Date 5 June 2017

Attn: News Editors, Producers

For publication immediately

Media Release

Serious legal doubts on Government's proposed takeover of TasWater

The State Government's forced takeover of TasWater may not be legal according to high-level advice received by the council-owned water and sewerage business.

TasWater Chairman Miles Hampton said preliminary legal advice obtained by the company concluded the State Government could not legislate to override the application of the Federal Corporations Act.

TasWater is a company established under the Corporations Act 2001, and the 29 Tasmanian Councils are shareholders in the company.

Mr Hampton said that as part of its normal fiduciary obligations, the Board had sought independent advice on whether the proposed takeover by the State Government was legal.

He said while the preliminary legal advice had been formulated prior to the Government's legislation being tabled in the Parliament, it provided a clear indication that any State law could be subject to challenge under section 109 of the Australian Constitution.

Shaun McElwaine SC has advised: ''No provision of the Corporations Act entitles a person to compulsorily expropriate a share from a shareholder, nor to diminish or expunge [their] rights." Mr McElwaine also advised, "no provision of the Corporations Act entitles a person to transfer the entirety of the property of TasWater to another entity, unless TasWater agrees."

Mr McElwaine noted that section 109 of the Constitution provides that where a State law is inconsistent with a Commonwealth law, the Commonwealth law will override the State law.

Mr Hampton said that in light of the legal advice and the clear resolve of Councils at the LGAT meeting held on 11 May 2017 to retain ownership, the Board of TasWater had determined that the company would take such action as was appropriate and necessary to determine the legality of the proposed takeover.

The Chief Owners' Representative Mayor David Downie said it was extraordinary that the Government was proposing a course of action that may not be legal.

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"If the government has not obtained legal advice it is obviously important that they do so before they introduce legislation into Parliament.

"Rather than provoke a potential legal battle, it is time for the State Government to commence working collaboratively with Owner Councils and TasWater for the benefit of all Tasmanians," Mr Downie said.

The President of the Local Government Association of Tasmania (LGAT) Mayor Doug Chipman said he was very concerned about the implications for all Tasmanians if poorly thought out legislation was ultimately subject to an expensive legal challenge.

"We have repeatedly called on the Treasurer to provide his modelling and details of how he plans to speed up TasWater's work plans, but nothing has been provided. Now it seems that the forced takeover may not even be legal" he said.

- ends -

Further information:

- *Attached please find legal advice for information purpose only.*
- *TasWater media contact, Simon Pilkington, (03) 6237 8201*

SM+A

SHAUN
McELWAINE
+ ASSOCIATES

29 May 2017

The General Manager Legal & Governance
TasWater
GPO Box 139
HOBART TAS 7001
Attn: Ms Ailsa Sypke

Dear Ms Sypkes,

PROPOSED STATE TAKEOVER

I refer to your request for advice of 1 May 2017, and to our subsequent email correspondence. My opinion is requested on whether it is open to the State to appropriate the assets of TasWater?

Introduction and disclaimer

I note that little detail as to what steps the State has in mind is currently known, apart from the broad assertion that legislation will be enacted. The form and content of the legislation has not been disclosed, and is likely to not exist at present.

Accordingly, I cannot express a dispositive opinion unless and until the actual form of legislation which is contemplated by the State has been tabled.

However, for the purposes of providing this preliminary advice, a degree of insight as to what is contemplated may be obtained from a publication which currently appears on the Premier's website.[1] On that site, there is a document with the title *'Taking Control of TasWater*'. Amongst other statements it asserts:

> *'….the State Government has decided to take control of TasWater in order to fix it….*

'the State Government has decided that the best way to resolve Tasmania's inadequate water and sewerage infrastructure is to assume ownership and control over TasWater.'

[1] www.premier.tas.gov.au

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In a section titled: '*Summary of Key Matters'* the following information is provided, (and I adopt the same numbering):

> *"1. The Government intends to establish a new Government business to provide water and sewerage services in Tasmania, through legislation to be introduced in the 2017 Spring session of Parliament and for the new business to commence operations on 1 July 2018.*
> *2. We will transfer the operating business and all its employees to the new Government business.*
> *7. A legislated obligation to provide Councils with payments of $20 million dollars per year from 2018 – 2019 over a 7 year period, to provide Councils with the same returns as announced by TasWater last year.*
> *8. A commitment from the Government that it will receive no net returns from the entity over this period; and, following this period, Councils will receive one half of any returns from the entity in perpetuity.*
> *11. No employees will lose their jobs as a result of the change in ownership. TasWater employees will be transferred to the new TasWater Government business and their employment terms and conditions will be retained.*
> *12. The legislation for the takeover of TasWater will contain explicit provisions to prevent a future privatisation of TasWater."*

Possible takeover models

You have requested that I assume, for the purposes of my opinion, that a variety of models to effect the takeover may be legislated, including an assumption or transfer of shares or assets. Obviously, without the benefit of the legislation which is contemplated, any assumptions which I make may well need to be reassessed.

Subject to this caveat, I direct attention in this opinion to the following possible legislative mechanisms:

1. A compulsory acquisition of the shares issued by TasWater;
2. A compulsory acquisition of the assets of TasWater, together with an assumption of its liabilities by transfer to a new State-controlled entity;
3. A winding up of TasWater and a statutory transfer of its assets, together with an assumption of liabilities to a new State controlled entity;
4. A legislated removal of the directors of TasWater, and their replacement with compliant individuals in the expectation that the new

directors will cause a transfer of the assets of TasWater to be made to a new entity, perhaps in consideration for a corresponding assumption of liabilities by the new entity.

The first or second option would appear, at least at a high level of abstraction, to be closest to the model which is contemplated, especially when one reflects upon the mechanism which was adopted to first create the three water and sewerage corporations, and then to establish TasWater.

The water and sewerage assets owned by each municipal council became the subject of transfer orders, published by the Treasurer pursuant to Part 3 of the *Water and Sewerage Corporations Act 2008*.

In broad terms that mechanism enabled the Treasurer by notice published in the Gazette to order the transfer to a specified transferee of assets, rights, liabilities and employees.[2] Once made, a transfer order took effect to vest assets and liabilities in the transferee.[3] Section 45 expressly provided that '*no compensation is payable to any person or body in connection with a transfer except to the extent (if any) to which the transfer order giving rise to the transfer so provides.*'[4]

The Treasurer was also permitted, by notice published in the Gazette, to specify the consideration on which a transfer was made and the value or values at which assets, rights or liabilities were transferred.[5] The same mechanism was employed when the State legislated to abolish the three regional corporations upon the formation of the TasWater, in accordance with the *Water and Sewerage Corporation Act 2012*.[6]

At this point I note that my assumption that fair compensation will not be paid is not entirely consistent with points 7 and 8 of the Summary of Key Matters section of the *Taking Control of TasWater* document published on the Premier's website. However, there is an obvious and very real difference between fair compensation for the value of assets which are acquired (or transferred) and the Government's commitment to legislate for equivalent dividend payments and/or a share of any returns in perpetuity: the cash flow (which might otherwise be received by local councils as dividends in their capacity as shareholders) does not equate to fair compensation for the value of assets which may be acquired, or transferred, without any obligation to pay fair market value.

[2] Section 41.
[3] Section 43.
[4] Section 45.
[5] Section 46.
[6] Part 3, sections 27-38.

This point is well illustrated if regard is had to TasWater's Annual Report for the year ending 30 June 2016, which notes that the net assets exceed $1.5B.

There is no doubt that the State has plenary power to enact legislation to expropriate property, and there is no corresponding obligation to pay fair compensation.[7] In this State, and by convention, generally speaking there is an obligation to pay fair compensation where the State exercises compulsory power to acquire land in accordance with the *Land Acquisition Act 1993*. However, and subject to rights which may flow from Federal legislation, the State may enact legislation, the effect of which is to compulsorily acquire or transfer the assets of TasWater to a new State-controlled entity, and without any obligation to pay compensation. Accordingly, any limitation upon the expressed intention of the State must be found in Federal legislation.

The formation of TasWater

TasWater was incorporated on 5 February 2013 in accordance with the *Corporations Act 2001*. As noted on the ASIC database, there are 29 ordinary issued shares, one each of which is beneficially held by each municipal council in Tasmania.

Section 5 of the *Water and Sewerage Corporation Act 2012* (WSCA) required each council to form, or to participate in the formation of, a proprietary company limited by shares and pursuant to the *Corporations Act*. Section 7 of WSCA clarifies the status of TasWater, explicitly stating that it is not and does not represent the councils or the Crown, and that neither councils (unless specifically agreed or provided in TasWater's Constitution) or the Crown are liable for any debt, liability or obligation of TasWater.

The Corporations Act 2001

The *Corporations Act* is Federal legislation which replaced the Co-operative Scheme which was provided for in the Corporations Law. Its enactment followed a constitutional challenge to the validity of provisions dealing with the incorporations of companies and to aspects of the cross-vesting scheme.[8] In consequence each State enacted legislation pursuant to section 51 (xxxvii) of the Constitution, the purpose of which was to refer matters relating to corporations and financial products and services to the

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[7] *Commonwealth –v- NSW* (1915) 20 CLR 54; *Commonwealth –v- WMC Resources Ltd* (1998) 194 CLR 1 at 149 and *Durham Holdings Pty Ltd –v- NSW* (2001) 205 CLR 399.

[8] *NSW –v The Commonwealth* (1990) 169 CLR 482; re *Wakim; ex-parte McNally* (1999) 198 CLR 511.

Commonwealth Parliament.[9] The effect of this referral, from each State, is that the *Corporations Act* is a single enactment of the Commonwealth Parliament, and operates as a national law throughout Australia. Accordingly, all aspects of the regulation of corporations are subject to Federal statutory law.

However, there is an exception to this. The referral of corporations powers by each State occurred in consequence of an intergovernmental agreement whereby, the Commonwealth agreed that each State could specifically legislate for exemptions. The provision which facilitates this is section 5F of the Corporations Act. It operates as follows: a State may, by legislation, declare a matter to be an excluded matter for the purposes of the Corporations Act. The declaration may relate to the whole of the Corporations Act or to specified provisions contained in it. Where a declaration is made then no provision of the Corporations Act applies in the State in relation to the declared matter.

Relevant excluded matters

Section 8 of the WSCA is such a provision, and has effect that the following provisions of the *Corporations Act* are not applicable to TasWater:

- The appointment and removal of Directors: Part 2M.4;
- Takeovers: Chapter 6;
- Compulsory acquisitions and buyouts: Chapter 6A;
- The rights and liabilities which flow from takeovers and compulsory acquisitions: Chapter 6B;
- Information about ownership of listed companies: Chapter 6C;
- Continuous disclosure: Chapter 6CA;
- Fundraising: Chapter 6D;
- Financial services in markets: Chapter 7; and
- The mutual recognition of securities: Chapter 8.

Subject to these matters, the *Corporations Act* regulates the property, rights and obligations of TasWater particularly in relation to its shareholders.

Nature of shares and share ownership

As is well understood, a share is a component of the capital of a company. Owning a share confers membership status as a shareholder. A share is, in part, a contract between the shareholder and the company. Section 1070A(1) of the

[9] In Tasmania, this was the *Corporations (Commonwealth Powers) Act 2001*.

Corporations Act declares a share to be the personal property of the shareholder (although one must note that this provision, contained in chapter 7, is excluded pursuant to section 8 of WSCA). Nonetheless, at common law a share is personal property. It is often described as a chose in action.[10]

The relationship between the shareholder and the company depends not only on the terms of issue, and the constitution of the company, but also upon specific provisions of the *Corporations Act*. It is well accepted that the relationship between a shareholder and a company in part turns upon *'a series of mutual covenants'*.[11]

There are a number of useful authorities on what is a share, and the rights which flow from it, for example, the judgment of Lockhart J in *Sydney Futures Exchange Ltd –v- Australian Stock Exchange Ltd*[12] as follows:

> *'a share is a right to a specified amount of the share capital of the company, carrying with it rights and liabilities when the company is a going concern and in the course of its winding up. A share is a chose in action entitling its holder to the rights and subjecting him to the liabilities provided by the memorandum and articles of association and by legislation. The rights attaching to a share include the right to participate in dividends whilst the company is a going concern and the right to participate in the distribution of assets available for the shareholders upon a winding up. They also include the right to receive capital in excess of the company's wants which the company resolves to distribute upon a reduction of capital.'*

In a respected text book, Ford's Principles of Corporations Law, attention is drawn to the analysis of Professor Pennington who observed that a share is:

> *'a species of intangible moveable property which comprise a collection of rights and obligations relating to an interest in a company of an economic and proprietary character, but not constituting a debt.'*[13]

The authors continue:

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10 *Archibold Howie Pty Ltd –v- Commissioner of Stamp Duties* (NSW) (1948) 77 CLR 143 at 156.

11 *Borland's Trustee –v- Steel Brothers & Co Ltd* (1901) 1 Ch 279 at 288.

12 (1995) 56 FCR 236. See also Campbell J in *White –v- Shortal* (2006) 60 ACSR 654 at 689; [2006] NSW SC 1379 at [197..

13 15th ed at [17.2010].

> *'a share is a fractional part of the capital of the company, conferring on the shareholder a certain to a proportionate part of the assets of the company, whether by way of dividend or distribution of assets in winding up; and that interest may come to represent in value far more than the original capital which has been contributed in respect of the shares.'*[14]

In many respects, the *Corporations Act* confers entitlements upon shareholders which are enforceable in accordance with its terms. For example, shareholders have rights to seek remedies in accordance with chapter 2F if, for example, the affairs of a corporation are being conducted in an oppressive or discriminatory way.[15] They have the right to appoint and remove directors pursuant to Part 2M.4, although this is displaced in accordance with section 8 of the WSCA by the specific provisions contained in TasWater's Constitution. Shareholders may inspect books pursuant to chapter 2F.3, call and attend meetings in accordance with chapter 2G.2, participate in reductions of capital in accordance with chapter 2J and, ultimately, receive a distribution upon winding up in accordance with part 5.5.

Notably, section 1350 provides for the payment of compensation in the event of a compulsory acquisition of property which is otherwise on just terms. If the Corporations Act operates in a manner which triggers a compulsory acquisition of property, then the person who acquires it is liable to pay compensation, and there is a statutory mechanism to determine the amount in the event of a dispute. However, if the State simply legislates to compulsorily acquire the shares, or to transfer them, this section will not be engaged as the criterion for its operation is that the Corporations Act allows the acquisition of property.

Section 109, Constitution

Section 109 of the Constitution provides:

> *'When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.'*

It is well settled that section 109 operates in cases of direct or indirect inconsistency. There are two important cases of the High Court which are of present relevance.

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[14] At [17.210].

[15] Section 232.

Bell Group NV (in liquidation) –v- Western Australia[16]

This case involved a challenge to the State's legislative framework for the dissolution and administration of the Bell Group Companies (the Bell Act). The Bell Act made provision for the vesting of the assets of the companies in a State-controlled authority for ultimate distribution at the absolute discretion of the controller of the authority.

The constitutional validity of the Bell Act was challenged in the High Court, particularly by the Australian Taxation Office, upon the ground that section 109 of the Constitution invalidated it. Put simply, the ATO contended that in accordance with certain provisions of the *Income Tax Assessment Act*, the Commissioner was entitled to receive, in the liquidation, a priority payment in its capacity as a creditor of various Bell Group Companies. Unanimously, the High Court determined the Bell Act as invalid.

It is useful to set out the summary reason why, as given in the plurality decision[17] in the introductory portion of their judgment (my emphasis):

> *'9. For the reasons which follow, it should be concluded that the Bell Act is invalid in its entirety by the operation of s 109 of the Constitution because of inconsistency between provisions of the Bell Act and provisions of the Tax Acts. The Bell Act purports to create a scheme under which Commonwealth tax debts are stripped of the characteristics ascribed to them by the Tax Acts as to their existence, their quantification, their enforceability and their recovery. The rights and obligations which arose and had accrued to the Commonwealth as a creditor of the WA Bell Companies in liquidation, and to the Commissioner, under a law of the Commonwealth prior to the commencement of the Bell Act are altered, impaired or detracted from by the Bell Act.'*

The majority of the High Court noted that a conflict referred to in section 109 of the Constitution *'may arise in a number of ways'* including where a *'State law, if valid, might alter, impair or detract from the operation of a law of the Commonwealth Parliament.'*[18]

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16 [2016] HCA 21; (2016) 90 ALJR 655.

17 French CJ, Kiefel Bell, Keane, Nettle and Gordon JJ.

18 At [51].

Such inconsistency may arise from the legal operation of the law, or its practical effect.[19] The ATO was found to have substantial statutory rights and priorities in the liquidation, which the Bell Act purported to override.

For several reasons, the High Court concluded that the Bell Act was invalid because of inconsistency with the statutory rights conferred in favour of the ATO. In broad summary, the Court reasoned as follows:

- The pooling and distribution of the assets of the Bell Group Companies, at the discretion of the authority, was inconsistent with the statutory priority afforded in favour of the ATO under the Federal legislation (the *Income Tax Assessment Act*)
- Taxation debts owed to the Commonwealth, were purportedly extinguished and
- The scheme stripped Commonwealth tax debts of the characteristics given to them pursuant to Federal legislation, including their existence, quantification, enforceability and recovery.[20]

Accordingly, the majority of the High Court reasoned that the Bell Act purported to alter, impair or detract from the operation of each of those rights which arose, and had accrued, to the Commonwealth and to the Commissioner under a Federal law prior to the enactment of the Bell Act. The High Court held that the alteration or impairment of, or detraction from, the Federal law was significant and by virtue of section 109 of the Constitution, the State law was invalid.

Commonwealth –v- Cigamatic Pty Ltd (in liquidation)[21]

In this case the High Court determined that a State law could not validly abolish a prerogative of the Commonwealth, being a priority payment right upon the winding up of a corporation. A majority of the High Court reached this result by determining that State laws could not bind the Commonwealth in this respect. Academic commentators have argued for many years that the principle is unsound. The High Court revisited the question in *Re-residential Tenancies Tribunal; ex-parte Defence Housing Authority* in 1997.[22] The Court did not overturn the principle, but appeared to confine it to questions of Commonwealth and State immunity from laws of general application.

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19 At [51].

20 Specifically [57-60].

21 (1962) 108 CLR 372.

22 (1997) 190 CLR 410.

In the context of my opinion, it is the *Bell Group Case* which is more useful.

Analysis

For present purposes, the relevance of these cases is as follows: is it is open to the State to legislate in a way whereby the rights enjoyed by the shareholders of TasWater are displaced and or whether its assets may be expropriated (with or without compensation), otherwise than in accordance with the *Corporations Act*?

According to my research a question of this type has not been the subject of previous judicial analysis in Australia. There is one article, by an academic lawyer, which touches on it, although written in the context of the *Work Choices Act*.[23] Whilst the main focus of the article is in relation to the effect of that Act, the author posed for consideration the following (my emphasis):

> *'The ability of a State to insulate constitutional corporations operating within its boundary from the effect of the Work Choices Act is limited. Any direct attempt by a State to deny or interfere with the operation of the Federal legislation will be rendered invalid by section 109 of the Constitution. In theory, each State could attempt to wind up the corporations incorporated in that State and replace them with a new kind of statutory entity which mirrors the nature, rights and liabilities of those corporations. However, such an approach would face a number of difficulties. In the first place, it may be that an attempt by the States to wind up companies otherwise in accordance with the regime established by the Corporations Act 2001 would be invalid by reason of section 109 of the Constitution.*

Each shareholder of TasWater is entitled to valuable property rights and has the benefit of statutory rights conferred by the Corporations Act. Each shareholder is entitled, in accordance with the Act, to participate in a distribution of dividends when the company operates as a going concern and to receive a proportionate distribution of any surplus, upon a winding up. Shareholders have rights to, at least indirectly, determine the management of a corporation by exercise of the power to appoint and to remove directors. No provision of the Corporations Act entitles a person to compulsorily expropriate a share from a shareholder, nor to diminish or expunge the rights which are enjoyed. No provision of the Corporations Act entitles a person to transfer the entirety of the property of TasWater to another entity, unless TasWater agrees. The mechanism for agreement is either assent by the

[23] D. Barnett, 'The Corporations Power and Federalism' (2006) 29(1) UNSW LJ 91.

Board of Directors or the passing of a resolution by the shareholders at a meeting called for such purpose.

Moreover, the mechanism which applies to the winding up of TasWater is set out in the *Corporations Act*. The methodology for the realisation of assets, the payment of liabilities and the ultimate distribution of surplus equity to the contributories (which is the status a shareholder has upon commencement of liquidation) is the subject of specific regulation at section 501 (in the case of a voluntary winding up) and section 488(2) (in the case of a compulsory winding up). Somewhat obviously, before a surplus is available for distribution, the liquidator is obliged to get in the assets, determine the liabilities, make priority payments and otherwise distribute dividends to creditors, in particular as provided for at sections 556 – 563AAA.

The foreshadowed intention of the State cuts across the fundamental rights enjoyed by shareholders pursuant to the *Corporations Act* and the statutory provisions which regulate the winding up of corporations. The intention will also most likely displace the regulatory and control mechanisms which govern the operation of TasWater in accordance with the *Corporations Act*.

In my view, there is a credible argument that, if the State enacts legislation to the effect which has been announced, it is likely to be inconsistent with one or more provisions of the *Corporations Act* and if it is, it will most likely be invalid by operation of section 109 of the Constitution.

These consequences flow from the very mechanism which was adopted by the Parliament of Tasmania in order to incorporate TasWater pursuant to the WSCA. Plainly, it was open to the Parliament to create a statutory corporation in accordance with that Act, and to provide for its ownership, its directors and its management. But Parliament did not do this. It simply required each council to form or to participate in the formation of, a corporation pursuant to the *Corporations Act*.

Once this statutory obligation was complied with, the corporation became subject to Federal legislation. More importantly for present purposes, the shareholders became entitled to all of the benefits provided for in the *Corporations Act*.

For these reasons, in my opinion, it is reasonably arguable that it is not open to the State to simply legislate in a manner which displaces the effect and operation of the *Corporations Act* upon TasWater, and its shareholders, for reasons similar to those which resulted in the High Court declaring the Bell Act invalid: in summary, because any such legislation would purport to create a

scheme whereby rights conferred by Commonwealth legislation *'are stripped of the characteristics ascribed to them*' including *'their existence, their quantification and their enforceability'*.[24] If that were to be the operation or effect of the intended State legislation, then there is clearly a basis for contending invalidity by reason of section 109 of the Constitution.

In expressing this preliminary opinion I have not overlooked the ability which the State has to legislate, conformably with section 5F of the *Corporations Act* and in a manner which declares further excluded matters, the focus of which is upon TasWater and the implementation of the intent of the State. However, in my view any such attempt would raise separate and problematic issues as to inconsistency with section 109 of the Constitution.

For example, if it is assumed that, the enabling legislation of the State contains a provision which displaces the *Corporations Act*, in whole or in relevant respects, for the purpose of making effective the expropriation scheme which is contemplated. If the entirety of the *Corporations Act* were to be excluded, then the legislation would simply declare that in relation to TasWater the *Corporations Act* ceases to apply from a particular date.

The flaw in this type of scheme is self-evident. The rights which are presently enjoyed exist because of incorporation pursuant to the *Corporations Act* and have accrued to the shareholders (and to TasWater) by reason of it. It may be open to the State to legislate prospectively and in a way whereby future rights are not acquired by the shareholders or the corporation pursuant to the *Corporations Act*. But it does not follow that it is open to the State to legislate in a way which retrospectively displaces rights which have accrued. For example, a shareholder cannot be forced to compulsorily transfer his or her shareholding, except where the compulsory acquisition provisions of chapter 6A apply, and in combination with section 1350.

As I have pointed out above, these provisions have never applied to TasWater. Thus the shareholders enjoy protected status in accordance with the *Corporations Act*. Any legislation which is now designed to displace those rights faces the (not inconsiderable) prospect of being invalid because of inconsistency with section 109. The point is a very simple one: If rights have accrued by reason of the operation of Federal legislation, then any State legislation the effect of which is to extinguish such rights, must operate inconsistently with the grant in the first place, and for this reason was inconsistent within the meaning of section 109.

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[24] *Bell Group –v- Western Australia* at [9].

Moreover, any attempt to first displace the application of the *Corporations Act*, in order to then divest it of its assets by transfer to a State controlled business entity, is likely to be viewed as a *'circuitous device'*[25] to indirectly avoid section 109, and for this reason would most likely be invalid. On its face, the *Corporations Act* so operates, and if State legislation were to be introduced so as to provide for a transfer of assets from TasWater, then relevantly in my opinion it would alter, impair or detract from the operative provisions of the Corporations Act, particularly in relation to the rights of shareholders, which I have set out above.

I return to the examples of the exercise of legislative power which might apply. I am of the opinion that in each of the four examples which I have set out above, there is a credible argument that any legislation which seeks to achieve one or more of these outcomes, may be invalid, as follows:

- The first mechanism is likely to be invalid because it operates inconsistently with the rights conferred upon the shareholders by the *Corporations Act*, and raises the question of direct inconsistency
- The second would most likely lead to indirect inconsistency in that, practically, the shareholders would be stripped of their ownership of the net assets
- The third raises a question of direct inconsistency with the statutory mechanisms which apply to the winding up of corporations and
- The fourth, if implemented, would require the directors to act inconsistently with a range of statutory obligations which bind them to, for example, exercise their powers and functions for the benefit of the corporation and to act in its best interests.[26]

Conclusions

My opinion, as contained in this letter, is that there is a possible basis on which the legislative scheme that is assumed to be contemplated by the State Government could be contended to be invalid.

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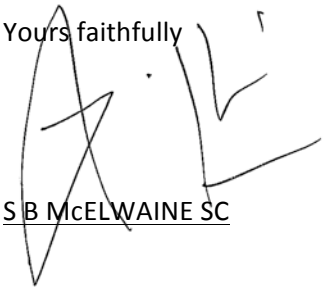
[25] *Bank of NSW –v- The Commonwealth* (1948) 76 CLR 1 at 349, Dixon J.

[26] Particularly, section 180 (care and diligence), 181 (good faith and the best interests of the corporation and proper purposes), 182 (use of position to gain an advantage for themselves, or someone else or to cause detriment to the corporation) and or 183 (misuse of corporate information, to cause detriment to it).

I note again that there is little currently known as to how the State Government intends to pursue a takeover of TasWater, and accordingly this advice is preliminary only and will need to be retested once further details are known.

Yours faithfully



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