

W.A. GLENDINNING & ASSOCIATES PTY LTD

OPINION ON THE EFFECT OF THE BELL GROUP COMPANIES (FINALISATION OF MATTERS
AND DISTRIBUTION OF PROCEEDS) AMENDMENT BILL 2016
ON MARANOA TRANSPORT PTY LTD

29 March 2016

Privileged and Confidential

INSTRUCTIONS

1. We are instructed to provide our opinion on the consequences of the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Amendment Bill 2016 (Amendment Bill)* for Maranoa Transport Pty Ltd ACN 009 668 393 (in liq) (Maranoa) and its High Court constitutional challenge to the validity of the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Act 2015 (WA) (Bell Act)*.

SUMMARY

2. If enacted, the Amendment Bill will:
 - 2.1. deem all funds held by, for and on behalf of Maranoa to have vested in the WA Bell Companies Administrator Authority (**Authority**) on 27 November 2015;
 - 2.2. deem the control and management of the affairs of Maranoa to have been transferred to the Authority on 27 November 2015; and
 - 2.3. deem that the liquidator of Maranoa had no power (without the Authority's written approval) to have acted on behalf of Maranoa since 27 November 2015.
3. Accordingly, if passed, the Amendment Bill would mean that Maranoa's High Court challenge could not proceed, because Mr Woodings will be "deemed" never to have had authority to give instructions on behalf of Maranoa, or to apply funds of Maranoa to pay legal costs incurred in the action. (Some of those costs have no doubt already been met from the funds of Maranoa, as the liquidator was entitled to do; but the retrospective effect of the Bill will mean that he is "deemed" not to have been so entitled).

ANALYSIS

A radical change to the scheme of the Act

4. Clause 4 of the Amendment Bill amends the Bell Act by defining Maranoa to be a WA Bell Company.

5. This amendment represents a radical change to the scheme of the Bell Act. As it stands, all of the 35 companies identified as WA Bell Companies in the Bell Act were registered in Western Australia. The “WA” in the phrase “WA Bell Companies” means registered in Western Australia.
6. Maranoa was registered in Queensland. If the Amendment Bill becomes law, Maranoa will be the only Bell group company not registered in Western Australia to be covered by the Bell Act. Significantly, there are a number of other Bell companies not registered in Western Australia which the Amendment Bill does not propose to cover.¹
7. The Explanatory Memorandum for the Bell Act clearly contemplated that only WA-registered Bell group companies would be covered by the Act. It stated (emphasis added):

“This Bill provides a framework for the dissolution of the *WA-registered Bell Group companies*, and the administration and distribution of the Bell Litigation Proceeds, with a view to avoiding further protracted and expensive litigation.”

8. Similarly, in the Second Reading Speech for the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015 (WA)*, the Treasurer stated:²

“This bill provides a framework for the dissolution of the *WA registered Bell companies* and the administration and distribution of the Bell litigation proceeds to avoid the perpetual litigation that appears to be inevitable on any matter associated with these companies... As the bill refers to legal relationships governed only by the laws of Western Australia and *companies registered in Western Australia*, this legislation has little or no effect on other states and the national Corporations Act 2001.”

9. It can be seen that the original decision to cover only WA-registered Bell group companies by the Bell Act was deliberate. This was no doubt to minimise the chances of a successful challenge to the constitutional validity of the Act on the basis of its extraterritorial effect or inconsistency with the *Corporations Act 2001*.

The liquidator’s challenge to the constitutional validity of the Act

10. The liquidator of Maranoa, Mr Antony Woodings, commenced a constitutional challenge to the Bell Act by a writ of summons filed in the High Court on 4 February 2016. This was the third of three constitutional challenges brought in the High Court

¹ The following are Bell group companies which are not registered in Western Australia: Great Western Transport Pty Ltd (Qld), Maradolf Limited (Vic), W&J Investments Pty Ltd (NSW), Western Interstate Pty Ltd (NSW), Western Transport Pty Ltd (Qld).

² Western Australia, Parliamentary Debates, Legislative Assembly, 6 May 2015, 3167-3168 (Dr M.D. Nahan, Treasurer).

– the first having been commenced by BGNV on 27 November 2015 and the second having been commenced by W.A. Glendinning on 18 December 2015.

11. The reason why Mr Woodings did not commence proceedings until 4 February 2016 was that he required court approval for Maranoa to do so. Master Sanderson, in the WA Supreme Court, gave the Court's approval on 2 February 2016.

Effect of the Amendment Bill on Maranoa and the liquidator

12. Clause 4 of the Amendment Bill provides that, except in section 51(1) of the Bell Act, a reference in the Bell Act to a WA Bell Company includes a reference to Maranoa. Clause 2 of the Amendment Bill provides that clause 4 of the Bill takes effect from 27 November 2015 and therefore the Amendment Bill operates with retrospective effect.³
13. This has three critical consequences for Maranoa and Mr Woodings.
14. First, it means that all property held by, for or on behalf of Maranoa will be retrospectively deemed to have been transferred (by force of section 22 of the Bell Act) to the Authority on 27 November 2015. @ \$40M
15. Secondly, the Authority would be retrospectively deemed to have been the Administrator of Maranoa since 27 November 2015 (Section 27 of the Bell Act).
16. Thirdly, section 29 of the Bell Act provides that while a company is under the administration of the Authority, no person other than the Authority can perform or exercise a function or power as an officer of the company without the Authority's written approval. Therefore, Mr Woodings would be retrospectively deemed not to have had authority to act for or on behalf of Maranoa, since 27 November 2015.

Effect of the Amendment Bill on Maranoa's constitutional challenge

17. In introducing the Bill, the Treasurer stated that he was advised that it would have no substantive effect on the High Court challenge. With respect, he was clearly misinformed. If passed, the Bill will bring Maranoa's challenge to a halt. It will result in Maranoa and Mr Woodings never having had funds to pay for Maranoa's High Court challenge and never having been authorised to. The challenge was commenced on 4 February 2016, but the funds held by the liquidator for Maranoa will be deemed to have been transferred to the Authority on 27 November 2015.
18. The Amendment Bill will also deem the liquidator never to have had authority to instruct lawyers on behalf of Maranoa since 27 November 2015 (before the date on which the High Court challenge was commenced).

³ The retrospective effect of the Amendment Bill is confirmed by clause 14 of the Bill, which inserts s.85(5) into the Act in the following terms: "The rights, obligations and liability of all persons are taken to be, and to have always been, the same as if the Amendment Act had received the Royal Assent on 26 November 2015 and sections 4 to 10 of that Act had come into operation on 27 November 2015."

19. The Amendment Bill will also retrospectively render a nullity the orders made by the Supreme Court on 2 February 2016, which authorised Maranoa and Mr Woodings as liquidator to bring the constitutional challenge - a collateral attack on the long established principle of the “separation of powers”.

CONCLUSION

20. The Amendment Bill will retrospectively deem Maranoa to be a WA Bell Company from 27 November 2015. Given that Maranoa will be the only Bell group company not registered in Western Australia to be deemed a WA Bell Company, it is impossible to escape the conclusion that Maranoa is being brought within the coverage of the Act to defeat the constitutional challenge commenced by Maranoa, by removing the liquidator’s authority to provide instructions to the lawyers conducting the constitutional challenge, and by depriving the liquidator of funds for the constitutional challenge.
21. The retrospective operation of the Bill has serious adverse consequences for the liquidator, who acted in good faith, in accordance with the authorisation of the Supreme Court of Western Australia, and in compliance with the law as it stood at the time.
22. One consequence will be that, although he obtained approval to commence the High Court challenge by order of the Supreme Court, Mr Woodings will be personally liable to pay the fees of all those he has instructed but will have no assets (other than his own) from which to pay them.
23. While it is open to the Western Australian Parliament to pass laws with retrospective effect, such laws always have the potential to undermine the rule of law. For the reasons set out above, it is our opinion that the Amendment Bill is an egregious affront to the rule of law. It deems unlawful actions which at the time were not only lawful but taken with the prior approval of the Supreme Court.


Malcolm McCusker


Steven Penglis


Adam Sharpe