether they apply according to their tenor outside of the State may involve a similar analysis to that undertaken by Barrett J in *HIH*, but with the focus not on provisions that apply in the State but on those that apply outside it.

The Decision in HIH

16. As Barrett J observed in *HIH*, s 5F(2) contains a restriction of territorial application and a restriction of application to subject-matter.[3] His Honour stated:[4]

> The effect of both s 5F(2) and s 5F(4) is to single out a particular "matter", being the "matter" identified by the state or territory enactment, and to cause

[3] (2003) 202 ALR 610 at 645 [88].
[4] (2003) 202 ALR 610 at 645 [88].

> the territorial operation of the Corporations Act to be modified and restricted so that such application as it would otherwise have had "in" the relevant state or territory "to" (or "in relation to") the particular "matter" is negated. As a corollary, such application as the Corporations Act has to or in relation to the particular matter that cannot be classified as application "in" the state or territory is not negated.

17. Justice Barrett was (respectfully) correct to identify a territorial limitation in s 5F(2). However, Victoria does not agree with Barrett J's further analysis in paragraphs [89]-[92] of *HIH*,[5] an analysis adopted by Maranoa, the Bell Plaintiffs and WA Glendinning.[6] Relevantly, Barrett J there construed s 5F(2) as only capable of "meaningful" operation in respect of *Corporations Act* provisions "dealing with matters having clear territorial attributes".[7] If a matter is not a thing to which any *Corporations Act* provision applies in a "territorially defined" way, s 5F(2) would (on Barrett J's analysis) "lead nowhere".[8]

18. Justice Barrett's construction of s 5F(2) is unduly narrow. Section 5F(6) defines "matter" for the purposes of s 5F as including "act, omission, body, person or thing". On Barrett J's construction, s 5F could never operate effectively where the declared matter is a corporation. Domestic corporations are incorporated throughout the Commonwealth and (on this argument) are therefore lacking in a territorial connection to any particular State or Territory.[9] In the case of foreign corporations, because Barrett J's analysis fixes on the jurisdiction of incorporation, such corporations would also have no territorial connection to any particular State or Territory of the Commonwealth.

19. Central to his Honour's reasoning in *HIH* was the conception that corporations "have one indivisible existence as a body corporate throughout 'this jurisdiction' without reference to any political or geographical subdivision of it".[10] His Honour went on to say that a law that applied to a company which was incorporated indivisibly throughout the jurisdiction did not have a particular territorial operation but operated

---

5 (2003) 202 ALR 610 at 645-646 [89]-[92].
6 Maranoa's Submissions at [75]; Bell Plaintiff's Submissions at [95]; WA Glendinning's Submissions at [39].
7 *HIH* (2003) 202 ALR 610 at 645 [89].
8 *HIH* (2003) 202 ALR 610 at 646 [92].
9 *HIH* (2003) 202 ALR 610 at 645-646 [90].
10 *HIH* (2003) 202 ALR 610 at 645-646 [90].

in a way that is "geographically indiscriminate". This was the foundation for the proposition that there are provisions, many in number, which reflect this indivisibility and which therefore do not have any geographic operation. His Honour concluded that such provisions are outside of the reach of s 5F.

20. An intractable problem with that analysis is that the starting point assumes that the *Corporation Act* applies indivisibly within "this jurisdiction". That premise does not provide a valid launching pad for determining the meaning and effect of a provision whose avowed intent is to provide that some or, indeed, all of the provisions are not to apply by reference to a State.

21. Moreover, the premise that there should always be one indivisible corporate existence across the Commonwealth, which cannot be undercut by s 5F, is belied by the fact that the concept of "this jurisdiction" is itself variable. Section 5F enables a State to disengage the whole of the *Corporation Act* with respect to a matter. Section 5G also provides for specific exclusions from a universal corporate structure. The reasoning in *HIH* undermines those matters by assuming an immutable characteristic.

22. On the logic of Barrett J's reasoning, s 5F also has no effective operation in respect of a natural person, because natural persons are citizens of Australia (or, if a foreigner, citizens of a foreign state) but are not, for *Corporations Act* purposes, territorially connected to any particular State or Territory. Such a confined operation is inconsistent with the statutory purpose of s 5F(2), as evident in the broad definition of "matter".

23. Thus, it is inconsistent with s 5F to ask whether a provision of the *Corporations Act* applies to the matter in a territorially defined or territorially ascertainable way.[11] It is wrong to limit the operation of s 5F (as Maranoa seeks to do) to circumstances where the "relevant *Corporations Act* provision has no clear territorial attributes in Western Australia",[12] or (as the Bell Plaintiffs and WA Glendinning seek to do) to limit s 5F(2) to applying only to those *Corporations Act* provisions that apply in a "territorially defined or territorially ascertainable way".[13]

---

11 *HIH* (2003) 202 ALR 610 at 646 [92].
12 Maranoa's Submissions at [75].
13 Bell Plaintiffs' Submissions at [96]; WA Glendinning's Submissions at [48].

24. The error in this approach is borne out in Maranoa's submissions. Maranoa describes the Bell Act as excluding "the application of provisions of the *Corporations Act* that are concerned with the liquidation of the WA Bell Companies".[14] But this is not the right question under s 5F. By the terms of s 5F(1) the relevant question is: "what is the 'matter' that is declared to be an excluded matter?" The answer to that question is "each WA Bell company". Having so identified the relevant matter, subsection (2)(d) makes plain that the provisions of the Corporations legislation (other than s 5F and otherwise than to the specified extent) do not apply in Western Australia in relation to each WA Bell company. To render s 5F ineffective where the relevant *Corporations Act* provision has no clear territorial attributes in the particular State leaves it practically meaningless.[15]

25. If a further territorial connection with Western Australia is required, that connection is provided by the fact that each of the WA Bell Companies was registered and incorporated in Western Australia (under Western Australian law) immediately before the commencement of the *Corporations Act*, and is taken to be registered in Western Australia since the commencement of the *Corporations Act*.[16]

26. The Bell Plaintiffs and Maranoa attach no weight to the place of registration, preferring to focus on the fact that corporations are incorporated throughout the Commonwealth.[17] However, the place of registration is an important concept for the purposes of the *Corporations Act*. The *Corporations Act* draws a distinction between registration and incorporation and between the jurisdiction of registration and the jurisdiction of incorporation (see s 119A). Moreover, these distinctions have consequences. Note 3 to s 119A states that "[a] law of a State or Territory may impose obligations, or confer rights or powers, on a person by reference to the State or Territory in which a company is taken to be registered for the purposes of this Act". The *Corporations Act* is based upon a scheme that ties registration to States or Territories, and this fact cannot be ignored when asking whether the Bell Act

---

14 Maranoa's Submissions at [77].
15 Maranoa's Submissions at [75].
16 Amended Special Case (**ASC**) at [17], Special Case Book (**SCB**) 168 (**Bell Proceeding**).
17 Maranoa's Submissions at [68]; Bell Plaintiffs' Submissions at [92].

operates in a manner that is sufficiently territorially connected for the purposes of s 5F.

Section 5G of the *Corporations Act*

27. Section 52 of the Bell Act is expressed, by subsection (1), to have effect "if, and to the extent that, an excluded Corporations legislation provision has any application, as a law of the Commonwealth, in relation to a WA Bell Company'. Section 52(2) then provides that the provisions of Part 3, 4 and 5 and sections 55 and 56(3) are declared to be "Corporations legislation displacement provisions" for the purposes of s 5G of the *Corporations Act*.

10 28. Section 52 of the Bell Act falls within item 3 of the table in s 5G, namely a "post-commencement provision". There can be no doubt that s 5G applies (as the Bell Plaintiffs expressly accept),[18] given that the conditions of item 3 are met by s 52 of the Bell Act.

29. Section 5G, when it applies, is a powerful provision. It has effect "despite anything else in the Corporations legislation".[19] If it applies, it avoids direct inconsistency between State and Territory laws and the Corporations legislation.

30. The Bell Plaintiffs and Maranoa make submissions about the construction of s 5G(4).[20] Victoria agrees with the construction advanced by the Bell Plaintiffs, and does not make any submissions about the application of s 5G(4) to the Bell Act.

20 31. The Bell Plaintiffs, Maranoa and WA Glendinning make submissions about the construction of s 5G(8).[21] Victoria agrees with the construction advanced by the Bell Plaintiffs, and does not make any submissions about the application of s 5G(8) to the Bell Act.

32. As to s 5G(11), the plaintiffs' acknowledge that the use of the words "does not operate *in* a State or Territory" (emphasis added) raises the same question of

---

18 Bell Plaintiffs' Submissions at [99]. Neither Maranoa nor WA Glendinning take issue with the application of s 5G, but do not expressly say that it applies.

19 *Corporations Act*, s 5G(1).

20 Bell Plaintiffs' Submissions at [100]-[101]; Maranoa's Submissions at [87]-[88].

21 Bell Plaintiffs' Submissions at [105]-[110]; Maranoa's Submissions at [89]-[94]; WA Glendinning's Submissions at [51]-[59].

territorial connection as raised by s 5F(2).[22] Victoria's submissions in relation to s 5F(2), set out above at paragraphs 16 to 26 above apply equally to s 5G(11).

C. No inconsistency with s 39(2) of the *Judiciary Act*

33. The Bell Plaintiffs and WA Glendinning take issue with the fact that the Bell Act purports to terminate, inter alia, proceedings in which the Supreme Court of Western Australia was exercising federal jurisdiction and the judicial power of the Commonwealth.[23] Broadly speaking, the challenge is made on two fronts: the first involves an alleged inconsistency with s 39(2) of the *Judiciary Act* (addressed in Part C, at paragraphs 36 to 40 below); the other involves what is said to be a repugnancy with Ch III of the Constitution (addressed in Part D, at paragraphs 41 to 56 below).

Exercise of Federal Jurisdiction in COR 146 and COR 179 of 2014

34. A threshold question is whether the Supreme Court of Western Australia was in fact exercising federal jurisdiction in the proceedings identified by the parties. COR 146 of 2014 is identified by the Bell Plaintiffs and WA Glendinning.[24] The Bell Plaintiffs also identify COR 179 of 2014,[25] and WA Glendinning identifies COR 208 of 2014.[26]

35. In the Bell proceeding, the parties have agreed that the Supreme Court of Western Australia was exercising federal jurisdiction in COR 146 and COR 179 of 2014.[27] Victoria does not quarrel with this proposition. There has been no agreement by the parties to this effect in the WA Glendinning matter. Although WA Glendinning submits that the Supreme Court of Western Australia is exercising federal jurisdiction in COR 208 of 2014,[28] the Bell Plaintiffs say that the answer to this question depends on the outcome of BGNV's removal application in S247 of 2014.[29] Given the agreement between the parties in relation to COR 146 and COR 179, the

---

22 Bell Plaintiffs' Submissions at [126]-[127]; Maranoa's Submissions at [86]; WA Glendinning's Submissions at [60].
23 Bell Plaintiffs' Submissions at [128]-[145]; WA Glendinning's Submissions at [71]-[146].
24 Bell Plaintiffs' Submissions at [129]; WA Glendinning's Submissions at [79].
25 Bell Plaintiffs' Submissions at [129].
26 WA Glendinning's Submissions at [79].
27 ASC [59] (SCB 183).
28 WA Glendinning's Submissions at [100]-[101].

federal jurisdiction question can be decided without the need to determine whether the Supreme Court of Western Australia is exercising federal jurisdiction in COR 208 of 2014. Victoria does not make any submissions in relation to that issue.

Jurisdiction invested by s 39(2) subject to modification by State law

36. The Bell Plaintiffs and WA Glendinning contend that the Bell Act is inconsistent with s 39(2) of the *Judiciary Act*.[30] For the following reasons, this submission is misguided.

37. Section 39(2), subject to certain exceptions, conditions and restrictions, provides that:

> The several Courts of the States shall within the limits of their several jurisdictions, whether such limits are as to locality, subject-matter, or otherwise, be invested with federal jurisdiction, in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it …

38. The Bell Plaintiffs and WA Glendinning contend there is inconsistency between the Bell Act and s 39(2) of the *Judiciary Act*, for the purposes of s 109 of the Constitution. The Bell Plaintiffs focus on two categories of provisions of the Bell Act:

(1) *First*, those provisions (ss 25(5), 29 and 73) that have the effect of preventing any further steps being taken in COR 146 of 2014.[31]

(2) *Secondly*, those provisions (s 22, Part 6 and s 26) that are said to have the effect of "depriv[ing] the subject matter for determination in COR 146 of 2014 of its character and status as a "matter" and denuded the federal jurisdiction of the Court of effective content".[32]

On this basis, these provisions are said to alter, impair or detract from the exercise of federal jurisdiction invested in the Supreme Court of Western Australia.[33] WA Glendinning focuses its s 109 submission on ss 22, 25(5) and 73 of the Bell Act.[34]

---

29 Bell Plaintiffs' Submissions at n 141.
30 Bell Plaintiffs' Submissions at [131]-[136]; WA Glendinning's Submissions at [121], [136].
31 Bell Plaintiffs' Submissions at [134].
32 Bell Plaintiffs' Submissions at [135].
33 Bell Plaintiffs' Submissions at [134]-[135].

39. The difficulty with the s 109 argument is that it ignores that s 39(2), in investing federal jurisdiction in State courts, only does so "within the limits of their several jurisdictions". As Dixon J stated in *Minister for Army v Parbury Henty & Co Pty Ltd*:[35]

> The limits of jurisdiction of any court so invested found their source in State law and, I presume, any change made by the State in those limits would, under the terms of s 39(2), ipso facto make an identical change in its Federal jurisdiction.

40. Here, if there is any change in the exercise of federal jurisdiction (whether that change is described as an alteration, impairment or detraction), the source of the change is State law. The terms of s 39(2) require that the investiture of federal jurisdiction effected by s 39(2) changes with any modifications of jurisdiction effected by the State law. Accordingly, there can be no s 109 inconsistency.

D. No repugnancy with Ch III of the Constitution

41. The Bell Plaintiffs and WA Glendinning advance several arguments in challenging provisions of the Bell Act that are said to be sourced in Ch III of the Constitution. Those arguments, although expressed differently, can be summarised as follows:

(1) The first argument, advanced by both the Bell Plaintiffs and WA Glendinning, involves the proposition that there is (arising from Ch III) a limitation on State legislative power that prevents a State Parliament from contracting or impairing federal jurisdiction (as the Bell Plaintiffs put it)[36] or from seeking to prohibit the exercise of federal judicial power by a State Supreme Court (as WA Glendinning puts it).[37]

(2) The second involves the proposition that the Bell Act purports to "wrest" "matters" from the courts and, in so doing, puts the quelling of those matters into the hands of the Executive.[38]

---

34 WA Glendinning's Submissions at [121], [136].

35 (1945) 70 CLR 459 at 505 (Dixon J), approved in *Forsyth v Deputy Commissioner of Taxation* (2007) 231 CLR 531 at 538 [3] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ).

36 Bell Plaintiffs' Submissions at [138].

37 WA Glendinning's Submissions at [118]-[119].

38 WA Glendinning's Submissions at [142]-[146]; Bell Plaintiffs' Submissions at [142]-[143].

No relevant limitation on State power

42. The contention that the Bell Act offends a limitation on State power arising from Ch III rests upon a mistaken assumption, namely that what the Bell Act does is contract (or impair or prohibit the exercise of) federal jurisdiction.

43. It does not. Federal jurisdiction is only ever invested in State courts under s 39(2) within the limits State jurisdiction. Moreover, as noted by Isaacs J in *Le Mesurier v Connor*, s 39(2) is "constantly speaking in the present".[39] If a State law contracts the jurisdiction of a State court by (for example) staying any proceedings involving a specified subject matter, and if some of those proceedings are conducted in the exercise of federal jurisdiction, that State law is not limiting federal jurisdiction. The limitation comes about by virtue of s 39(2) itself, because federal jurisdiction is only ever invested within the limits of State jurisdiction extant at any particular point in time. Accordingly, there can be no "impairment" of federal jurisdiction. In this way, the limitation on State power submission suffers from the same flaw as the submission that provisions of the Bell Act are inconsistent with s 39(2) of the *Judiciary Act*. It ignores the terms of s 39(2) itself.

44. More fundamentally, it is incorrect to submit that a State Parliament has no power to contract or interfere with the exercise of federal jurisdiction. In advancing this submission, the Bell Plaintiffs rely heavily on the reasons of McHugh J in *APLA Ltd v Legal Services Commissioner (NSW)* (***APLA***).[40] In *APLA*, McHugh J held that the regulations at issue in that proceeding[41] could not validly apply to advertisements that concern causes of action in federal jurisdiction.[42] However, his Honour was in dissent on this issue.[43] With the exception of Kirby J, the balance of the Court rejected the plaintiff's Ch III argument.[44]

---

39 *Le Mesurier v Connor* (1929) 42 CLR 481 at 503 (Isaacs J), cited in *Forsyth v Deputy Commissioner of Taxation* (2007) 231 CLR 531 at 538 [3] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ).

40 (2005) 224 CLR 322.

41 Pt 14 of the *Legal Profession Regulation 2002* (NSW).

42 *APLA* (2005) 224 CLR 322 at 370 [91] (McHugh J).

43 It is wrong to suggest, as the Bell Plaintiffs do at n 177 of their submissions, that McHugh J was not in dissent *on this issue*.

44 *APLA* (2005) 224 CLR 322 at 351-352 [30]-[35] (Gleeson CJ and Heydon J), 411 [247]-[248] (Gummow J), 454-455 [391]-[396] (Hayne J), 483-486 [467]-[473] (Callinan J).

45. In the passage relied upon by the Bell Plaintiffs, McHugh J describes three limitations on State power:[45] first, that the States cannot invest federal courts with jurisdiction; secondly, that the States cannot "alter or interfere with the working of the federal judicial system set up by Ch III"; and thirdly, the States cannot enact legislation in contravention of the *Kable* principle.

46. The Bell Plaintiffs appear to invoke the second category of limitation described by McHugh J in *APLA*.[46] However, the Bell Act does not fall within this category, which is directed to attempts by a State to alter the structure of the judicial system established by Ch III (as exemplified in *Commonwealth v Queensland*, in which Queensland purported to legislate to refer questions or matters concerning that State to the Judicial Committee of the Privy Council).[47]

47. In order to accept the Bell Plaintiffs' submission (and that of WA Glendinning), this Court must recognise the existence of a new category of limitation, namely a limitation on the power of the States to contract or impair the exercise of federal jurisdiction. There are three reasons why the Court should reject this submission.

48. *First*, it would involve a departure from the law as understood and applied in cases such as *APLA*. The Ch III argument advanced by the plaintiffs in *APLA* included a submission that the impugned regulations had the purpose of reducing the volume of personal injury litigation, and that this would have an impact on litigation in federal jurisdiction.[48] The Court, by majority, rejected the argument.[49] As a matter of substance, the argument advanced by the Bell Plaintiffs is the same as the argument rejected in *APLA*.

49. *Secondly*, the State power argument is inconsistent with the text of s 77 of the Constitution. Section 77(iii) confers power on the Commonwealth Parliament (with respect to any of the matters mentioned in ss 75 and 76) to make laws "investing any court of a State with federal jurisdiction". The State legislatures do not possess this

---

45 *APLA* (2005) 224 CLR 322 at 364-365 [77]-[78] (McHugh J).
46 Bell Plaintiffs' Submissions at [140].
47 (1975) 134 CLR 298, referred to by McHugh J in *APLA* (2005) 224 CLR 322 at 364 [78].
48 *APLA* (2005) 224 CLR 322 at 411 [249] (Gummow J).
49 *APLA* (2005) 224 CLR 322 at 351-353 [30]-[35] (Gleeson CJ and Heydon J), 411 [247]-[248] (Gummow J), 454-455 [391]-[396] (Hayne J), 483-486 [467]-[473] (Callinan J).

power.[50] However, the conferral of an exclusive power on the Commonwealth Parliament to *invest* federal jurisdiction in a State court does not say anything about the power of a State court to legislate in a way that impacts upon the exercise of that federal jurisdiction.

50. The State power submission blurs the important distinction drawn in s 77 between defining federal jurisdiction, and investing with federal jurisdiction. The Bell Plaintiffs say that "only the federal Parliament may define the federal jurisdiction of a State court".[51] That proposition is incorrect. Section 77(i) confers power on the federal Parliament to make laws "defining the jurisdiction of any federal court other than the High Court", whereas s 77(iii) confers power to make laws "investing any court of a State with federal jurisdiction". Thus, while the Commonwealth Parliament has exclusive power to *define* the jurisdiction of federal courts, the exclusive power conferred with respect to State courts is only as to the *investing* of federal jurisdiction. Section 77 does not purport to confer any exclusive power on the Commonwealth Parliament to define the federal jurisdiction of a State court.

51. *Thirdly*, the State power submission is contrary to the well-established proposition that "the Commonwealth must take [State] courts as it finds them, notwithstanding the differences that exist from State to State".[52] As Gummow J observed in *APLA*, "[t]his is the language of a restraint upon or limit to the scope of the federal legislative power under s 77(iii)."[53] Applying this principle in *APLA*, Gleeson CJ and Heydon J noted that "State and territory schemes of regulation of the legal profession form part of the context in which federal jurisdiction is exercised, and have an impact upon the practical circumstances in which the rule of law is maintained."[54] In the same way, the scheme established by the Bell Act is now part of the context in which federal jurisdiction must be exercised in Western Australia.

52. Proceeding on the basis that s 77(iii) empowers the Commonwealth Parliament (exclusively) to invest State courts with federal jurisdiction, it may be observed that

---

50 *APLA* (2005) 224 CLR 322 at 406 [229] (Gummow J).
51 Bell Plaintiffs' Submissions at [138].
52 *APLA* (2005) 224 CLR 322 at 406-407 [232] (Gummow J), citing *Leeth v The Commonwealth* (1992) 174 CLR 455 at 469.
53 *APLA* (2005) 224 CLR 322 at 407 [232] (Gummow J).
54 *APLA* (2005) 224 CLR 322 at 352 [32] (Gleeson CJ and Heydon J).

the way in which the Commonwealth Parliament has chosen to exercise its power under s 77(iii) is by enacting s 39(2) of the *Judiciary Act*. It follows that the only real question arising is whether the Bell Act is inconsistent with Commonwealth legislation for the purposes of s 109 of the Constitution. It is a s 109 issue, not a Ch III issue. For the reasons given, the argument that the *Bell Act* is inconsistent for s 109 purposes with s 39(2) of the *Judiciary Act* should be rejected.

No "wresting" of judicial power

53. WA Glendinning contends that the Bell Act impermissibly "wrests" "matters" from the State courts and provides for the quelling of the those matters by the Executive.[55] A similar argument is advanced by the Bell Plaintiffs, although the argument is also put on the basis that the Bell Act impermissibly directs the Supreme Court as to the manner and outcome of the exercise of its jurisdiction.[56]

54. This argument does not accurately describe what the Bell Act does. It is accepted that, by virtue of certain provisions of the Bell Act, proceedings pending in federal jurisdiction will not continue and will not be the subject of a determination by the Supreme Court of Western Australia. Indeed, the Bell Act's objects include the avoidance of further litigation.[57] Accordingly, one result of the Bell Act is that there will be a number of "matters" pending in the Supreme Court of Western Australia that will not be "quelled" by the Court. However, the Bell Act does not purport to transfer those matters to the Executive or to have the Executive quell those matters. The Bell Act transfers specified property to the Authority (s 22). It provides for the treatment of liabilities of a WA Bell Company, and then provides that actions, claims or proceedings arising out of such liabilities cannot be made or maintained against specified entities otherwise than in accordance with Part 4 of the Act (s 25). It also stays proceedings with respect to property of a WA Bell Company, except with the Court's leave (s 73(1)). While these provisions (and the Bell Act generally) may have an impact on "matters" in State courts, there is no basis for the contention that the Bell Act confers on the Authority the right to "quell" those matters.

---

55 WA Glendinning's Submissions at [145].
56 Bell Plaintiffs' Submissions at [142]-[145].
57 Bell Act, s 4(h).

55. So, too, the Bell Act does not purport to direct the *manner* in which judicial power is to be exercised.[58] Legislating to stay proceedings involving a particular subject matter unless the Court grants leave (as s 73 does) or otherwise bringing about the end to proceedings (as provisions such as s 29 may do) is not the same thing as directing the Supreme Court as to the manner and outcome of the exercise of its jurisdiction.

56. Again, this argument is difficult to maintain in light of this Court's decision in *APLA*. In enacting the impugned regulations at issue in *APLA*, the State had an "avowed purpose" of reducing the volume of personal injury litigation, a purpose that would have an impact on litigation in federal jurisdiction.[59] This was not fatal in *APLA* and it should not be fatal here. As Gummow J noted in rejecting the plaintiffs' complaint about this fact, "[m]any state laws may operate in a practical sense which is apt to reduce overall the volume of litigation in federal jurisdiction."[60]

PART VI: ESTIMATE OF TIME FOR ORAL ARGUMENT

57. Victoria estimates that it will require approximately 20 minutes for the presentation of oral submissions.

Dated: 23 March 2016

RICHARD NIALL
Solicitor-General for Victoria
Telephone: (03) 9225 7225
richard.niall@vicbar.com.au

KATHLEEN FOLEY
Telephone: (03) 9225 7999
kfoley@vicbar.com.au

58 Contrary to what is said by the Bell Plaintiffs (see Submissions at [142]) and WA Glendinning (see Submissions at [122]-[136]).
59 *APLA* (2005) 224 CLR 322 at 411 [249] (Gummow J).
60 *APLA* (2005) 224 CLR 322 at 411 [251] (Gummow J).