

**AN EFFECTIVE PRIORITY FOR THE  
COMMISSIONER OF TAXATION IN LIQUIDATION:  
*BELL GROUP NV (IN LIQ) v WESTERN AUSTRALIA*  
(2016) 331 ALR 408**

I INTRODUCTION

In *Bell Group NV (in liq) v Western Australia*,<sup>1</sup> the High Court<sup>2</sup> unanimously held that the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Act 2015* (WA) (*'Bell Act'*) was invalid in its entirety under s 109 of the *Constitution*. The Court found that the *Bell Act* was inconsistent with Commonwealth tax legislation<sup>3</sup> that ascribes certain characteristics to Commonwealth tax debts,<sup>4</sup> and that created obligations owing to the Commissioner as a creditor of the Bell Group entities.<sup>5</sup>

The issues ultimately decided by the High Court in *Bell* were relatively confined. That said, in determining that a s 109 inconsistency existed, the Court provided a useful and instructive analysis of the meaning, operation and effect of the relevant provisions of the *Tax Acts*.

This case note focuses on the High Court's interpretation of one of these provisions, namely s 215 of the *ITAA 1936* (now s 260–45 of sch 1 to the *TAA*). It concludes that the High Court's findings as to the obligations owing to the Commissioner by a liquidator under s 215 support a view that an effective or 'quasi' priority exists in favour of the Commissioner in collecting tax debts vis-à-vis other unsecured creditors in liquidations.

In this case note, a reference to former ss 177, 208–9 and 215 of the *ITAA 1936* should be read equally as a reference to their current *TAA* equivalents.<sup>6</sup>

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<sup>1</sup> (2016) 331 ALR 408 (*'Bell'*).

<sup>2</sup> French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ, Gageler J in a separate (concurring) judgment.

<sup>3</sup> *Income Tax Assessment Act 1936* (Cth) (*'ITAA 1936'*) and *Taxation Administration Act 1953* (Cth) (*'TAA'*) (collectively *'Tax Acts'*).

<sup>4</sup> *Bell* (2016) 331 ALR 408, 424 [60].

<sup>5</sup> *Ibid* 426 [66].

<sup>6</sup> Sections 177 and 208–9 of the *ITAA 1936* are now enacted in substantially similar terms in *TAA* sch 1 ss 350–10(1) item 2 and 255-5 respectively. *ITAA 1936* s 177 applies to assessments issued on or before 1 July 2015 and *TAA* sch 1 s 350–10(1) item 2

## II FACTS IN *BELL*

The 2013 settlement of the ‘mega-litigation’<sup>7</sup> involving the Bell Group<sup>8</sup> resulted in some \$1.7 billion being made available to the liquidators of the Group for distribution to its creditors.<sup>9</sup> Despite hopes that the creditors would ‘cooperate to bring about a swift and equitable distribution’,<sup>10</sup> further litigation as to the distribution of the proceeds ensued. It was in this context that the Western Australian Parliament — Western Australia being a creditor of Bell Group entities and having provided substantial funding for the liquidator’s recovery proceedings — enacted the *Bell Act*.

The *Bell Act* established a state-based regime for dissolving and administering the property of the Bell Group and a number of its subsidiaries.<sup>11</sup> The intended practical effect of the *Bell Act* was to establish a statutory authority<sup>12</sup> in which all property of the relevant Bell Group companies would vest.<sup>13</sup> Western Australia (through the Authority and the Governor) could then determine at its ‘absolute discretion’ who was paid an amount from the property vested in the Authority.<sup>14</sup> The Authority had absolute discretion to determine the existence of liabilities of the Bell Group companies and their quantum.<sup>15</sup> Any property not distributed would vest in Western Australia.<sup>16</sup>

Unsurprisingly, the plaintiffs in the High Court proceedings were substantial creditors of Bell Group companies. The plaintiffs alleged that the *Bell Act* was invalid under

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applies to assessments issued after 1 July 2015. *ITAA 1936* ss 208–9 apply to amounts due and payable on or before 1 July 2000 and *TAA* sch 1 s 255–5 applies to tax debts due and payable after 1 July 2000. Section 215 of the *ITAA 1936* is now enacted in substantially similar terms in *TAA* sch 1 s 260–45. *ITAA 1936* s 215 applies in respect of assessments issued by the Commissioner for periods before the 2007 income year. *TAA* sch 1 s 260–45 applies to assessments issued in respect of the 2007 income year onwards.

<sup>7</sup> Dan Butler, ‘Equitable Remedies for Participation in a Breach of Directors’ Fiduciary Duties: The Mega-Litigation in *Bell v Westpac*’ (2013) 31 *Company and Securities Law Journal* 307, 307.

<sup>8</sup> *Westpac Banking Corporation v Bell Group Ltd (in liq) (No 3)* (2012) 44 WAR 1. See also *Bell Act* sch 2 for a list of proceedings relating to the recovery of funds by the liquidators of the Bell Group.

<sup>9</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 6 May 2015, 3167 (Michael Nahan, Treasurer).

<sup>10</sup> *Ibid.*

<sup>11</sup> See *Bell Act* sch 1 for a list of the 35 relevant subsidiaries of The Bell Group Ltd.

<sup>12</sup> Called the WA Bell Companies Administrator Authority (‘Authority’): *Bell Act* s 7.

<sup>13</sup> *Bell Act* s 22.

<sup>14</sup> *Ibid* ss 37–44.

<sup>15</sup> *Ibid* s 37.

<sup>16</sup> *Ibid* ss 46(2), 48.

s 109 of the *Constitution* due to its inconsistency with the *Tax Acts, Corporations Act 2001* (Cth) ('CA') and s 39(2) of the *Judiciary Act 1903* (Cth).

The Attorneys-General of each of the other states intervened (generally in support of the defendant), as did the Commissioner of Taxation and the Attorney-General of the Commonwealth (generally in support of the plaintiffs). In this regard, the Commonwealth was a creditor in respect of unpaid tax liabilities amounting to approximately \$466 million.

### III DECISION

The majority of the High Court found that the *Bell Act*<sup>17</sup> had the effect of 'altering, impairing or detracting' from ss 177, 208–9, 215 and 254 of the *ITAA 1936* and therefore that the *Bell Act* was invalid under s 109 of the *Constitution*.<sup>18</sup> The broad content and operation of these provisions is set out below in considering the High Court's reasoning.

Justice Gageler reached the same result but on a 'narrower basis'.<sup>19</sup> His Honour found that an inconsistency existed between the *Bell Act* and ss 215 and 254 of the *ITAA 1936* and that this inconsistency was itself sufficient to conclude that the *Bell Act* was invalid.<sup>20</sup>

The nature of the *Bell Act* as a 'package of interrelated provisions ... intended to operate fully and completely ... to provide a comprehensive regime for dealing with all the relevant property'<sup>21</sup> of the Bell Group meant that the offending provisions could not be severed or read down. Without the offending provisions, the scheme could not possibly have operated as intended<sup>22</sup> and the *Bell Act* was invalid in its entirety.<sup>23</sup>

As the Court found inconsistency with the *Tax Acts*, it was unnecessary to consider the other challenges to validity.<sup>24</sup>

The High Court's reasoning is summarised below.

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<sup>17</sup> In particular ss 9, 16, 22, 25, 35, 37–9, 42–4 and 73–4: *Bell* (2016) 331 ALR 408, 424 [60].

<sup>18</sup> *Bell* (2016) 331 ALR 408, 424 [60], 426 [66].

<sup>19</sup> *Ibid* 430 [79].

<sup>20</sup> *Ibid*.

<sup>21</sup> *Ibid* 426 [69].

<sup>22</sup> *Ibid* (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ), 431 [81] (Gageler J).

<sup>23</sup> *Ibid* 427 [73].

<sup>24</sup> *Ibid* 427 [75] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ), 430 [78] (Gageler J).

### A *The Majority*

In finding that there was an inconsistency between the *Bell Act* and the *Tax Acts*, the majority of the High Court contemplated two broad aspects of the operation of the *Tax Acts*.

#### 1 *Characteristics of Commonwealth Tax Debts*

The majority found that ss 177 and 208–9 of the *ITAA 1936* ascribe certain characteristics to Commonwealth tax debts in relation to their existence, quantification, enforceability and recovery.<sup>25</sup> Under s 177, the production of a notice of assessment to a taxpayer is conclusive evidence that the assessment of a tax liability was made for the correct amount. Sections 208–9 complement s 177 by providing that such a debt is due to the Commonwealth and payable to the Commissioner, with the Commissioner able to recover the debt by suing in a court of competent jurisdiction.

According to the majority in *Bell*, the operation of ss 177 and 208–9 resulted in the accrual of rights in the Commonwealth to payment as a creditor of Bell Group companies.<sup>26</sup> The *Bell Act* purported to override these rights by, in effect, giving Western Australia a discretion to determine the existence of a liability of a Bell Group company to the Commissioner, the quantum of any such liability, whether to make a payment in respect of any liability and the amount to be paid.<sup>27</sup> It conferred on the Governor a power to extinguish tax debts by making no determination in respect of them.<sup>28</sup> Further, the *Bell Act* prohibited the Commissioner from bringing or continuing any action, claim or proceeding against any Bell Group company in relation to the tax liabilities.<sup>29</sup>

It followed that the *Bell Act* purported to ‘strip’ Commonwealth tax debts of the characteristics ascribed to them by ss 177 and 208–9 of the *ITAA 1936*.<sup>30</sup> In overriding the Commonwealth’s accrued rights as a creditor, the Commonwealth and the Commissioner were ‘reduced to the position of ... mere supplicant[s] for the exercise of a favourable discretion’.<sup>31</sup> This engaged s 109 of the *Constitution*.

#### 2 *Liquidator’s Obligations to the Commissioner*

The majority found that ss 215 and 254 of the *ITAA 1936* gave rise to obligations of the liquidators of Bell Group companies in favour of the Commissioner.<sup>32</sup>

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<sup>25</sup> Ibid 424 [60].

<sup>26</sup> Ibid 423 [55].

<sup>27</sup> Ibid 423 [57].

<sup>28</sup> Ibid 424.

<sup>29</sup> Ibid 424 [58].

<sup>30</sup> Ibid 424 [60].

<sup>31</sup> Ibid.

<sup>32</sup> Ibid 424–5 [62].

Section 215 broadly requires a liquidator not to part with any assets of a company until notified by the Commissioner of the amount sufficient to provide for pre-liquidation tax debts payable by the company. The liquidator must then set aside certain assets out of those available to pay ordinary debts to meet the taxation liability. The liquidator is liable to pay the tax to the extent of the amount set aside.

Section 254 applies to post-liquidation tax debts. It broadly requires a liquidator to retain, out of money coming to him or her as a liquidator, amounts sufficient to pay tax that is or will become due in respect of income, profits or gains derived by him or her as a liquidator. Again, the liquidator is liable to pay the tax to the extent of the amount required to be retained.

As the *Bell Act* purported to transfer and vest the property of Bell Group companies in the Authority, the majority found that the liquidator was prevented from complying with his obligations under ss 215 and 254.<sup>33</sup> The obligations owed to the Commissioner were substituted for ‘a mere expectancy or possibility of the payment of an uncertain amount’.<sup>34</sup>

The alteration, impairment or detraction from the operation of ss 215 and 254 of the *ITAA* by the *Bell Act* was significant so as to engage s 109 of the *Constitution*.<sup>35</sup>

#### B *Justice Gageler*

Whilst the majority tended to focus on the impossibility for liquidators to fulfil their ss 215 and 254 retention obligations, Gageler J also attached importance to the purpose and practical operation of ss 215 and 254 in protecting the Commonwealth’s revenue. In so doing, his Honour considered the proper characterisation, operation and effect of ss 215 and 254 of the *ITAA 1936*.

A core tenet of WA’s argument was that s 215 is no more than a ‘machinery provision’ imposing a setting aside obligation to ensure the availability of funds that *might* ultimately be required to be paid the Commonwealth.<sup>36</sup> The actual amount of the distribution, contended WA, is by s 215 to be determined in accordance with whatever law governs winding up.<sup>37</sup> In this case, the relevant law was the *Bell Act*.

Justice Gageler disagreed, holding that s 215 is more than a mere machinery provision to protect the Commonwealth’s revenue. Critical to this finding was the manner in which the liquidator’s setting aside obligation is calculated under s 215. The value of the assets required to be set aside (and therefore the extent of the liquidator’s payment obligation), quite independently of the operation of any other law, equates

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<sup>33</sup> Ibid 425 [65].

<sup>34</sup> Ibid 426 [66].

<sup>35</sup> Ibid.

<sup>36</sup> Ibid 433 [85].

<sup>37</sup> Ibid.

to the amount that would ordinarily be required to be paid to the Commissioner as an unsecured creditor under s 555 of the *CA*. It also equates to the amount that would have been required to be paid under the former corporations law of the states and territories. In Gageler J's view, this coincidence was part of the design of s 215 in imposing a payment obligation as a separate and distinct law of the Commonwealth.<sup>38</sup> The *Bell Act*, in removing from the liquidator's control the property that formed the subject matter of the liquidator's retention obligation, 'denude[d] s 215 of its relevant practical operation and in so doing flout[ed] its protective purpose'.<sup>39</sup> This gave rise to a s 109 inconsistency.<sup>40</sup>

Western Australia's arguments in respect of s 254 of the *ITAA 1936* mirrored its arguments about s 215, and suffered the same fate.

#### IV DISCUSSION

Since the enactment of the *Crown Debts (Priority) Act 1981* (Cth), the Commonwealth has not enjoyed general priority for income tax debts in insolvency. The Commissioner is entitled only to the same proportionate dividend as other ordinary unsecured creditors.<sup>41</sup>

Notwithstanding the lack of express priority, the Commissioner can still obtain certain advantages not afforded to other unsecured creditors.<sup>42</sup> These advantages arise by virtue of the Commissioner's enhanced ability to collect debts through administrative procedures not available to private creditors — a form of 'de facto tax priority'.<sup>43</sup> The retention and setting aside obligation imposed on liquidators in respect of tax liabilities under s 215 of the *ITAA 1936* may be seen as conferring such a de facto priority.<sup>44</sup>

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<sup>38</sup> Ibid 433–4 [89].

<sup>39</sup> Ibid 434 [93].

<sup>40</sup> Justice Gageler also added that s 29 of the *Bell Act*, which prevented the liquidator from performing any functions as a liquidator, would have prevented the liquidator's compliance with his s 215 obligations, giving rise to a s 109 inconsistency in any event: *Bell* (2016) 331 ALR 408, 434 [92]–[93].

<sup>41</sup> *CA* s 555.

<sup>42</sup> Sylvia Villios, 'The Commissioner's Power to Issue Creditor's Statutory Demands: Implications for Corporate Rescue Post Insolvency' (2014) 43 *Australian Tax Review* 187, 194.

<sup>43</sup> Ibid.

<sup>44</sup> Other examples include the imposition of personal liability on directors for unpaid tax liabilities under *TAA* sch 1 s 18-125 and the Commissioner issuing notices to third party creditors of the debtor company under *TAA* sch 1 s 260-5 (although this latter power is only operative *before* a liquidator is appointed: *Bruton Holdings Pty Ltd (in liq) v Federal Commissioner of Taxation* (2009) 239 CLR 346).

It is important to bear in mind that the broader collection powers conferred on the Commissioner (including by the predecessors to s 215) were enacted during a time in which the Crown maintained priority over unsecured creditors.<sup>45</sup> While the Crown maintained priority, the granting and exercise of powers to collect tax in a particular manner were ‘not of great practical concern’ in insolvency.<sup>46</sup> However, in line with the policy shift requiring the Commissioner to operate on an equal footing with other stakeholders, the question arises as to whether the Commissioner’s broader administrative powers in the context of insolvency elevate the Commonwealth above the position of ordinary creditors.<sup>47</sup> The decision of the High Court in *Bell* goes some way to answering this question, particularly in the context of s 215 of the *ITAA 1936*. In the author’s view, *Bell* strengthens the Commissioner’s position and supports the proposition that the Commissioner has an effective priority in insolvency.

It might be suggested that the operation of s 215 extends only so far as providing greater certainty and administrative efficiency to the Commissioner,<sup>48</sup> rather than conferring on the Commissioner any substantive right to payment. In other words, it may be argued that under s 215, the Commissioner is not granted any right or entitlement to the funds set aside — the provision operates merely to ensure that there are assets set aside to fund the payment of a potential liability, the quantum of which will be determined by reference to laws other than the *Tax Acts*. Indeed, this was the crux of the argument put forward by WA.

Prior to *Bell*, the view that s 215 is no more than a ‘machinery provision’ operating to ensure that there are funds available at the conclusion of a winding up sufficient to cover a distribution that *might* be required to the Commonwealth<sup>49</sup> did appear to have some basis in the case law.<sup>50</sup>

In *Farley*, Latham CJ of the High Court held that s 215 did not provide the Commissioner with a right to receive the sum set aside, nor did it create any charge over the sum.<sup>51</sup> His Honour stated:

These words, in my opinion, only show that the liquidator is required to provide a sum which will be available for the payment of such tax as may be found to

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<sup>45</sup> Catherine Brown, Colin Anderson and David Morrison, ‘The Certainty of Tax In Insolvency: Where Does the ATO Fit?’ (2011) 19 *Insolvency Law Journal* 108, 109.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

<sup>48</sup> See, eg, Thomson Reuters, *McPherson’s Law of Company Liquidation* (at 19 April 2015) [13.1410].

<sup>49</sup> *Bell* (2016) 331 ALR 408, 433 [85].

<sup>50</sup> See *Commissioner of Taxation (Cth) v Official Liquidator of EO Farley Ltd (in liq)* (1940) 63 CLR 278 (‘*Farley*’); *Re Richard Foreman & Sons Pty Ltd*; *Uther v Commissioner of Taxation (Cth)* (1947) 74 CLR 508 (‘*Uther*’); *Commonwealth v Cigamatic Pty Ltd (in liq)* (1962) 108 CLR 372 (‘*Cigamatic*’).

<sup>51</sup> *Farley* (1940) 63 CLR 278, 289.

be due. The actual amount to be paid and all questions of priority are then left to be determined by the law which is applicable.<sup>52</sup>

Further, in considering the imposition of personal liability on the liquidator for the payment of tax under s 215, Starke J stated that ‘the ... legislation is not dealing with substantive rights whether of priority *or otherwise* but is for the purpose of restraining the distribution of the funds of a company in liquidation in aid and in protection of the revenue’.<sup>53</sup> Similarly, Evatt J found that s 215 was ‘merely administrative’ and ‘designed to secure the setting aside of money pending final administration, all questions of priority and preference being determined by the law to be found elsewhere than in the section’.<sup>54</sup> *Farley*, insofar as it dealt with s 215, was followed by the High Court in *Uther* and *Cigamic*.

*Bell* appears to mark somewhat of a departure from the above characterisation of s 215. In light of *Bell*, it seems that an interpretation that s 215 is merely administrative and does not confer substantive rights to payment on the Commissioner ‘glosses the legal operation of the section and understates its purpose’.<sup>55</sup>

*Bell* makes clear that it would be inconsistent for a law of a state to diminish the Commissioner’s position under s 215 to one in which the Commissioner has only a ‘mere expectancy or possibility of the payment of an uncertain amount’.<sup>56</sup> In light of this, s 215 must now be viewed as itself creating a substantive right to payment in the Commissioner — a statutory right that is protected in equity. In other words, rather than ensuring the mere setting aside of assets, s 215 provides a mechanism for the enforcement of the Commissioner’s right to receive payment in respect of tax debts in insolvency.

Whilst the standing of ordinary unsecured creditors in liquidations may arguably be diminished by state legislation, s 215 protects the Commonwealth’s position. The Commissioner in *Bell* had a substantive right to receive the amount he would ordinarily expect to receive in a *pari passu* liquidator distribution under the *CA*. The ‘stronger’ interpretation of s 215 in *Bell* arguably creates an effective priority for the Commissioner in liquidations.

## V CONCLUSION

Prima facie, *Bell* might be seen as a non-controversial application of s 109 of the *Constitution* to politically controversial state legislation. However, *Bell* goes beyond

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<sup>52</sup> Ibid.

<sup>53</sup> Ibid 297 (emphasis added).

<sup>54</sup> Ibid 327.

<sup>55</sup> *Bell* (2016) 331 ALR 408, 433 [86].

<sup>56</sup> Ibid 426 [66].



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this. It provides new High Court authority on the proper characterisation and scope of s 215 of the *ITAA 1936* (and its *TAA* equivalent).

*Bell* constitutes a development in the existing law by confirming that s 215 confers substantive rights on the Commissioner to payment in liquidations. The Commissioner's protected position under s 215 is *not* a right afforded to other ordinary unsecured creditors in liquidations. To this end, *Bell* reinforces and expands the effective or quasi priority of the Commissioner in insolvency.

