SUBMISSION

To:	Standing Committee on Legislation
From:	Hugh McLernon representing WA Glendinning and Associates Pty Ltd ("WAG")
In RE:	The Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015 ("Bill")
Date:	4 October 2015

Introduction

1. This submission will deal primarily with the impact of the current provisions of the Bill upon the commercial and financial position of WAG and its shareholders if and when the Bill is passed into Law.

2. Reference is made to the "current" provisions of the Bill because it has already been substantially amended and future amendments are probable.

3. Some of the impacts of the Bill are common to all unsecured creditors while others are unique to WAG. While this submission does not deal with those common factors in any depth, I respectfully ask the Committee to consider, on WAG's behalf, the submissions of other unsecured creditors as they are likely to also impact on WAG.

4. In order to explain our position, It is necessary to outline part of the history surrounding the introduction of the Bill. I will try to do so as shortly as possible.

The essence of this submission

5. The State of Western Australia, through ICWA has been, and still is, a central commercial participant in the distribution of $1.7Bn between primarily the State and four other parties including WAG (there are numerous other smaller bondholders primarily outside of Australia. Each of the five major parties is keen to maximise their return. That maximisation can only occur at the expense of the other parties because the $1.7Bn is not sufficient to pay out all creditors 100 cents in the dollar. Apart from the size of the fund in dispute there is nothing out of the ordinary in this situation. It happens in everyday commercial dealings.

6. If the distribution is left to be dealt with according to the laws of Western Australia and the Commonwealth of Australia then ICWA is in danger of not receiving a material part of the distribution. This fact should properly be reflected in the amount ICWA is prepared to accept to allow the liquidation to proceed. To date, that has not occurred. This has come about because ICWA is, in fact, the State of Western Australia with all of the power that

status bestows. It was not prepared to compromise when it thought it had the legislative powers of the State at its disposal.

7. This state of affairs for ICWA has come about primarily through bad decisions made by then officers of ICWA and advisors to ICWA during the long and involved litigation funding process.

8. In order to counter the effects of this mismanagement on its legal rights to distribution, ICWA has prevailed upon the executive arm of Government to design, and then implement, a new law which will have the likely effect of maximising the distribution to ICWA at the expense of the other unsecured creditors.

9. It was initially thought, both by the executive and ICWA, that this new law would be a fait accompli. They believed that the Bill would become law by 30 June 2015 and would be implemented in the months following that date.

10. In order to assist the passage of the Bill into law, members of the executive and advisors to ICWA;

    a) have inaccurately insisted that the legislation is the only answer to "decades of further litigation"; and
    b) have attempted to demonise the other unsecured creditors and their advisors so that those observing the passage of the Bill will not be moved to oppose it.

11. As it transpired, the fait accompli was not in fact accomplished. The Bill is now parked while ICWA uses the looming presence of the Bill as leverage to maximise its return by "agreement" essentially between ICWA on the one hand and the other unsecured creditors on the other.

12. The Bill is an unnecessary breach of the rule of law which impacts unfairly on the unsecured creditors other than ICWA.

13. In time, it will come to be seen as the indicator of an increasing commercial risk in dealing with the sovereign State of Western Australia.

<u>WA Glendinning and Associates Pty Ltd</u>

14. WAG is a company incorporated in Western Australia on 15 September 1972.

15. Its current directors are myself, Mr Ben Coppin, Mr Stephen Spiers and Mr Wayne Bowen – all residents of Western Australia.

16. WAG was previously part of the family business of the late Mr Brian Coppin but now has only one asset – being a debt of $183M ("the Debt") owed to WAG by Bell Group Finance Pty Ltd (in liquidation) ("BGF"). The Debt is a legally due, enforceable and present

obligation of BGF. WAG has received acceptance of its proof from the liquidator and, in early May 2015, was expecting potential payout within a reasonable period of time (in insolvency terms, a reasonable time is about a year!)

The Debt

17. The Debt was originally owed by BGF to West Australian Newspapers Limited and Albany Advertiser Pty Ltd at a time when those companies had suffered substantial losses but were then making yearly profits. At that time, the effect of the taxation laws was that a company could not claim bad debts as losses unless the debtor company had been liquidated or the debt had been disposed of in some other way. At that time, all concerned, including BGF, West Australian Newspapers Limited and Albany Advertiser Pty Ltd, believed the Debt was uncollectable. In order to claim the losses arising out of that bad debt against profits being earned, West Australian Newspapers Limited and Albany Advertiser Pty Ltd sought to dispose of the Debt and did so to WAG on 26 February 1992 for a nominal amount.

18. In taking this step, these two companies exchanged the chance of payment of the Debt, or part of it, in favour of the acquisition of very large tax deductions. WAG, on the other hand, became the owner of the Debt and entitled to repayment, in whole or in part, depending upon the then precarious future of BGF or a distribution against the Debt from any future liquidator of BGF.

Original approach to SGIC (now ICWA)

19. During early 1991, McLernon Group Limited ("MGL") carried on business as, inter alia, a litigation funder. As the managing director of MGL, I observed the machinations occurring between the Bell Group of companies, the Bond Group of companies and the then Government of Western Australia and came to the conclusion that the securities provided by the Bell Group of companies to various banks in 1990 were likely to be overturned as constituting an undue preference to those banks, which had originally supplied credit on unsecured terms before taking security against various of the Bell Group assets.

20. During the course of my observation, I learnt that SGIC was a major creditor of companies within the Bell Group primarily as the holder of subordinated bonds issued by companies within the Group.

21. Between August and October 1991 I, and a legally trained employee of MGL, Mr Paul Edgar, prepared a proposal to present to SGIC which would have the effect of;

    a. alerting SGIC to the fact that the securities granted to the banks by the Bell Group companies were capable of being overturned; and
    b. that would return value to the Bell Group Companies – part of which might then flow through to SGIC as a creditor of those companies.

22. The written proposal was presented by me to the managing director and company solicitor of SGIC on 17 October 1991. Mr Edgar attended the presentation.

23. SGIC did not accept the proposal from MGL. I mention the work and presence of Mr Edgar only because, after leaving the employ of MGL in early 1992, he became the primary solicitor for ICWA from about 1994 in relation to the Bell Resources litigation funding transaction.

24. All of these events occurred prior to WAG becoming a creditor of BGF as set out above.

Expectation Pty Ltd takes a 50% interest in the Debt

25. After failing to interest SGIC in our proposal to pursue repayment of their bonds, I kept a watching brief over the unfolding saga enveloping the Bell Group of companies and the Bond Group of companies. I saw that BGF was placed into liquidation in March 1993. I attended a meeting of the unsecured creditors of The Bell Group Limited (in liquidation) on 6 February 1995 and noted that the liquidators were intending to pursue the banks in relation to the securities referred to in paragraphs 19 and 21 above and were then calling for financial support from unsecured creditors to enable that pursuit to occur.

26. At that meeting, I observed that Mr Edgar was present, acting as solicitor for SGIC.

27. Mr Edgar advised the meeting that SGIC was funding the Law Debenture Trust Company ("LDTC") which, in turn, was funding the liquidators to pursue the banks in relation to the security transactions. The ATO and Bell Group NV were also disclosed as funding creditors.

28. On about 11 October 1996, the company of which I was then the managing director (Expectation Pty Ltd) obtained a 50% interest in the Debt for an initial consideration of $20,000 and an undertaking from me that I would oversee the possibility of collection of the Debt through co-funding the liquidators in their pursuit of the banks. The other 50% was retained by members of the Coppin family.

29. Over the next year and a half or so, I was in regular contact with the liquidators, the funding creditors and their various advisors.

30. I was advised that the unsecured creditors who were funding the action (being SGIC (through LTDC), Bell Group NV and the Australian Taxation Office) had spent approximately $6M and expected to expend about $15M in due course.

31. As the then managing director of Expectation Pty Ltd, I knew that the company could provide to WAG its pro-rata share of the funding thought to be necessary to pursue the litigation against the banks. In addition, ICWA itself, and through the services of Mr Edgar, knew that I understood the factual and legal matters involved in the litigation and was ready, willing and able to provide pro-rata financial support to the liquidators.

32. Nevertheless, throughout that year and a half period, the liquidator and the funding creditors, with the assistance of their advisors, prevented WAG from becoming a funding creditor to the extent that I made a futile complaint to the Australian Securities and Investment Commission ("ASIC") regarding the conduct of the liquidator in refusing to countenance funding from WAG as an unsecured creditor of BGF. These events form the basis of WAG's primary argument in the section 564 proceedings that the funding creditors should have their return reduced to reflect the fact that not all unsecured creditors were given a proper opportunity to fund the proceedings.

The Litigation against the banks

33. The original writ against the banks was issued in 1995 and was ferociously defended by the bank syndicates through to judgement in 2008.

34. The solicitors and counsel involved in the litigation were those representing the liquidator (as Plaintiff) and those representing the banks (as Defendants).

35. WAG was not represented by either solicitors or counsel in that litigation and had no input into the litigation whatsoever.

36. After various appeals by the banking syndicates, a settlement was reached and approximately $1.7Bn was paid to the liquidator of the Bell Group companies. The funds were finally received by the liquidator in about June 2014.

37. That brought an end to the litigation against the banks. That litigation had yielded a judgement of $2.7Bn (after the Full Court appeal) and a settlement of $1.7Bn (after the banks lodged their appeal to the High Court).

38. No one could properly criticise any of the lawyers in the litigation for either the liquidator or the banks.

39. One could perhaps criticise the banks for not settling the litigation at a point where they could have done so for around $150M in 1996 but that was their choice. Certainly no rational criticism regarding the length of the proceedings could be levelled at the plaintiffs, their advisors, their funders or unsecured creditors. Litigation timing is governed by the nature of the case but primarily by the approach adopted by the defendants.

The liquidation of The Bell Group Companies

40. Once the litigation was concluded and out of the way and the settlement funds were received the liquidation process got fully underway.

41. It was then the liquidator's duty at law to determine the assets and liabilities of the various Bell Group companies and to determine the true debts owed to each of the unsecured creditors. In addition, the liquidator had the task of honouring his undertaking, made to

the funding creditors, to make application to the Supreme Court for orders under Section 564 of the Corporations Act in favour of those funding creditors.

42. Those proceedings were commenced by October 2014 and the liquidator lodged a comprehensive statement of issues, facts and circumstances with the Supreme Court in April 2015, setting the scene for the Court's adjudication on questions which would help the liquidator to determine how much of the $1.7Bn would be awarded to each of the funding creditors pursuant to Section 564 of the Corporations Law.

43. At the same time, the liquidator had prepared a computerised programme by which a rough estimate could be made of the amount likely to be due to each creditor under the multitude of different scenarios which came from the seven or eight major factors which impacted on the potential 564 award.

44. ICWA also prepared a lengthy statement of its issues, facts and circumstances it sought to rely upon as did BGNV. These statements were lodged with the Court in April 2015. The other parties have now provided their statements of issues, facts and circumstances to the Court.

45. These documents assisted the parties to crystalise the legal points which needed to be determined so as to enable the liquidator to proceed with the liquidation.

46. A short précis of the legal problems for ICWA which emerged from those statements is as follows;

    a. ICWA is not a creditor of either BGF or the Bell Group Limited. All of the bonds, in which ICWA has an interest, are in fact held by a trustee. The trustee is the creditor of both BGF and The Bell Group Limited.

    b. In any event, the interests of ICWA in all of the bonds are subordinated to the interests of other bondholders. Accordingly, all other bondholders must be paid out in full before any payment can be made to or for ICWA.

    c. ICWA came to the conclusion and/or was advised that it could arrange an amendment to the relevant trust deeds to remove its subordinated status.

    d. That could not in fact occur because the trust deeds provided that such amendments could only occur if they did not impact adversely on the interests of other bondholders and, of course, they did. To this day, the bonds held for ICWA remain subordinated. This means that ICWA is at the back of the distribution queue in relation to all of the bonds.

    e. It is the trustee for the bondholders that is entitled to payment under Section 564 of the Corporations Act because it was the trustee who funded the litigation.

f. ICWA provided its funds for the litigation not to the liquidator but to the trustee who then provided the funds to the liquidator.

g. The terms of the trust deed are such that, if a payment is made under Section 564, then it will be paid to the trustee and the trustee must satisfy all other Bondholder' claims before it can pay ICWA anything.

h. Presumably because ICWA or its advisors realised that there could be a serious problem with subordination, ICWA purchased an interest in an alleged $300M debt owed by The Bell Group Limited to a company called J N Taylor Holdings Limited. The purchase was at a few cents in the dollar of the face value of the debt.

i. It is probable that this $300M will not be admitted to proof by the liquidator and would not be properly claimable by ICWA.

j. In order to further improve its position as a creditor, ICWA entered into what became known as the Western Interstate transaction but the whole premise of that transaction may be vitiated by fraud committed by officers of the Bond Group of companies.

k. Despite this rocky base, ICWA decided to co-fund the litigation against the banks along with the Australian Taxation Office and Bell Group NV. Those other two entities were clearly creditors with unarguable claims.

l. When the Global Financial Crisis hit and the costs of the litigation were out of control, both ATO and BGNV elected not to continue funding but ICWA elected to do so in circumstances where BGNV continued with its entitlement to a major litigation funding fee even though it was no longer providing litigation funding. ICWA was paying for BGNV and was funding the ATO's contribution.

47. There is no doubt that there are arguments both ways on all of these matters and the position of ICWA may be stronger in some than in others but there is equally little doubt that ICWA had a hard, litigious road to overcome if it was to receive a major portion of the $1.7Bn of litigation proceeds.

<u>Other Litigation after the bank Settlement</u>

48. Since the final settlement with the banks and payment by them of the settlement sum the only major litigation has been issued by the liquidator and ICWA, being the applications to the Supreme Court for orders in favour of the funding creditors under section 564 of the corporations act. In attempting to finally establish its Proof of Debt WAG appealed to the Supreme Court against a ruling by the liquidator that WAG was not entitled to, about $19M in interest which instead was likely to go to West Australian Newspapers Limited.

Shortly after the institution of the appeal, the liquidator, WAG and WA Newspapers Limited settled the matter by an apportionment between WAG and West Australian Newspapers Limited which satisfied all parties.

49. BGNV instituted proceedings in London in an attempt to ensure that LDTC did not change the terms of the various trust deeds to remove the subordinated status of the bonds held by ICWA. At an interlocutory hearing the English Court stayed that action and referred it to the West Australian courts.

50. ICWA also issued an appeal against the ruling of the liquidator regarding the composition of the committee of inspection appointed to the insolvent estate of BGF. No further steps have been taken by ICWA in relation to those proceedings.

51. Prior to the mediation no proceedings had been issued by either the Australian Taxation Office or BG (UK) Limited (in liquidation)(the other two major unsecured creditors).

52. It is reasonable to say that the only litigation in existence at the time of the mediation was the 564 application which had been issued by the liquidator pursuant to undertakings to do so given to ICWA, BGNV and the Australian Taxation Office.

53. Prior to the issue of those Section 564 proceedings all of the unsecured creditors were aware of the problems besetting such an application and had agreed to a major mediation with the hope of avoiding a formal hearing on the 564 application.

The Original Mediation

54. All of the parties agreed to attend a mediation in Singapore on 12 and 13 May 2015.

55. Prior to so attending, all of the parties prepared position papers and exchanged them with the other unsecured creditors and the liquidator.

56. Mr Roger Gyles QC (retired Federal Court Judge) had agreed to act as mediator and a mediation agreement between all the parties had been settled and executed.

57. It is not possible to say now whether the mediation would have resulted in a settlement. The two creditors with the largest claim (ICWA and BGNV) were clearly at loggerheads regarding their entitlement and there were subsidiary disputes between those two unsecured creditors and other unsecured creditors. The point is however, that all of the unsecured creditors had undertaken to attend in Singapore and to act reasonably in attempting to mediate an outcome of the various disputes without the necessity for further litigation.

58. WAG had prepared diligently for the mediation and had attended conferences with Mr Gyles regarding the position they would adopt during those proceedings. Mr Gyles also met separately with all of the other unsecured creditors and the liquidator.

59. The mediation was to be attended by unsecured creditors and their advisors from Australia, as well as from the United Kingdom and the Netherlands.

60. By 5 May 2015 a lot of work, expense and Court time had been taken up with the preparation for the 564 application and the mediation about to take place in Singapore.

61. All of that came to an abrupt halt on 5 May 2015.

The Bill

62. On the morning of 5 May 2015 a director of WAG was alerted to a media statement which had been released by the Treasurer headed "New Legislation to finalise Bell Group Case".

63. Prior to the issue of that press release no officer or employee of WAG had any idea that the State intended to introduce and, if possible, implement this litigation cutting across, as it did, both the pending 564 application in the Supreme Court and the Mediation which was about to take place in Singapore.

64. On instructions from WAG, Counsel for WAG contacted the State Solicitor and asked for an explanation. He was informed that the State Solicitor was unable to comment but despite the content of the release, expected the mediation to continue in Singapore.

65. After consulting with other unsecured creditors and the mediator, WAG determined that until it understood the effect of the Bill in toto and the ramifications arising from the Bill for WAG, none of its directors or advisors would attend the mediation.

66. A similar stance was taken by both the ATO and BGNV.

67. ICWA proceeded with a "show mediation" at which the only other unsecured creditor was BG (UK), the liquidator of which, and her advisors, had already encamped for Singapore.

68. After the failed mediation and prior to the Singapore mediation the State Solicitor introduced a new strategy by advising the unsecured creditors that ICWA was " prepared to recommend" to the Government that an amendment should be made to the Bill whereby any agreement reached at the Singapore mediation could be included as a schedule and the Act could be amended to simply require the authority to pay those funds forthwith.

69. That proposal had the opposite effect to that expected by the State Solicitor, at least on WAG, and, in my observation upon the other unsecured creditors, other than ICWA. It indicated that the Bill was what it appeared to be, a methodology for leverage by the State against the other unsecured creditors. It indicated to the unsecured creditors that the executive arm of Government and this commercial arm were acting in unison to exert pressure on the other unsecured creditors to agree to something they were not willing to freely accept.

The Treasurer's public campaign

70. During the two months after the introduction of the Bill into the Legislative Assembly, the Treasurer, assisted by the Managing Director of ICWA, carried out an organised campaign in the Parliament and in the public arena – attempting to paint the following picture;

    a. that the bill was the only possible alternative to decades of further litigation; and
    b. for one reason or another, most of the unsecured creditors, other than ICWA, were not morally entitled to any particular consideration in the distribution of the $1.7B.

71. I have attached at Schedule 1,2, and 3 a copy of the major comments made by the Treasurer.

72. The commentary in relation to WAG was ill informed, inaccurate and unfair.

73. The Treasurer was requested by the solicitors for WAG to withdraw his comments regarding WAG, the solicitors for WAG and legal practitioners in general, but he declined to do so. I have attached that correspondence at schedules 4 and 5.

74. This commentary was occurring while the directors of WAG were obtaining legal advice in relation to the operation of what was then Section 47 of the Bill so that they could respond publicly to the statements being made about WAG and its solicitors.

An alternative to litigation

75. WAG has never courted and does not wish now to be involved in litigation regarding the Debt.

76. In common with the other unsecured creditors, other than ICWA, WAG had no prior notice or knowledge of the proposed Bill and has never been approached by ICWA or its representatives to discuss any alternatives to the litigation issued by ICWA and the liquidator referred to in paragraphs 41 to 45 inclusive above. One obviously workable alternative is to be found in the provisions of the Commercial Arbitration Act 2012 – the provisions of which could be modified by appropriate legislation.

77. I have attached, at Schedule 6, a copy of a short advisory note from counsel retained by WAG, Mr Steven Penglis, in this regard.

The Singapore mediation

78. Despite some misgivings about the likely stance to be adopted by the State Solicitor and ICWA at the mediation, WAG agreed nevertheless to travel to Singapore to attend a two day mediation in mid June 2015 in an attempt to settle the claims of the five unsecured creditors.

79. Only one of the five unsecured creditors attended the mediation backed by the legislative power of the State of Western Australia. ICWA knew it had that power and it was prepared to use it in conjunction with the State Solicitor.

80. In a 10 minute session during the mediation where the State Solicitor and ICWA met directly with the WAG representatives, the State Solicitor opened the meeting with the statement "We have not yet decided which of you we are going to throw under the bus."

81. I remonstrated with the State Solicitor regarding the inappropriateness of that statement and he did not proceed with it. It did, nevertheless, demonstrate the hubris which emerges when one party to a mediation has the legislative power of the State behind it. No settlement emerged from the mediation or has emerged thereafter. There appears to be very little, if any, contact being made between the two main players ICWA and BGNV.

<u>The Treasurer discloses ICWA's negotiating position</u>

82. After the mediation , the Treasurer informed the Parliament that ICWA considered an appropriate settlement would be as follows;

    a. to ICWA $700M
    b. to ATO $430M
    c. to BGNV $480M
    d. to WAG $50M
    e. to BG (UK) $55M

83. After reading the transcript of the Treasurer's remarks, I instructed the solicitors for WAG to write an open offer by WAG to all of the other unsecured creditors.

84. That letter set out a settlement on the following basis;

    a. to ICWA $650M
    b. to ATO $380M
    c. to BGNV $520M
    d. to WAG $100M
    e. to BG (UK) $100M

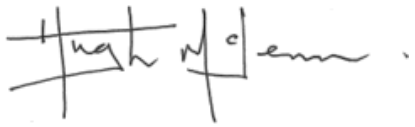
85. I attach at Schedule 7 a copy of that open offer - it has not been accepted and nothing has been heard from ICWA.

<u>Conclusion</u>

86. All of the unsecured creditors (probably including ICWA) hold high level legal opinions that the Bill if it becomes law is subject to being overthrown in the High Court of Australia because provisions of it are inconsistent with laws of the Commonwealth.

87. Attached as Schedule 8 is a short summary of the more important parts of the current Bill.

88. They relate to provisions which taken together represent legislation of a type never before seen in the Parliament of Western Australia.



Hugh McLernon
Director
WA Glendinning and Associates PTY LTD

Government of **Western Australia**
Department of **the Premier and Cabinet**

Hon Mike Nahan MLA
Treasurer

5/5/15

MEDIA STATEMENT

New legislation to finalise Bell Group case

The Western Australian Government will introduce legislation into State Parliament to finalise the long-running Bell Group legal case.

Treasurer Mike Nahan said he would introduce the Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015 into Parliament to bring an end to one of Australia's longest running legal cases.

The Bell Group companies collapsed in the early 1990s, leaving creditors to recover money from 20 Australian and international banks. After almost 20 years of litigation principally financed by the Insurance Commission of Western Australia (ICWA), settlement between the liquidators of Bell and the banks was finalised in June 2014.

"ICWA has advanced the liquidator about $200 million since 1995 before the final settlement was reached with the banks," Dr Nahan said.

Litigation has recommenced in Western Australia and the United Kingdom between the remaining creditors of the Bell Group to determine how the $1.7 billion settlement will be apportioned.

"We have seen this case already consume 20 years of court and public resources and there is limited confidence there will be a timely conclusion that does not involve further complex and protracted litigation across multiple jurisdictions," the Treasurer said.

"We do not intend to allow this litigation to consume a third decade, as well as a great deal more time, money, and the precious limited resources of this State."

There are now effectively only four major creditors of Bell: ICWA, the Australian Tax Office, and two parties which are or which represent professional litigation funders or distressed asset speculators.

"Introducing this legislation will inject some certainty into the timing of the distribution of funds to creditors," Dr Nahan said.

Fact File

- **More information will be provided in the Explanatory Memorandum and Second Reading speech on May 6, 2015**

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TRANSCRIPT OF PROCEEDINGS

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TRANSCRIPT OF RADIO INTERVIEW

INTERVIEW BETWEEN:

MIKE NAHAN, TREASURER OF WESTERN AUSTRALIA and JOHN McGLUE, 'DRIVE' HOST

CONDUCTED AT DRIVE RADIO, PERTH

FRIDAY, 22 MAY 2015

MR McGLUE: I've got a story to tell you. Two and a half weeks ago, 5 May, it was a Tuesday when an extraordinary media release was issued by the state government. It declared it was introducing legislation to finalise commercial litigation that has been running in Western Australia for 20 years, and at which the WA government is deeply involved. It involves a company called Bell Group. It was once controlled by Robert Holmes a Court, then Alan Bond controlled, but it failed in a big way and it ended in a monster legal case, with creditors squabbling over the money.

They had a big blue over who had right to the cash that was left and 20 years on an award of $1.7 billion, $1.7 billion, in favour of the creditors against the banks of the company, that was a settlement effectively after a judgment was awarded. There is now a question about how the winnings get divvyed up, and there's a lot of them, and how much those who paid for the legal action on the way through, how much they deserve out of the divvying up. That is where the WA government comes in because it has kicked in around $200 million to the legal fight on the way through, and that's happened through the Insurance Commission of WA.

With the legal process under way to decide who is going to get what, the government is not taking any chances, it has decided to pass a law that allows it and not the courts to decide who gets the cash. The bill also says that anybody who tries to interfere with its objectives could be goaled, which sounds pretty brutal. Treasurer Mike Nahan has carriage of the bill and he joins me. Treasurer, welcome to Drive.

MR NAHAN: Thanks, John.

MR McGLUE: Why have you done this?

MR NAHAN: Your summary is accurate. It started out back in the 80s in the WA Inc days. The SGIO kicked in $312 million at the direction of the government to buy into Bell Group. Bell Group went into liquidation and for 20 years there was litigation suing essentially a whole series of banks that had rights to the Bell Group. It ended in a settlement in 2013, where the banks put $1.7 billion into an account. All along that way the government, through the ICWA, Insurance Corporation of WA, paid most of the litigation costs, all told the state has invested over $500 million into this process over 20 years.

In fact, I know lawyers who have spent their whole career of 20 years on this case alone. It was the most extensive and expensive case in Western Australian history and one of the largest in Australian history.

MR McGLUE: Okay, but it's on the home straight now, so why have you intervened?

MR NAHAN: No, that would be nice. There has been since 2013 a pool of money to be distributed and all we've seen is one court case after another and it appears that this litigation is going to be ongoing. If nothing is done you can see litigation for another decade or more going on. It isn't just the major creditors, all the moms and pops are all gone, all the small creditors are all gone, there are five parties involved in it.

The Insurance Corporation is the largest and is paying almost all the bills, the ATO, the Australian Tax Office, and then there's a number of groups that bought distressed debt some years ago, who are professional litigants and who are stretching this on through litigation in the Australian courts, in the British courts, in the courts all around the world.

MR McGLUE: Isn't that what happens though, Mike Nahan, is that if somebody takes a legal action the matter stays in the courts? What you are doing now is saying, "We don't want to wait for the courts to go through their process. I'm not going to rely on the outcome of the court process. We are going to intervene and legislate because we're the government and we're basically going to usurp the legal process." Just tell me this: on what principle is your decision based to do that?

MR NAHAN: Let me describe what we're doing, let's make it sure. The people who bought distressed debt, one of them bought it for $175, who hasn't been funding the litigation, who are using the courts around the world to leverage and they're demanding $200 million in exchange, okay. There's another one, I don't know how much his debt is, but bought it and one of them did put some investments in, he's a Dutch doctor who is a litigant and buys distressed debts and litigates to the extent to use the courts to push people off and waste a large amount of money and have their opponents give up.

They did invest about $22 million in the 90s, now they're demanding $900 million. If we did nothing it would go on for years, we would probably be left with nothing. If we do not fund this we will be left with nothing. The law is not perfect. The court process is expensive. People can use this, particularly if we, the ICWA, is paying all the bills, they will drain us until there's nothing left.

MR McGLUE: What is the principle on which you are making this decision to intervene and usurp a legitimate legal process.

MR NAHAN: It is a legal process, whether it's legitimate, that's the question.

MR McGLUE: It has never been declared as not being legitimate.

MR NAHAN: What we have done is we are for the purpose of the Corporations Act, which is the national Corporations Act of 2001, those are powers given to the Commonwealth by the state. The process we're pursuing is we're for the purposes of Bell Group in Western Australia, we're going to bring the Corporations Act back into state jurisdiction. We're going to through an act, we're going to take the total of $1.7 billion, put it into a fund, we're going to appoint a group to look through all the demands and liabilities and expenditure and make an appropriation, allocate that $1.7 billion equitably across all the five claimants.

Rather than going on and spending another decade trawling through what was done by the Bell Group back in the 1980s, I mean the Bell Group, they're spending on a whole range of processes going through what happened in the 1980s, about both the actions of the Bell Group. If you remember it was owned by Holmes a Court who had a tendency to have a very expensive spire network of investments and interrelationships and it has taken a huge amount of time and keeping lawyers employed, but the purpose of this act is through the powers of the Company Act to take it and settle the case now equitably, considering all the expenditures and rights of the various five participants who remain in the case.

MR McGLUE: It's 14 after 4 on Drive. The treasurer Mike Nahan is my guest. We're talking about the legislation the government has introduced into state parliament to tidy up and to accelerate the end of the Bell Group litigation. It has been around, as the treasurers says, for 20 years. It stems back to the WA Inc years, which many of you I reckon probably have never heard of, but it was government and business getting into trouble in the late 1980s and this is one of the postscripts to all of that era.

I've got to say, treasurer, the legal affairs editor of The Australian wrote today that your actions here is tantamount to destroying legal rights and might be expected in Myanmar or Fiji at the height of that country's military dictatorship, that's how he described it. How does that sit with you?

MR NAHAN: Colourful and might sell a newspaper, but absurd. Again, this is a case that has been going 20 years and is being pursued, funded by us the taxpayers through ICWA, and has been for 20 years. We've invested $500 million into it. We secured a settlement from the banks of 1.7 and the professional litigants who are using it, employing a lot of lawyers, who I am not surprised that a journalist who relates often to lawyers have some complaints about this. It is a radical move - - -

MR McGLUE: Hang on, you guys have been paying the lawyers more than $200 million - - -

MR NAHAN: Yes, otherwise - - -

MR McGLUE: - - - so you've described it a lawyers' picnic, you have been the one supplying the food mostly.

MR NAHAN: Yes, we have and we got a settlement of 1.7 billion too, otherwise the money would have gone somewhere else.

MR McGLUE: A final question for you, treasurer. I've known you a long time, you're a classic free market guy, a liberal in the real sense of the word.

MR NAHAN: Yes.

MR McGLUE: You're a free market guy, so you're intervening now in a longstanding properly constituted and conducted legal process, because the government is unhappy about the pace of it and the fact that the outcome is uncertain for the government.

MR NAHAN: Yes, it's going through proper processes, but people with large piles of money behind them are pursuing litigation to wear the process out and exploit it, to extenuate it, they have done it for 20 years and they plan to do it for 10 more years, dissipate the $1.7 billion that's in there and hope they get a scrap. They only put in a few million dollars, in one case $175, and are using and distorting the legal process to make hundreds of millions of dollars. It's time to say this is enough and let's stop it.

MR McGLUE: My point to you is, it's the free market.

MR NAHAN: No, this is - - -

MR McGLUE: You've always upheld the virtues of the free market - - -

MR NAHAN: This is nothing about markets, John. This is nothing about markets.

MR McGLUE: - - - and now you're doing something different.

MR NAHAN: This is a distorted legal system. There's nothing about the markets here. The law is the best we have often, they're not perfect, there are problems here with professional litigants from around the world that can use the power of lawyers to distort it and move the issues around the world from Dutch Antilles, to London, to Singapore, to Perth, to the High Court and stretch it out, dissipate the money. Their whole purpose is to keep the litigation going so we can walk away and they can have free pickings of the pile of money, that's the purpose.

This is a distorted system and the purpose of the bill is to put a stop to it and put an allocation of funding fairly and effectively to all the participants, and not waste another 20 years and billions of dollars feeding a legal frenzy.

MR McGLUE: It's good to talk with you this afternoon. Thank you so much for that explanation.

MR NAHAN: Thanks, John.

MR McGLUE: That is the treasurer of Western Australia, Mike Nahan.

END OF INTERVIEW

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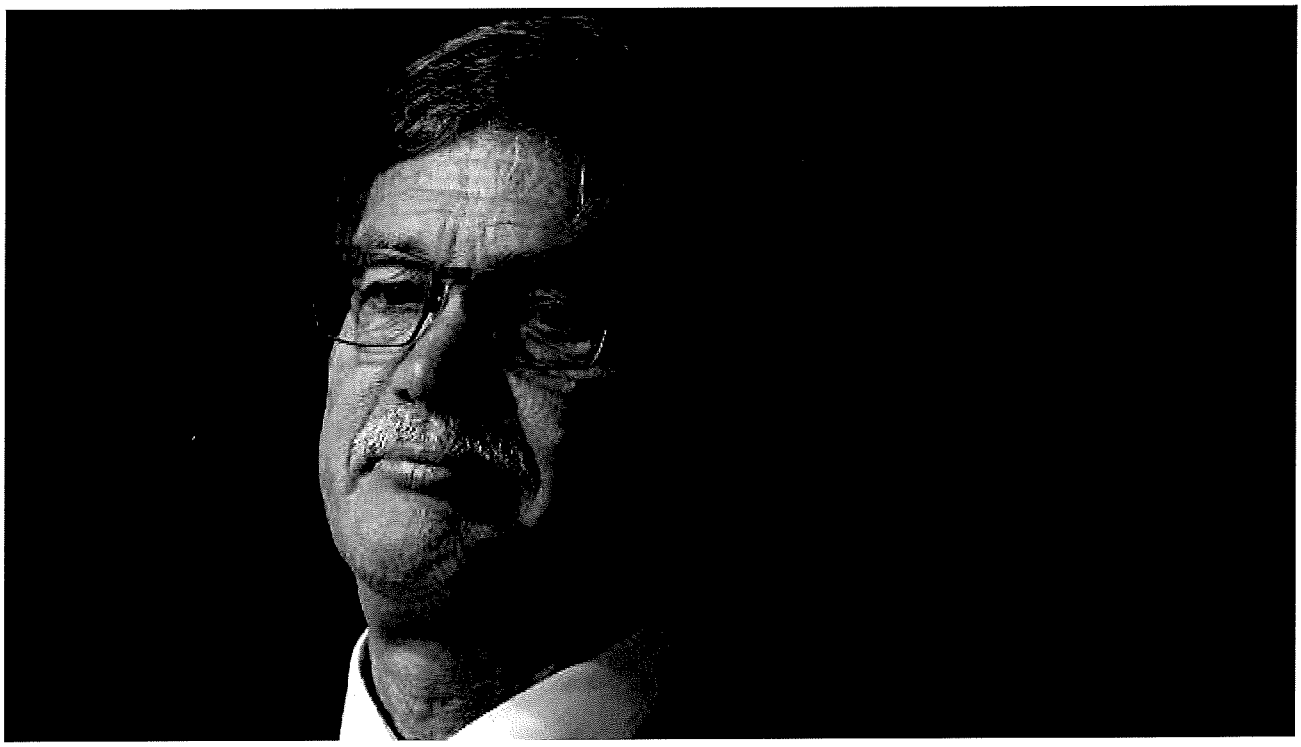
WA News

WA Treasurer Mike Nahan dismisses legal community's concerns about legislation to finalise Bell Group case

June 4, 2015 10:43am

KATE CAMPBELL, LEGAL AFFAIRS REPORTER PerthNow



Treasurer Mike Nahan says the Bell Group legislation will stop the gravy train that the legal community has ridden for 20 years. Picture: File image

WA Treasurer Mike Nahan has rejected criticism of legislation to put an end to the long-running Bell Group legal saga, saying the government was "stopping the gravy train that the legal community has ridden for 20 years".

The Australian and WA bar associations issued a joint statement on Thursday, attacking the legislation – introduced into WA Parliament last month – and raising fears it will "erode the rule of law".

The laws will decide the distribution of the $1.7 billion settlement awarded to creditors after a long legal battle following the collapse of Alan Bond's Bell Group in the 1990s.

The legal community's criticisms come the same week as it was revealed that Mr Bond is on life support in a critical condition after undergoing heart surgery.

The Bell Group liquidator and banks agreed to the settlement in 2013 and finalised it last year. But that did not stop subsequent litigation about the pool of funds from continuing.

The bar association aired concerns about four aspects of the new laws – stopping current applicable corporations legislation from applying to the Bell case, transferring power from the courts to the government and imposing a retrospective alteration.

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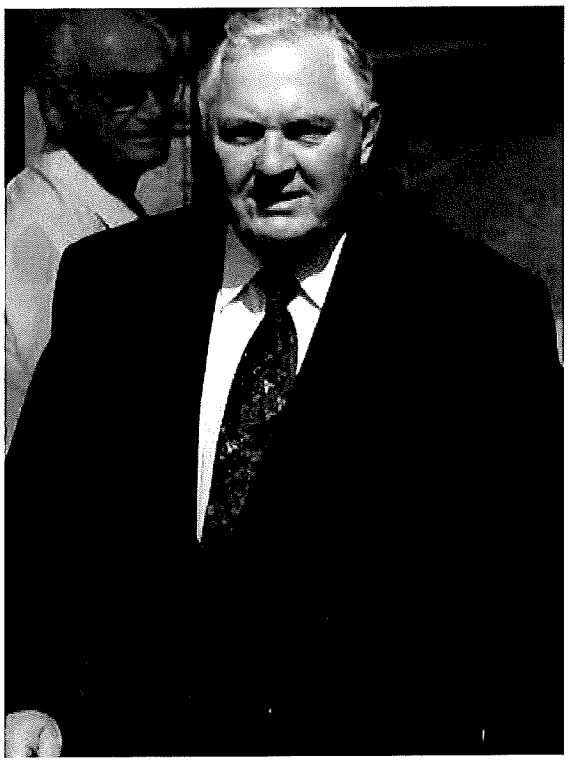
They are also worried that the Bill could criminalise any legal challenge to its validity, with significant penalties of a $200,000 fine and five years' jail.

"It represents the overturning of existing rights and the bypassing of established legislation and the position of the courts," the associations' statement read.

"Rather, the Bill replaces them by executive processes which erode the rule of law and are conducted without transparency and without the protections which the law currently provides."



Alan Bond pictured at a 1996 court appearance over fraud offences. Picture: File image

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Dr Nahan said it was "disappointing" the WA Bar Association did not see the "unique and intractable" need for intervention in the Bell case "to bring and end to 20 years of legal and litigation costs that couldn't deliver an outcome."

"All creditors are facing further decades of litigation and this intractable problem only has a solution in legislation. This is the only way out. The Bill means creditors will get paid soon," he said.

"Suggestions that the Bill is eroding the rule of law are misplaced. The Bill uses existing provisions of the Commonwealth's Corporations Act which preserves the power of State Parliaments to pass laws displacing the operation of the Act, in particular for company insolvencies."

Dr Nahan conceded the Bill might not be popular for some lawyers, who have racked up more than $500 million in legal costs without payments being made to creditors.

"We are stopping the gravy train that the legal community has ridden for 20 years," he said.

"The WA Bar Association and the legal fraternity in general have benefited by $200 million by opposing the Bill as this is the amount WA taxpayers have footed to date to fund the litigation. This matter should be wound up and the money returned to taxpayers and creditors in years and not decades."

The case, which started in 1995, involved loans worth $265 million to Mr Bond's former Bell group of companies. It became Australia's longest and most expensive commercial litigation case.

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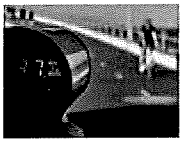
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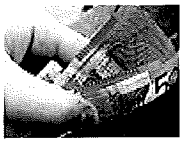
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(4)

HARDY•BOWEN

LAWYERS

Our Ref: **MPB:JTS:140125**
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18 June 2015

Dr Mike Nahan MLA
13th Floor
Dumas House
2 Havelock Street
West Perth WA 6005

Dear Dr Nahan

Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015

1. We write to you in your parliamentary capacity in respect of comments you have made as Treasurer of the Western Australian government regarding the Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015 (**Bill**).

2. We act for W.A. Glendinning & Associates Pty Ltd (**WAG**), a long time creditor of the Bell Group Finance Pty Ltd (in liquidation) (**BGF**), with an admitted proof of debt of $183,310,909.04 (**Debt**).

3. We refer to some of your recent statements in respect of Bill detailed below:

   (a) Media Statement 'New Legislation to Finalise Bell Group Case' dated 5 May 2015 (**Media Statement**);

   (b) ABC Drive interview with John McGlue dated 22 May 2015 (**Interview**); and

   (c) PerthNow article 'WA Treasurer Mike Nahan dismisses legal community's concerns about legislation to finalise Bell Group case' dated 4 June 2015 (**Article**).

4. In the course of those recent statements, you have made a number of inaccurate and misleading statements and allegations against WAG, its officers, its lawyers and lawyers in general, which we set out and respond to below:

   (a) <u>From the Media Statement</u>

   "*There are now effectively only four major creditors of Bell – ICWA, The Australian Tax Office and two parties which are or which represent professional litigation funders or distressed asset speculators.*"

   <u>Response</u>

It is not correct to say that there are only four major creditors. There are five major creditors including the liquidator of Bell Group (UK) Holdings Limited (in liquidation) (**BG (UK)**) who has claims for $55M and circa $300M. The $55M claim relates to monies currently held on trust by the liquidator for BG (UK) and the $300M is a claim in relation to monies taken from a subsidiary of BG (UK) in the most unusual and suspicious of circumstances. Just why the Government has seen fit to take away $55M from the beneficiary of a trust is a mystery to all reasonable observers but, no doubt, especially to the liquidator of BG (UK). None of this has been explained by any of your public statements.

WAG is not and does not represent a professional litigation funder and is not a distressed asset speculator. WAG is an Australian proprietary company with a sole asset being the Debt.

We assume that you are drawing the public's attention to the fact that Hugh McLernon, a director of IMF Bentham Limited (**IMF**), a well known litigation funding company, is also a director of WAG. There is no relationship (beyond that common directorship) between IMF and WAG and your attempts to insinuate such a relationship are regrettable. Moreover, your negative portrayal of professional litigation funding is myopic, given that this is exactly the role undertaken by the Insurance Commission of Western Australia (**ICWA**) in the Bell Group litigation.

(b) From the Media Statement

"We do not intend to allow this litigation to consume a third decade, as well as a great deal more time, money and precious limited resources of this State."

Response

You correctly refer to June 2014 as the date upon which the settlement in this matter was finalised between the liquidator and the banks. You fail to make it clear that not all of the creditors were parties to that litigation and that none of them (other than ICWA) had any control over the course of the litigation. The whole thrust of your statement, however, is to falsely give the impression that the creditors (other than ICWA) were not only involved, but were also responsible for the delays, in the litigation. What you have repeatedly said publicly since introducing the Bill has sought to foster a false belief in the minds of others that WAG is one of the parties responsible for the time taken up by the Bell Group litigation.

(c) From the Interview

"There has been since 2013 a pool of money to be distributed and all we've seen is one court case after another and it appears that this litigation is going to be ongoing, if nothing is done you can see litigation for another decade or more going on."

Response

As you said in the Media Statement, the funds were actually deposited with the liquidator in June 2014. In the ensuing eleven months, the following litigation was commenced in Australia:

(i) the liquidator made application to the Supreme Court of Western Australia for an order in favour of ICWA and others under Section 564 of the Corporations Act for a payment to be made to those parties in light of the financial support they gave to the litigation against the banks (COR 146 of 2014) issued on 4 August 2014;

(ii) ICWA commenced proceedings to put before the Supreme Court a number of questions in relation to which it sought resolution so as to improve its position in any distribution of the funds (COR 202 and 208 of 2014);

(iii) ICWA commenced proceedings in the Supreme Court to achieve membership of the committee of inspection of Bell Group Finance Pty Ltd (in liquidation) (COR 179 of 2014) issued on 15 September 2014; and

(iv) the liquidator made application for the removal of the Bell Group Limited liquidator (COR 122 of 2014). This matter was filed on 25 June 2014 and finalised on 21 August 2014.

(v) WAG commenced proceedings to overturn the decision of the liquidator not to admit circa $19.3M of its claim (COR 162 of 2014). This matter was filed on 25 August 2014 and finalised on 9 December 2014.

(vi) the liquidator made application for adjudication on a question of conflict (COR185 of 2014). The application was filed on 24 September 2014 and consent orders were filed on 23 October 2014.

As can be seen, all of the material litigation issued and remaining outstanding in Australia since receipt of the $1.7B was issued by ICWA or the liquidator.

In any event, there is no credible basis upon which to infer that the litigation in respect of the distributions to Bell Group creditors will consume a "*decade or more*" of court time.

Furthermore, to imply that this justifies the State intervening in the manner proposed by the Bill is entirely misguided. The Bill not only imposes a State appointed body as the adjudicator for liquidation distributions (in a matter in which a State owned body is a major creditor with a disputed claim), but also, and most significantly, the legal basis upon which the disputes will be determined.

To imply that such a draconian approach is a necessary response to a perceived risk of creditors exercising their legal rights under the laws of this State and the Commonwealth is simply not credible.

Dr Mike Nahan MLA
Treasurer of Western Australia

18 June 2015

(d) From the Interview

"There's a number of groups that bought distressed debt some years ago, who are professional litigants and who are stretching this on through litigation in the Australian courts, in the British courts, in the courts all around the world."

Response

In addition to the hyperbole involved in "the courts all around the world", the balance of the quote is also completely inaccurate in relation to WAG. WAG took no part in the Bell Group litigation and did not appoint solicitors and counsel until 28 November 2013. WAG is, by no stretch of anyone's imagination, a "professional litigant" and it is certainly not stretching out the litigation against the banks through the Australian courts, the British courts or the courts all around the world.

Your reference to the "British Courts" is presumably a reference to the matter of Plaza BV versus the Law Debenture Trust Corporation plc which was issued in June 2014 and stayed in favour of the jurisdiction of the West Australian courts on 16 January 2015.

The only outstanding litigation at the time of the introduction by you of the Bill was thus that issued by either ICWA or the liquidator within the preceding 9 months.

(e) From the Interview

"The people who bought distressed debt, one of them bought it for $175, who hasn't been funding the litigation, who are using the courts around the world to leverage and they're demanding $200M in exchange, OK"

Response

That is clearly and unequivocally a reference to WAG and it is completely and unequivocally untrue. In all fairness, it must be withdrawn. It is wrong and/or misleading in at least the following particulars:

(i) WAG made long and concerted efforts to become a co-funder of the Bell Group litigation with ICWA, the Australian Tax Office (**ATO**) and Bell Group N.V. (in liquidation) (**BGNV**). WAG was repulsed in those endeavours after taking the matter as far as complaining to the Australian Securities and Investments Commission about the conduct of the liquidator in refusing to deal with its request to become a funder. The existing funders, including ICWA, actively opposed funding from WAG;

(ii) WAG is not using courts around the world to leverage a result for itself; and

(iii) WAG has never demanded $200M in exchange for that leverage.

(f) From the Interview

"If we did nothing it would go on for years, we would probably be left with nothing. If we do not fund this we will be left with nothing. The law is not perfect. The court process is expensive. People can use this, particularly if we, the ICWA, is paying all the bills, they will drain us until there's nothing left."

Response

Again, most of the content of this passage is inaccurate and/or incomplete as follows:

(i) At the time the Bill was introduced by you, the creditors were not faced with a binary choice between the Bill and years of litigation. The Bill was introduced as the creditors were about to assemble for a well prepared mediation in Singapore. The Bill could and should have been held off until after the mediation failed – if it did fail;

(ii) ICWA would be left with nothing if, and only if, it was entitled to nothing. There is a very strong argument that ICWA is not entitled to any payment on its bonds because they are totally subordinated to the claims of all other creditors. In addition, ICWA is not entitled to any payment in relation to the JN Taylor debt (purchased by ICWA at the time of its funding for cents in the dollar) and ICWA is clearly entitled to no payment in relation to the Western Interstate transaction. The only likely payment to ICWA in respect of BGF would arise from its funding of the litigation. In that regard, it is no different to any other litigation funder; and

(iii) It is fatuous to suggest that ICWA would be the only party paying for the court processes that have been put in place since the formal liquidation began. Each party will pay their own legal costs and those who succeed will be repaid those costs. Thus, ICWA will be the only party paying legal costs if it is unsuccessful. ICWA will not be drained unless its claims are totally, or in the main part, without foundation.

(g) From the Interview

"It is a legal process, whether it's legitimate, that's the question."

Response

Our client and we consider it to be irresponsible of you to have called into question the legal system in Western Australia – especially when that call had been made in relation to litigation issued by ICWA and the liquidator.

(h) From the Interview

"But people with large piles of money behind them are pursuing litigation to wear the process out and exploit it, to extenuate it, they have done it for 20 years and they plan to do it for 10 years more, dissipate the $1.7B that's in there and hope they get a scrap. They only put in a few million dollars, in one case, $175, and are using and distorting the legal process to make hundreds of millions of dollars. It's time to say this is enough and let's stop it."

Response

It is difficult to know where to start in relation to this passage. The major points, however, are as follows:

(i) your reference to "$175" clearly means that you are including WAG in your commentary;

(ii) it is untrue for you to say that WAG is pursuing litigation to wear the process out, to exploit the process or to extenuate it (WAG has no litigation pending and was completely vindicated in the litigation it undertook against the liquidator);

(iii) as pointed out above, neither WAG nor any of its legal advisors have been involved in litigation "for 20 years". On the contrary, they have only been involved for a very short period of time;

(iv) WAG has a simple debt and, pursuant to the law, it has proved that debt to the satisfaction of the liquidator such that he has admitted it to proof in the liquidation. That is all that WAG has done – every step has been done according to law and does not deserve your opprobrium. You are criticising WAG for exercising its legal rights;

(v) WAG does not intend to dissipate the $1.7B or any part of it. It simply seeks to obtain its legal entitlement – whatever that might be according to law;

(vi) We do not understand your reference to "hope they get a scrap". WAG is not looking for a scrap – it is looking for payment of its due entitlement as quickly as possible. That is why it agreed (along with ICWA and the other creditors) to the initial mediation; and

(vii) it is untrue to say that either WAG or its legal advisors are "distorting the legal process to make hundreds of millions of dollars". That passage seems to be highly defamatory of WAG, its officers and the legal professionals involved in the WAG claim.

(i) From the Interview

"This is a distorted system and the purpose of the bill is to put a stop to it and put an allocation of funding fairly and effectively to all the participants, and not waste another 20 years and billions of dollars feeding a legal frenzy."

Response

The current lawyers for ICWA, BGNV and ATO have been acting for their clients for many years, advising them in relation to the litigation funding for the actions against the banks. The lawyers for BG (UK) and WAG have only recently been retained and had nothing whatsoever to do with the litigation during the previous 20 years. They have not been involved in a legal feeding frenzy. They have simply been doing their job. They deserve your clearest apology. Your reference in this interview to the litigation issued by ICWA and the liquidator (referred to in the response to item (c) above) potentially wasting another 20 years and billions of dollars is in our view groundless and misleading and should never have been made by a Minister of the State speaking to the public in order to reassure them that the destruction of personal property rights by the Bill was justified and should be accepted by them.

(j) From the Article

"But Western Australia's Treasurer Mike Nahan has strongly rebuked the criticisms, saying the State Government was "stopping the gravy train" the legal community had "ridden for 20 years"."

Response

ICWA paid out approximately $200M to the liquidator's solicitors to enable them to pursue the litigation, which eventually gave rise to the $1.7B. That seems to be a result which should be a matter of congratulation to the lawyers employed by the liquidator rather than the castigation you have heaped upon them. ICWA undertook the funding of this litigation in circumstances where it was a completely subordinated creditor. That was a courageous undertaking, but it forms no basis for the criticisms you now deliver to the people ICWA engaged to achieve its purpose.

(k) From the Article

"Dr Nahan said their comments were "disappointing" while saying any suggestion the laws erode the rule of law was "misplaced".

Response

It is impossible for us to understand how any Minister of the State could consider the Bill not to erode the rule of law. The Bill seeks to:

(i) appropriate personal property to the State without compensation;

(ii) deny the creditors of the Bell Group Companies the right to have their entitlements determined by the Supreme Court applying the law which governs such entitlements in this country (namely the Corporations Act);

(iii) leave the creditors to the prerogative of the exercise by a statutory authority (**Authority**) of a largely unfettered discretion, and where, in so far as they go, the matters to be considered by the Authority are clearly designed to prefer one creditor over all others, namely the State-owned ICWA;

(iv) allow the Authority to operate outside the rules of natural justice, and to deny the creditor's any appeal from the Authority's decisions and to restrict any judicial review to jurisdictional error only.

Moreover, the Bill also provides that there is no obligation upon the Authority to distribute all of the assets that it is to inherit from the Bell Group Companies, with the beneficiary of that scenario being the State (in whom all undistributed assets are to vest).

Then there is the exposure of the creditors and their legal representatives to the potential of committing a criminal offence if they do anything whatsoever with a view to defeating the achievement of the stated objects of the Bill. On the face, of it, that would include an otherwise lawful challenge to the validity of the Bill if enacted.

Put simply, the Bill erodes a number of principles which are fundamental to the legal system of this country.

(l) From the Article

"all creditors are facing further decades of litigation and this intractable problem only has a solution in legislation, this is the only way out."

Response

You present to the public and the Parliament only a binary solution between the Bill and decades of litigation. That was not the only way out. There was a third alternative which was well underway. It is a matter of some amazement to us that you have never mentioned the existence of the mediation, which was about to take place in Singapore, when you introduced the Bill.

(m) From the Article

"Dr Nahan said 'the legal community's criticism was unsurprising because of the financial benefit it stood to gain if the current situation continued. I appreciate that the bill might not be popular for some lawyers who have racked up over $500M in legal costs without payment being made back to creditors. The WA Bar Association seeks to benefit by $200M by opposing the bill as this is the amount WA taxpayers have footed to date to fund the litigation'."

HARDY•BOWEN
LAWYERS

Dr Mike Nahan MLA
Treasurer of Western Australia — 18 June 2015

Response

These comments are scandalous and beneath the dignity of your office. Nothing more need be said about them but to simply set them out in print once more. We trust they are the product of your media advisors rather than your own truly held attitude to our legal system.

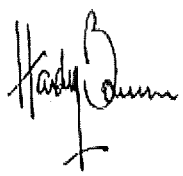
5. WAG considers you to be duty bound by your public office to place the full facts before Parliament when it reconvenes to consider the Bill to ensure that all members of parliament can consider the Bill in a fully informed manner, not least due to the unprecedented financial self-interest of the State of Western Australia in adopting the legislation proposed in the Bill.

6. The comments detailed in paragraph 4 which refer to the legal advisers engaged by the parties to this matter have no basis or legitimacy whatsoever and wrongly discredit up-standing members of the legal profession engaged in the conduct of matters arising from the Bell group liquidation.

7. The local legal profession is governed by a code of conduct enshrined within the Legal Profession Act 2008, the Legal Profession Conduct Rules 2010 and the Western Australian Bar Association Conduct Rules. Accusations that lawyers are acting in a manner in contravention of their duties to the court and in breach of law and regulation is a contention that should only be made to the Legal Practice Board of Western Australia and not freely canvassed in public, not least by a member of the State Government. This issue is only amplified when the accusations are made in such hyperbolic and unsubstantiated public statements by the Treasurer of the Western Australian government.

8. WAG requests that you immediately publically retract and withdraw the comments referenced above in respect of itself and its legal advisers and reserves all its rights with regard to the same, including without limitation, to write to all members of Parliament to inform them of the gross inaccuracies in your public statements and your failure to present in such statements a balanced account of the matters pertaining to the Bill.

Yours faithfully



Hardy Bowen

Hon Mike Nahan MLA
Treasurer; Minister for Energy;
Citizenship and Multicultural Interests

Our ref: 48-11792

Hardy Bowen
PO Box 1364
WEST PERTH WA 6872

Dear Sir/Madam

BELL GROUP COMPANIES (FINALISATION OF MATTERS AND DISTRIBUTION OF PROCEEDS) BILL 2015

Thank you for your letter dated 18 June 2015 regarding W.A. Glendinning & Associates Pty Ltd, which you call WAG (a term I will adopt) and the Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015.

First, and before I respond to the substance of comments made by you, I note that you preface your comments by saying that I "... have made a number of inaccurate and misleading statements and allegations against WAG, its officers, its lawyers and lawyers in general, which we set out and respond to below:...". You then set out a number of specific items clipped from longer media statements and interviews. Some of those need to be set in a broader context.

Secondly, I do not intend to respond to each comment made by you. We would simply disagree, which would not do much to advance a debate which has been stirred up in the media by others than me. But there are a number of comments I need to deal with.

Accordingly, and briefly:

(a) The intention of the Bill is not, nor does it operate to, deprive any creditor or other person of funds they are entitled to. No one knows what they are entitled to, nor will they know for a very long time. The Bill is intended to ensure that all parties receive a considerable amount of money, representing a reasonable return on their entitlements, in a reasonable timeframe, without having to expend time and resources unnecessarily. For you to allege "the Government has seen fit to take away $55M", is mischievous in circumstances where you are aware there is agreement between ICWA and the liquidator of BG(UK) that that amount should be paid, which the Government supports, and you were provided with a copy of that agreement in confidence, for the purpose of the recent mediation.

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(b) You attempt to portray WAG, which bought about $183 million in debt for $125 in the same category as ICWA. You also say WAG is not a professional litigation funder or a distressed debt trader. That is a regrettable conflation on my part. Clearly WAG is represented by a professional litigation funder, but it has not funded a cent of the litigation (though I gather it wanted to, after much of the early risk had been taken out, a characteristic of some professional litigation funding). So it's not actually a litigation funder because it hasn't funded anything. ICWA has funded the Bell litigation in accordance with its contracted obligations to the liquidators, since it agreed to do so in 1995, (unlike others to that agreement), expending approximately $200 million. It did so in an endeavour to recover amounts that it was owed and also for the other creditors. It is not purely an altruist, but it is not in the business of litigation funding – it is a statutory insurer. That it had to do what it has done is a legacy of a disastrous period in our State's political and commercial history, which it has had a role in cleaning up. But it has done the job it was asked to do by the liquidators.

Those who now stand behind WAG have no such motivations. I don't know any other term for a claimed debt of $183 million that can be bought for $125 than distressed debt, or the resale of an interest in that debt for $30,000 than distressed debt trading. Distressed debt traders buy cheap debt and hope it gets more valuable because circumstances change. They may use aggressive tactics then to try to recover than debt. The investment has paid off: payment of the very generous amount to which I referred in Parliament to the investors who now control WAG will produce a return on their investment of about 40 million per cent. Payment of what WAG is seeking would yield about 150 million per cent. At the expense of the creditors who (mostly) didn't buy distressed debt and actually funded the litigation. Do you really think that anyone can accept that?

(c) It is unclear to me from my comment that "We do not intend to allow this litigation to consume a third decade, as well as a great deal more time, money and precious limited resources of this State" does anything other than mean exactly what it says. It makes no imputation that anyone in particular was involved, or responsible for delays, and your assertion otherwise, is frankly spurious. As I have accepted, WAG has been sitting on the sidelines patiently waiting. It is now agitating claims long taken as settled which will see distribution delayed for many years, while parts of the Bond/Bell saga are re-litigated.

I cannot speak for the liquidator of TBGL and BGF, but I am aware proceedings commenced by ICWA were commenced in response to a volume of correspondence received from, amongst others, your firm over time which raised sufficient issues to indicate that resolution by mediation was highly unlikely. In an endeavour however to respond to that suggestion positively and constructively in a mediation environment in which the issues raised by your solicitors may be discussed and possibly resolved (to the extent those issues were known by ICWA), but time not lost if litigation was ultimately (as was indicated by your solicitors' correspondence) required, ICWA commenced proceedings outlining each of the issues it understood the various parties considered required raising, and progressed to mediation. This was, I understand, communicated in a letter to your solicitors dated 31 July 2014.

There is ample evidence that issues now raised in correspondence (which are substantially more complex than those to which you refer as the proceedings commenced by the TBGL and BGF liquidator, and ICWA), will take many years to resolve. They include: tax liability, Western Interstate (in Australia or the UK or both), J N Taylor Holdings, liquidator conflict issues, trustee conflict issues and other clever things that parties think it will serve their interests to raise, before getting to the core distribution issues.

The Government does not intend to permit the limited resources of this State to be used for a further extended period to meet the commercial ends of few parties, in circumstances where it is not clear those parties are genuine in their desire to reach settlement by agreement.

All the Act does is ensure that does not occur; that the various parties' claims are assessed by an independent, and qualified Administrator within a specific period, and those funds are distributed.

(d) There is no reference to WAG in this quote that I am able to see, although it is plain WAG did buy distressed debt. So did offshore bondholders.

(e) I understand that in 1995 a number of creditors including WAG were initially invited to fund the TBGL and BGF liquidator, but declined to do so. When the litigation was substantially de-risked WAG indicated a willingness to consider funding only one of the liquidators, on terms not acceptable to the liquidator, or the other creditors who had by then paid significant funds to the liquidator. The two liquidators jointly prosecuting the claims against the Banks were as you are aware fully funded at that stage.

Your reference to WAG having made "long and concerted efforts" is a pretty shorthand shot at what happened. Mine was a little short hand as well – your client wants $183 million, not the "rounded" $200 million; and so far it has only commenced proceedings in the Western Australian Supreme Court appealing against a decision of the TBGL liquidator to reject a portion of a proof of debt lodged by it. But it is for example threatening to challenge Western Interstate's competing claims – that can only be in court. Your statement WAG is not using Courts to leverage a result for itself is not exactly wholly accurate.

(f) The object of the Bill is, as is apparent from clause 4, intended to avoid the parties incurring further cost, expense, and time, and ensure a distribution of funds held by the TBGL and BGF liquidator in a reasonable time, and on a reasonable basis. The mediation process was not affected by that process. Parties were, I understand, free to agree or not agree a distribution of those funds at mediation. The Bill provides for that and I have said in Parliament that the Government would be prepared to amend the Bill to accommodate a reasonable settlement. If no agreement is reached the Bill if passed will become the law of this State, and subject to the use of litigation to defeat it (a recurrent theme), the Bell litigation proceeds will be distributed in accordance with its provisions.

(g) This comment – as are most of the others referred to in your letter, - was made in the course of a radio interview, from which you have quoted one sentence. It is of course, intended to refer to the use of the legal process, not the legal process itself, as is clear from the following quote referred to in your letter.

(h) You are correct to say WAG has not engaged in litigation "for 20 years". In fact, it has done very little for nearly 20 years, in exchange for which it now claims $183 million of proceeds generated by parties who have been involved in litigation for that entire period, and paid away in excess of $240 million of legal fees and other costs. There has been a gravy train. You may not have ridden it until recently, but a few carriages have now been added that you can hop into.

I don't doubt that you're doing your job, as are the many other talented lawyers who have been involved over 20 years, in some cases until they burnt out and left the law. The Shadow Treasurer noted that in his Second Reading speech on the Bill. But in this case it is not a terribly socially or economically useful job, nor is it achieving a socially or economically useful objective. And so it needs to stop.

(i) Again, you have twisted what I have in fact said: there is no reference in this comment to BG(UK). Nor is this intended to be a reference to the system itself, but to the manner in which the system is being used by those entrusted with its respectful, and judicious use. I have recognised, as have my colleagues, that some legal problems can become, or can be made, too complex to be solved efficiently by the Courts. We have decided that Bell is the bellwether case for that complexity.

I don't need to deal with the balance, I have already said enough. This is polarizing legislation and I accept that. It is not easy to get a Government to legislate on something as novel and complex as this. But sometimes a problem arises that just has to be fixed. The more spin doctors, PR firms and lobbying involved, the more Government digs in to its position. The Bill has now passed the Assembly. On 11 August it will go to the Council. There is a window of seven weeks where sensible parties can get on with doing a deal if there is a deal to be done. Huffing and puffing won't get that done.

Yours sincerely

Mike Nahan

DR MIKE NAHAN MLA
TREASURER; MINISTER FOR ENERGY;
CITIZENSHIP AND MULTICULTURAL INTERESTS

06 AUG 2015

Steven Penglis
Barrister
Level 4, 40 St George's Terrace
Perth WA 6000

MEMORANDUM

TO: Hugh McLernon

FROM: Steven Penglis

DATE: 4 October 2015

SUBJECT: Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015 (**Bill**)

The opening paragraph of the Explanatory Memorandum to the Bill provides as follows:

> "*The object of this Bill is to provide a mechanism for the prompt, fair and reasonable distribution of proceeds from the Bell litigation which until 2013 occupied the courts of this, and other, jurisdictions, for almost 20 years.*"

The third paragraph of the Explanatory Memorandum is in the following terms:

> "*It is the Government's – and many other interested parties' – wish, that, by this Bill, the Bell litigation is brought to a close, funds are distributed equitably, and the costs and expense to the people of this State – and creditors – of another 10 or more years of Bell litigation, is avoided.*"[1]

Insofar as the apparent policy of the Bill is therefore to provide a mechanism for the prompt, fair and reasonable distribution of proceeds, it goes without saying that there can be no argument with the proposition that the distribution of proceeds from the Bell

[1] For the sake of completeness, I note that the 2nd paragraph of the Explanatory Memorandum is in the following terms:

> "*Since settlement in 2013 it has become increasingly obvious the parties' thirst for litigation has not diminished, with several sets of proceedings being issued, and more threatened, seeking to increase parties' entitlements to a portion of the AUD$1.75 billion held by the Bell Group Companies' liquidator. While there has been engagement in mediation, early attempts to pre-condition participation upon compromise of some parties' existing legal rights doom those mediation efforts to fail*".

The above is misleading in that:

(a) the only legal proceedings on foot are those commenced by the Liquidator and ICWA;
(b) only one additional proceeding has been threatened (with respect to Western Interstate).

litigation (**Distribution**) ought to occur promptly. Nor can there be any argument with the proposition that the Distribution should be on a "*fair and reasonable*" basis, so long as "*fair and reasonable*" is by reference to the legal rights and entitlements of each party (as is required by the rule of law).

Rather, the problem arises when ICWA/the State take the further step of asserting that, in order to achieve the above, the legal basis upon which the Distribution is to occur needs to be other than in accordance with the legal rights and entitlement of the parties.

The suggestion by the State/ICWA seems to be that a distribution of proceeds based on legal rights is inconsistent with "*a mechanism for the prompt, fair and reasonable distribution of proceeds from the Bell litigation*". That premise has never been explained and does not withstand scrutiny.

In this regard, I confirm my view that, if the true policy behind the Bill is to bring this matter to an end promptly and with a view to avoiding "*the cost and expense the people of this State – and creditors – of another 10 or more years of Bell litigation*", that does not require either:

(a) the Distribution to be other than pursuant to the parties' legal entitlements; and/or

(b) the creation of a *sui generis* (unique) structure such as that contemplated by the Bill.

In short, what the State can do is to legislate so that the Distribution is determined pursuant to the *Commercial Arbitration Act 2012* (with such modifications as are considered appropriate).

In this regard, I note that the Explanatory Note for the Commercial Arbitration Bill 2011[2] provides, by way of the first paragraph, the following:

> "*The paramount object of this Bill is to facilitate the fair and final resolution of commercial disputes by impartial tribunals without unnecessary delay or expense.*"

Indeed, those words are reproduced verbatim in clause 1C (1) of the Act, with sub-clauses (2) and (3) in the following terms:

> "*(2) This Act aims to achieve its paramount object by –*

[2] The *Commercial Arbitration Act 2012* replaced the *Commercial Arbitration Act 1985*. I have not been able to get my hands on the Explanatory Note for the 1985 Act.

(a) enabling parties to agree about how their commercial disputes are to be resolved (subject to sub-section (3) and such safeguards as are necessary in the public interest); and

(b) providing arbitration procedures that enable commercial disputes to be resolved in a cost effective manner, informally and quickly.

(3) This Act must be interpreted, and the functions of an arbitral tribunal must be exercised, so that (as far as practicable) the paramount object of this Act is achieved."

The *Commercial Arbitration Act* contains provisions such as:

(a) the parties are free to agree on the procedures to be followed by the Arbitrator in conducting the proceedings but, failing such agreement, the Arbitrator may conduct the arbitration in such manner as it considers appropriate;

(b) unless agreed to by the parties and the Arbitrator, the rules of evidence do not apply;

(c) the Parties must "*do all things necessary for the proper and expeditious conduct of the arbitral proceedings*";

(d) there is no automatic right of appeal. Rather, an appeal lies to the Supreme Court only on a question of law (as opposed to a question of fact) arising out of an award and only if the Supreme Court grants leave to do so.

In other words, there already exists a universally accepted mechanism to achieve a fair and final resolution of the Distribution by a third party to be appointed by the State without unnecessary delay or expense. Even if the State wanted to further "tighten" the provisions of the Act, such is a far more palpable approach than that provided in the Bill[3].

The above clearly demonstrates that the policy underlying the Bill can be readily achieved without creating a *sui generis* regime to apply to this matter and without interfering with the legal basis by which each party's entitlement to participate in the Distribution.

In my opinion, rejection of this approach would simply underscore what we believe to be the true driver behind what the State/ICWA are doing, namely to use the stated policy as an excuse to re-write the basis upon which each party's entitlement to the distribution will

[3] For example, section 27J of the Act provides that any question of law arising in the course of the arbitration may be referred to the Supreme Court (albeit only with the consent of all parties or the Arbitrator). Such a provision could be expressly excluded in the legislation providing for the Distribution to be determined by arbitration.

be determined and, in particular, to do so in a way which puts ICWA/the State in a better position than exists at law.

Steven Penglis

Notes on various provisions of the Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015

1. Clause 4 sets out the objects of the Act.

2. Clause 4 (a) states that the first object is to provide a mechanism to resolve, without litigation, disputes which have arisen in relation to the distribution of funds received by the liquidator of the Bell Group of companies as a consequence of the litigation and settlement in 2013.

   Comment – There was, at the time of the introduction of the Bill (5 May 2015), already in existence, a particular mechanism to resolve the disputes without litigation, namely the mediation agreed to by all parties including ICWA and scheduled to commence in Singapore on 12 May 2015.

   This is, accordingly, not a material purpose of the proposed legislation.

   If it was then it would have been introduced into the Parliament if, and when, the mediation was unsuccessful.

   In addition, there is now in existence a well understood and resourced system for the fair resolution of disputes which consists of the company liquidation system enshrined in the Corporations Act – assisted, where necessary, by the courts of the State of Western Australia and the Commonwealth of Australia. There is simply no need for the creation of an ad hoc quasi liquidator/Court/administrative tribunal to resolve the disputes in this matter.

3. Clause 4 (b) states that the second object is to provide a form of external administration of the WA Bell companies.

   Comment – There is already, in existence, a form of external administration which is central to the orderly administration of companies in Australia and which has been carried out both efficiently and effectively by the current liquidator, who, amongst other things, has overseen the collection of $1.7 billion for the companies under his administration.

   This is not a material purpose of the proposed legislation.

4. Clause 4 (c) states that the third object is to provide appropriate compensation to the creditors who funded the Bell litigation.

   Comment – There is already in existence an appropriate compensation regime namely section 564 of the Corporations Act. A Court order under that section has already been sought by the liquidator with the support of the indemnifying creditors (including ICWA).

   This is not a material purpose of the proposed legislation.

   ICWA is not confident that the Supreme Court will award an amount to ICWA sufficient to satisfy what ICWA believes is its entitlement. ICWA has accordingly prepared this legislation and recommended its introduction into the Parliament in order to exclude the jurisdiction of the Supreme Court and ensure that it receives what it considers it is entitled to.

   (That ICWA prepared the Bill and recommended its introduction is implicit in Clause 64 (1) (e) of the Bill.)

5. Clause 4 (d) states that the fourth object is to "reflect" the circumstance that, without litigation funding, the Bell litigation fund would not exist.

Comment – It is a given that the Bell litigation fund would not exist without the litigation funding referred to or similar such funding. No question whatsoever has ever been raised by any party in relation to that circumstance. This legislation is not required to "reflect" that circumstance.

This is not a material purpose of the proposed legislation.

6. Clause 4 (e) states that the fifth object is to make reasonable provision for the distribution of the property of the Bell companies, having regard to the uncertainties existing as to the nature and extent of that property.

Comment – The property consists, primarily, of approximately $1.7 billion in cash, currently lodged in one or more bank accounts. There is no existing uncertainty as to the nature or the extent of that cash.

This is not a material purpose of the proposed legislation.

7. Clause 4 (f) states that the sixth object is to make reasonable provision for the satisfaction of the liabilities to the group of creditors having regard to the uncertainties existing as to the nature and extent of those liabilities.

Comment – The creditors' claims have already been properly, fairly and quickly adjudicated by the liquidator based, where appropriate, upon senior counsel's advice. There is little or no existing uncertainty as to the nature or the extent of the liabilities owed to creditors.

This is not a material purpose of the proposed legislation.

8. Clause 4 (g) states that the seventh object is to distribute the litigation funds generally in accordance with the intentions of the liquidator and the creditors who funded the litigation as set out in their litigation funding agreements.

Comment – The Act renders void all of the litigation funding agreements between the liquidator and various other parties whereby those parties undertook to pay (and then in fact paid) large sums to support the litigation. Those contracts are, by the terms of this legislation, replaced by the unappelable discretion of the Administrator.

The "intention" of the indemnifying creditors is at odds – one with the other and each is at odds with other non-indemnifying creditors. This is the classic situation in which the Supreme Court operates to decide the legal position. ICWA is so uncertain of its ground that it does not want to face or accept the Supreme Court's decision. It has accordingly lobbied the government to seize the fund and take the place of the Court.

This is the true purpose of the proposed legislation.

9. Clause 4 (h) states that the eighth object is to avoid further litigation that will waste the resources of the State and other persons and consume the Bell litigation funds.

Comment – The primary disputes are between the creditors, who, between them, are currently entitled to the most of $1.7 billion, including ICWA, a State instrumentality. Those parties will be responsible for any litigation costs. As usual it is likely that the liquidator will

abide the outcome of any such litigation. Accordingly, such litigation is unlikely to impact upon, let alone consume, the Bell litigation funds.

This is not a material purpose of the proposed legislation.

10. Clause 5 (1) provides that the Act when promulgated will bind the Crown in right of the State and, so far as the legislative power of the State permits, in all its other capacities.

Comment – The bill has been drafted so as to bind the Crown in right of the Commonwealth – no doubt because one of the major unsecured creditors is the Australian Taxation Office. This is the first indication in the Bill of legislative overreach. The problem for the draftsperson was that, in all "fairness", the Bill could not possibly have been drawn so as to impact upon only some of the unsecured creditors. It had to impact on the Australian Taxation Office and thereby it had to be brought into conflict with the laws of the Commonwealth. Insufficient attention has been given to the question of inconsistency such that the Bill has, from its inception, been liable to produce an Act susceptible to being struck down by the High Court of Australia as inconsistent with Commonwealth legislation.

11. Clause 6 provides that it is the intention of the Parliament that the Act should, so far as possible, operate to the full extent of the extraterritorial legislative power of the State.

Comment – This clause reflects the fact that there are numerous foreign investors who are creditors of the Bell Group of companies. Those foreign creditors, like the Australian investors, made their investments into a country which was noted for the stability and perpetuity of its laws and regulations. Again, this clause was "necessary" because it would not have been possible to draw it in such a way that its terms impact only on Australian investors and leave separate and untouched the fortunes of foreign creditors. The Bill thus expropriates all funds, whether they are due to resident or foreign investors.

12. Clause 7 sets up a body corporate to be known as the WA Bell Companies Administrator Authority which is to be governed by the Administrator.

Comment – This Authority is simply an alternative emanation of the State. It replaces an independent insolvency system built up by statute, the common law and equity over hundreds of years. The statutory liquidation process affords certainty, impartiality and fairness. The Authority has none of those attributes.

One State Authority will be called upon to determine the commercial fate of another State Authority and will do so at its absolute discretion without oversight. When the courts in Western Australia are called upon to adjudicate between the State and its citizens, the doctrine of the separation of powers ensures that an independent arbiter (ie... the Court) makes those decisions.

13. By Clause 8, the Minister appoints an Administrator for a term chosen by the Minister on a remuneration chosen by the Minister and on the terms and conditions chosen by the Minister.

Comment – The Administrator is not required to have any relevant experience, training or expertise in the management of insolvent estates despite the fact that the Administrator is given the full powers of a liquidator (Clause 10 (2) (d)). The Administrator is essentially appointed (and may be dismissed) at the whim of the Minister.

The legislation therefore exchanges a trained, experienced liquidator operating according to law and well established principles of insolvency for the nominee of one of the five parties entitled to a share of the litigation funds who is empowered to operate in the place of the liquidator without any let or hindrance from the statutory laws of Australia and Western Australia, the Common Law or the rules of Natural Justice.
That fact alone demonstrates that the stated objects of the Act, other than the seventh, are makeweights.

14. Clause 10 (2) (d) empowers the Authority to exercise any power that a liquidator of a company can exercise under the Corporations Act Section 477.

Comment – Under the Corporations Act, no person can act as the liquidator of a corporation unless that person is a registered liquidator. The Authority is not a registered liquidator. By this provision, it is clothed with all of the powers of a liquidator but none of a liquidator's obligations. It may exercise those extensive powers but not under the oversight of ASIC or the Courts as would be the case with a registered liquidator.

In particular, no registered liquidator can act as a liquidator of a particular company if the liquidator is a creditor of that company. There is an obvious reason why this should be so. Human frailty would inevitably lead to decisions warped by self-interest and contrary to the interests of other creditors. There is a serious question whether the purported empowerment under Clause 10 is consistent with the provisions of the Corporations Act, requiring such power only to be exercised by registered liquidators.

15. Clause 9 (1) requires that the Authority collect the $1.7 billion, being the property of the WA Bell companies.

Comment – At the present time, the $1.7 billion is the property of the WA Bell companies. It appears that the money becomes the property of the Authority.

It is an astounding step for the State to expropriate such a large sum otherwise indirectly belonging to the parties other than the State in circumstances where the State constitution does not require such expropriation to be on just terms. No reasonable observer would suggest that the terms of this legislation are just terms for this expropriation.

The injustice of the terms upon which this expropriation will occur seems to be reflected in other terms of the bill which attempt to quash any avenues of complaint against the expropriation. The imposition of criminal penalties to assist the passage of a Bill through the Parliament of Western Australia is an extraordinary legislative development in this State.

16. Clause 11 enables the Authority to be staffed by State employees. Very little is done by the legislation to prevent the Administrator from also being a State employee.

Comment – In effect, one of the five parties vying for payment out of the litigation fund has been made the person who will have the absolute discretion to distribute the funds amongst those five parties.

17. By Clause 19, if the Fund suffers any loss because of fraud, dishonesty, negligence or failure to comply with the Act, then the Administrator is liable for the loss.

Comment – Note that it is not the State that becomes liable for the loss, but the individual Administrator. That may be cold comfort for creditors who actually suffer such a loss, but, in

any event, they have no right to take action against the Administrator for that loss. Only the Minister may take action under Clause 19 (4).

The provision seems to acknowledge the fact that creditors have no rights at all against the fund constituted by the $1.7 billion removed from the liquidator's hands into the hands of the Authority. Because they have no interest in the fund, they cannot sue for losses caused to the fund by State employees.

The utility of a provision which allows the State to sue the State for losses caused to a fund owned by the State does not appear – either from the Bill itself or any explanation provided to the Parliament thus far.

18. By Clause 22, the $1.7 billion belonging to the WA Bell companies is transferred into the ownership of the Authority. That transfer overrides all contracts, written laws and the common law, and takes effect even if part of the fund is held in a lawfully created trust by the current liquidator for a beneficiary.

Comment – The effect of this section is to make one of the five creditors the absolute owner of all of the $1.7 billion while leaving it up to the absolute discretion of the State, whether it will make an ex gratia payment of any part of that $1.7 billion, and if so, how much, to any of the other four creditors.

Beneficiaries of the trusts who lose their rights as beneficiaries under this clause are left with a claim to be determined at the absolute discretion of the Administrator.

(1A) is a recently proposed amendment to the Bill. It changes the effect of Clause 22 in as much as not all property is to be transferred to or vested in the Authority. Taxation objections, taxation reviews and taxation appeals are excluded from the section.

Comment – The Bill interferes with a massive legal and administrative system consisting of State and Federal laws which have evolved over many decades. It is inevitable when serious interference is proposed to that system, for ulterior motives, that unforeseen consequences will emerge and eventually multiple. This is but the first of those consequences.

19. Clause 25 provides, in effect, that creditors of the WA Bell companies are required to prove their claims to the Authority.

Comment – The creditors have already proven their claims to the liquidator and the liquidator has, where lawful and appropriate, admitted claims to proof, or rejected them. This procedure was clearly according to law. The Act declares that procedure to have been ineffective and requires proof again to the Authority which will not be bound or even required to take into account the decisions of the liquidator in that regard. One such claim will be made by ICWA, and the determination of ICWA's claim will be made by State employees in circumstances where their employer will benefit by the total acceptance of the proof. Other creditors will make their claims to the Authority in circumstances where the decision of those State employees will also benefit their employer depending upon whether those proofs are totally or partially rejected.

Where a liquidator in a normal liquidation admits a proof in the face of all reason and logic, other creditors are entitled to challenge that acceptance in a Court of Law. If the Authority accepts a proof from ICWA in such circumstances, then no such application can be made by other creditors. They cannot even be heard on the question by the Authority.

In any event, it appears that Clause 25 (1) will have no operation as no liabilities of the WA Bell company are admissible to prove against the company in the winding up of the company

under the Corporations Act part 5.6 as neither the Bell Group Limited nor Bell Group Finance Pty Ltd are being wound up under part 5.6 of the Corporations Act. No existing creditor will have a claim under Clause 25 (1) and the funds will remain the property of the State.

Comment – Clause 25 (4) is a particularly egregious provision. It strips away from a beneficiary property which the liquidator already holds in trust for that beneficiary. There is no sensible basis for this provision other than a desire to expropriate as much of the Fund as possible. It will be of little comfort that the beneficiary can line up with the creditors and seek to have its own property repaid at the discretion of the Administrator. That should be completely unnecessary.

20. Clause 25 (5) removes all legal rights provided by statute, by the common law or by equity which arise out of, or are related to the creditors' claims against the WA Bell companies.

Comment – It is worth reading this subsection a number of times because it really does mean what it says. The State is taking away property from citizens in commercial circumstances where the State itself stands to benefit from the removal of those rights. There is little or no precedent for this procedure in Western Australia.

21. Clause 26 renders void a whole suite of contracts between numerous parties stretching back over 20 years and involving many millions of dollars in expenditure.

Comment – There is nothing legally, morally or otherwise wrong with any of these contracts. It is simply the case that the State wishes to be rid of them. Many of the contracts were instigated, organised and drafted by ICWA to its then apparent advantage. Much of that expected advantage did not, in fact, emerge or has evaporated due to later events and ICWA has now urged the government to extricate it from what have turned out to be disadvantageous contracts with third parties.

There seems to be no doubt that ICWA expects to receive more funds under the Act than it would under the existing statutes, common law and equitable principles existing prior to the Act coming into operation. If this was not the case then the legislation would not have been introduced into the Parliament in the first place.

The proposition that the Act is necessary to protect the litigation fund and to accelerate payment out of the litigation fund does not hold water. As set out in the commentary under Clause 4 (h) there is no threat to the amount of the litigation fund and the facts are that settlement of the litigation occurred by payment on 24 June 2014 and by May 2015 a major mediation was due to occur between the creditors and the liquidator. There has been no material delay in the procedures since the settlement was finalised in June 2014.

22. Pursuant to Clause 26 (3), any person who paid out funds to support the litigation is put into the position of having to make a claim to the Authority which claim the Authority can pay or not at its absolute discretion.

Comment – This is fine if the funding creditor happens to be the State but not so fine for other funding creditors who are competing with the State. By way of example, the Authority could pay all of ICWA's contribution and none of BGNV's contribution to the funding of the litigation and BGNV could not be heard to complain against that treatment.

23. By Clause 27, each WA Bell company is dissolved.

Comment – As originally drafted, the Bill left the WA Bell companies in limbo in the period between the promulgation of the Act and the proclamation referred to in Clause 2 (1) (d) of the Act. The result was that the Authority took all the funds of these companies but left them in existence for a period prior to the proclamation. The question of who was to oversee that continued existence of these companies was not considered – or at least was not provided for. Recent amendments to the Bill seek to overcome this oversight by providing that the Authority will become the Administrator of the companies. This is another example of the law of unintended consequences.

Comment – It is not clear why the Bill provides for instant dissolution. Such dissolution normally occurs once all of the affairs of the company in question have been settled. It is to be hoped that those who have drafted this legislation have taken into account the effect of such dissolution on matters, including the operation of legal and equitable setoffs and the impact of clauses and procedures relating to the tax position of the various companies.

The dissolution of these companies would normally be made at the request of the liquidator once the liquidation is completed. Companies can often own choses in action or have financial assets which are not immediately obvious, including the tax advantages which accrue from past losses. The peremptory dissolution of the companies may prove to be highly disadvantageous to the unsecured creditors other than the ATO.

24. Clause 27 (4) applies subsection (5) of that clause to agreements which were in effect prior to the dissolution of a WA Bell company that refer to that company. Subsection (5) goes on to provide that "The agreement or instrument continues to have effect according to its tenor on and after the dissolution as if a reference in it to the WA Bell company were a reference to the Authority."

Comment – There are a multiplicity of agreements that are, no doubt, in existence which refer to a WA Bell company of which two types might be assignments of debt owed by such companies or mortgages over such debt.

This provision varies the terms of these assignments and mortgages by removing from them reference to the WA Bell company and inserting in its place reference to the Authority.

In the case of a mortgage, this would mean that the mortgagee has an interest over a debt owed by the Authority to the creditor in question. There being no such debt in existence, it would seem therefore that the mortgage is of no effect. The proposed legislation will have a multitude of unintended consequences which take away rights such as these.

25. Clause 29 imposes various obligations on the current liquidator of the WA Bell companies. In addition, the recent amendments provide that the WA Bell companies fall under the administration of the Authority (rather than the liquidator) in the period between promulgation of the Act and proclamation pursuant to Clause 2 (1) (d).

Comment – The Corporations Act has extensive provisions referring to the obligations, oversight and removal of liquidators from Australian corporations. On the face of it, this on the run drafting face saving amendments to such draconian legislation is potentially causing more problems than it solves.

26. By Clause 30, the Authority is required to give a notice to persons it believes are creditors, requiring such person to provide full particulars of their claim to the Authority within 30 days. In like manner, the clause requires the Authority to publish a newspaper advertisement, calling for such particulars from other creditors within 30 days.

Comment – There is no provision for receiving such particulars after 30 days and nor is there any power provided to the Authority to extend the date beyond 30 days. The intention appears to be that unless such particulars are provided within the 30 day window then that is the end of the matter so far as the creditor is concerned.

27. Under Clause 30, the Authority is required to give notice for persons to provide full particulars of any liabilities owed by a WA Bell company to that person.

Comment – The Authority is required to replicate the Proof of Debt procedure which has already been undertaken by the liquidator – sometimes at great expense to the proving creditors. WAG spent almost a year locating the relevant documentation to prove its debt beyond reasonable doubt to the satisfaction of the liquidator and spent many hundreds of thousands of dollars in doing so. Under Clause 30, that has to happen all over again. There seems to be no sensible purpose in this provision – other than to undo the decisions of the liquidator. One of those decisions involves a refusal by the liquidator to admit into proof a $300M claim by ICWA. This provision overthrows that determination and allows the Authority to determine it anew – it can decide for itself whether it will take that $300M claim into account in the exercise of its absolute and unfettered discretion to award ICWA some part of the $1.7Bn.

Comment – There are currently numerous bondholders resident in other countries. Clause 30 (2) provides that publicity need only be given for claimants in Australia. There is simply no way that notice will come to the attention of anyone outside Australia. In any event, Clause 30 only gives a person 30 days to provide particulars of their claim and thereafter the claim is lost. That result is, itself, draconian. Under the normal rules of insolvency, claimants do not lose their rights simply because they fail to respond to a notice in a newspaper or provide particulars of their claim within a nominated time period. They only lose their rights once a full distribution has been made.

28. Under Clause 31, the Authority is required to determine the property and liabilities of each WA Bell company, report to the Minister and make recommendations to the Minister.

Comment – The proposition that the Authority is required to do any real work in determining the property and liability of each WA Bell company is questionable because that is the role that has already been performed by the liquidator. This is probably why the Authority is entitled to call for the reports of the liquidator in relation to these two matters. This seems to be dressing up the work to be done by the Authority as though it is of some substance (refer Clause 29).

As the property and liabilities of each WA Bell company is a question of fact, it is unusual to see a provision such as that in Clause 33 (3) that the Authority has an absolute discretion in determining those properties and liabilities.

29. Clause 32 requires the Authority to give creditors a 14 day period in which to make written submissions regarding the Authority's determination in relation to the property and liabilities of the WA Bell companies.

Comment – It appears that the draft recommendations of the Authority will be the first occasion upon which a creditor learns what part of its claim will be admitted as a liability of the WA Bell companies. If that amount is less than the creditor's claim then the creditor is entitled to make written submissions relating to its claim.

Most importantly, however, creditors are not permitted to make written submissions in relation to the claims made by other creditors. This is one of the central protections for

creditors provided in the Australian insolvency process. If a liquidator wrongly admits a creditor's proof then any other creditors can object to that admission and can obtain a ruling of the Court, overturning that admission.

As is usually the case, the creditors of the WA Bell companies are uniquely positioned to provide material relevant to other creditors' claims which those creditors may not wish to press upon the Authority.

30. Clause 33 provides that, in determining the property and liabilities of each WA Bell company, the Authority "must have regard to" all of the work done by the liquidator in relation to those matters.

Comment – The replication of the work done by the liquidator is highly unlikely to occur. The Authority will simply, at its choosing, come to the same conclusion except in those circumstances where it decides not to do so.

31. Under Clause 35 (2) (a) to (c), the Authority must recommend the amount to be paid (if any) to a creditor. In doing so, the Authority must have regard to the objects of the Act, any agreement between the creditors as to the distribution of the proceeds of the litigation and any submissions made by the creditor in question.

Comment – This provision in relation to agreements between creditors is an insidious part of the Bill designed to put commercial pressure on creditors to accept payments they would not otherwise accept. The obvious dynamic between the five creditors is that one creditor (the State) has the legislative power of the West Australian Parliament behind it while the other four have only the protection of the law. As a result, the likely agreements are as between ICWA on the one hand and other creditors on the other hand. The likelihood of relevant agreements between creditors other than ICWA is negligible. These provisions are therefore an enticement that if creditors agree with ICWA as to what they and ICWA should receive then that matter must be taken into account by the Authority.

The carrot and stick approach inherent in this provision reflects poorly on those who drafted the proposed legislation. "Agree to your entitlement in advance of the passing of the legislation and you will receive preferred treatment, don't agree and you will suffer the consequences of failing to do so."

It seems obvious from its terms in general but from this provision in particular that this legislation was born in a lawyer's mind rather than a parliamentarian's soul.

32. Under Clause 35 (2) (d), the Authority may assess the priorities for each liability in accordance with the Corporations Act as if the Authority was actually winding up the company in accordance with those provisions.

Comment – Section 555 of the Corporations Act provides that, except as otherwise provided by the Act, all debts and claims proved in a winding up rank equally and, if the property of the company is insufficient to meet them in full, they must be paid proportionately. It is inevitable that all of the debts and claims of the five creditors will not be met from the property of the company so that, in normal circumstances, they would be paid proportionately. That, again, is a central aspect of the insolvency system in Australia. Clause 35 (2) (d) does not impose that basic rule of equity upon the Authority. The Authority may assess priorities according to Section 555 in its absolute and unfettered discretion.

33. Under Clause 35 (2) (iv), the Authority may also have regard to the relative size and the relative importance of the satisfaction of a liability to the relevant creditor.

Comment – The legislation does not go on to describe how the "importance of satisfaction" may be relative to some other matter or what that matter might be. Perhaps the legislation is intended to provide that a poor man should be paid before a rich man, a prince before a commoner, a moral man before a thief.

None of these relativities seem to have anything whatsoever to do with the rights of Australian citizens under the law. They are akin to social engineering.

34. Clause 35 (2) (e) (v) provides that the Authority may have regard to the detriment to a creditor of not receiving payment of any liability in full.

Comment – What matters are appropriate to be taken into account under this heading simply do not appear. Does it refer to the lifestyle of the creditor or his station in life or the morality of his position? It seems to be an absolute makeweight without any apparent legislative purpose.

35. Clause 35 (2) (e) (vi) provides that the Authority may take into account "any amount paid by a creditor for the acquisition of, or any interest in, a liability".

Comment – Again, this seems to require a social judgement on the part of the Administrator. Presumably, the less a current creditor has paid a former creditor for the debt in question, the less will be paid by the Authority to the current creditor. How that is to be determined by the Administrator does not appear. Nor does the underpinning of such a clause. It certainly brings to mind the reasoning of an earlier social organiser – "The expropriators are expropriated." (Carl Marx.) This provision will certainly be a warning to all future participants in the Australian debt market – do not become an expropriator by paying too little for a debt or you may become the subject of State expropriation.

Comment – This and numerous other clauses are subsets to the overall expropriation which is occurring under the Bill. The money is being expropriated and then the normal rights of creditors under the law are being reduced or removed at the unfettered discretion of the Authority.

36. Clause 35 (3) provides that any recommendation made by the Authority to the Minister need not contain reasons.

Comment – This appears to be an invitation for the reasons to be left out of the written recommendation and conveyed orally to the Minister. It is difficult to fathom the moral utility of such a provision.

37. Clause 35 (4) provides that the Authority has an absolute discretion as to the quantity of any liability, the amount recommended to be paid or the priority to be given to that payment.

Comment – This subsection says it all – the State will take the money and decide what shall be done with it in its absolute and unfettered discretion.

This is a huge discretion to be bestowed on the Authority ie... the ability to distribute at its absolute discretion $1.7 billion in relation to which interests were held by each of the five creditors prior to the Act coming into effect. The result is that the creditors have all been stripped of their legal rights and entitlements and in return have been put into the hands of a State-appointed Authority, originally to be advised by the solicitors for ICWA and whose discretion regarding payment is absolute. Only ICWA could have any serious confidence in this arrangement.

38. Clause 34 (5) provides that the Authority is not required to pay out the whole of the $1.7 billion.

Comment – If this does occur, then the unpaid balance of the fund reverts to the State (refer Clause 40 (2)). No adverse comment in relation to this provision would do justice to what is, put simply, a very bad law.

39. Clause 35 (6) provides that nothing in section 35 creates any right in or for the benefit of a creditor of a WA Bell company or any other person.

Comment – This provision seems to be intended to highlight or emphasise the fact that all payments out of the fund are effectively ex gratia – an act of largesse by the State towards some of its citizens.

There are all sorts of potential unintended consequences in this provision including whether the receipt of such payment on an ex gratia basis renders it not subject to taxation?

40. Clause 36 provides for the Authority to give priority to creditors who funded the litigation.

Comment – The provisions of this clause leaves little doubt but that the main object of the Act is to benefit ICWA at the expense of other creditors.

41. Subsection (1) applies section 36 to "creditors of any kind" who provided an indemnity against costs or liability in relation to the Bell litigation.

Comment – There is currently a serious question at law as to whether ICWA, as a subordinated creditor, has any standing at all to make a claim under Section 564 of the Corporations Act which enables the Court to award an advantage to a funding creditor. The words "of any kind" jump ICWA straight over that hurdle.

A subordinated creditor is a "creditor of any kind" and therefore in four or five words, the draftsman has removed a serious impediment to the claims by ICWA and enabled substantial payments to be made that may never have been paid under the law. This type of preferment of the State should have played a prominent part in the explanatory memoranda provided to members or the various speeches which have been made in the Parliament in support of the Bill.

42. Subsection (2) of section 36 provides that the Authority may recommend to the Minister an amount to be paid to a creditor for compensation for providing that funding or indemnity.

Comment – Again this jumps ICWA, BGV and ATO (against the interests of WAG and the other unsecured creditors) over another hurdle constituted by the normal rule as to whether a funding creditor can be paid more than his debt.

There has grown up in Australian jurisprudence a series of tests in relation to what is an appropriate payment to funding creditors under Section 564 of the Corporations Act. Those tests have been removed by this Bill – especially those which indicate a reduction in the payment to funding creditors such as those which have already been outlined to the Court during the course of the 564 Application which is currently pending.

43. Clause 36 (3) (d) then sets out the various matters that can be taken into account to increase the compensation.

Comment – The normal factors which are taken into account by the Courts to reduce the compensation have not been included in the legislation, especially the conduct of the liquidator and the conduct of the indemnifying creditors towards other creditors of the Bell companies.

The amount of the compensation is completely at large and, for instance, the whole of the fund could be paid as compensation to one funding creditor (say ICWA) without any redress being available to the other creditors.

44. Clause 36 (5) makes it clear that the Authority can recommend that an amount paid by way of compensation to an indemnifying creditor may be paid in addition to any other amount otherwise payable to the creditor.

Comment – Again, this provision enables the Authority to jump the indemnifying creditors or some of them over the hurdle that, at law, they could not get paid more than the amount of their debt.

45. Clause 37 requires that the Minister must submit a report of the Authority to the Governor. The Governor may, by instrument in writing, determine the amount to be paid to each creditor. The Governor is not required to distribute all of the $1.7 billion and again the Governor's determination need not contain reasons for his decision.

Comment – It is difficult to see why the Act erects this three step procedure for payment ie... the Authority determines a figure and recommends it to the Minister, the Minister recommends it to the Governor and the Governor determines this payment. The only decision that is even remotely required to be in accordance with the Act is the decision of the Authority so that the other two levels seem to be in place merely in order to ensure that the Authority "gets it correct".

46. Clause 38 provides for payments to be made out of the fund on the determination of the Governor. A creditor becomes entitled to payment once the determination has been made and once the creditor has signed a Deed of Release. Once payment is made then every liability of every WA Bell company to that person is by force of the Act discharged and extinguished. If the creditor in question refuses to sign the deed then after 12 months, every liability of every WA Bell company to that person is by force of the Act discharged and extinguished – regardless of the fact that no payment has been made.

Comment – There is no provision in the Act enabling the 12 month period to be extended. The pace at which matters are dealt with by the Authority will be very much up to the staff of the Authority. If, for any reason not attributable to the creditor in question, time runs out before payment then Clause 38 (6) operates to discharge and extinguish the debt owed to the creditor without payment to the creditor.

This is a classic example of a "take it or leave it" situation for the creditors.

47. Clause 39 has the effect of discharging the liquidator of the Bell companies from all liability arising from anything done or purportedly done by him in performing his duty.

Comment – It is simply inappropriate to provide a blanket discharge of all liability for the acts of the liquidator without possibly knowing what the liquidator has done or not done which

might make him liable to creditors or other parties for acts done or not done during the course of his liquidation. Such an unprecedented discharge has been made necessary by the fact of the other unprecedented steps that the State has taken in this proposed legislation. The State has taken such extreme steps, which would otherwise make the liquidator potentially liable for massive damages, that it has been necessary to provide an absolute discharge to protect the liquidator from the effect of the legislation while, at the same time, destroying all earlier claims that other parties may have had against the liquidator.

48. Clause 40 provides that the Fund is closed on the first anniversary of its coming into existence and, upon that date, all monies remaining in the Fund are "credited to the Consolidated Account".

Comment – It is not apparent from the terms of the Act why this 12 month period for the Fund has been selected by the State. At the very least, it provides the mechanism for an accelerated payment of a large sum to the State.

49. Clause 41 provides that the Authority and the Office of the Administrator are abolished 14 days after the Fund is closed (refer Clause 2 (1) (b)) and, at that time, all records and data of the Authority pass to the Minister.

Comment – This emanation of the State of Western Australia is created, is given life for a year or so and is then obliterated – almost as though those who created it are ashamed of what they have done.

50. By Clause 42, any property which emerges after the closing of the Fund as being owned by a WA Bell company accrues to and is payable to and vests in the State. It accrues for the benefit absolutely of the State and not on behalf of any other person.

Comment – This section simply sweeps up any property, which was not immediately obvious within the 12 month period, after the passing of the Act. It ensures that every last penny is covered by the legislation.

51. Clause 48 provides that a person must not enter into or carry out a scheme for the purpose of directly or indirectly defeating, avoiding, preventing or impeding the operation of the Act or the achievement of its objects.

The penalty for doing so is five years' imprisonment or a $200,000 fine.

Comment – Note that the scheme in question need not be carried out. It is sufficient if the person in question enters into the scheme – even if it is not carried out. A scheme may be a plan or proposal to take action ie... something short of actually taking the action and/or something simply in the mind of a person.

In addition, any action or course of action also constitutes a scheme.

Comment – What was meant by "The operation of this Act or the achievement of its objects"? Did it include any or all of the following?

a. Lobbying the Government not to introduce the bill into the Parliament;
b. Lobbying the Opposition or the Government or individuals within the Opposition or the Government to speak against the passing of the bill or parts of the bill;

c. Encouraging or inciting the media to write or speak about the implementation of the bill;
d. Preparing, lodging or speaking to applications to a Court for an injunction preventing the passage of the bill or parts of the bill;
e. Voting in the Parliament against the passage of the bill;
f. The preparation or signing of a petition to the Parliament urging that the bill not be passed;
g. The preparation or introduction of any bill to remove or amend any part of the Act.

Comment – All of these processes involving the Parliament, the Courts and the media are integral parts of our democracy. That may be a reason why Clause 48 is not meant to interfere with them but, on its face, the original language of Clause 48 did just that.

Since the Bill was introduced, three vital parts have been added to Clause 48.

First of all, those drafting the Bill had not clearly taken into account that the liquidator would have to continue with his work as required by law under the Corporations Act – at least until the Bill became law. The terminology of the original draft meant that the liquidator could not be certain that he could expend the money of the WA Bell companies in carrying out his duty. That this power was not explicitly given to the liquidator in the original Bill is indicative of the haste with which it was prepared and introduced into the Parliament.

Clause 48 (4) now provides protection to the liquidator from criminal sanction if he simply carries out his legal obligations. That such an amendment was necessary is an indictment of the care given to the drafting in the first place.

It also became apparent once the Bill was introduced that it might well interfere with the political freedoms of citizens in Western Australia – such that a further amendment was required to provide that persons exercising those freedoms did not commit a criminal offence. It is a difficult question to answer whether Clause 48 (5) was introduced to protect the political freedom of those who opposed the Bill or merely to cut off the probable High Court application to declare that provision of the Bill beyond the constitutional competence of the Parliament of Western Australia.

Finally, it was necessary for the draftsman to add a further amendment – making it clear that lawyers and their clients would not be committing a criminal offence by challenging the constitutional validity of the Act. The absence of the phrase "if any" in this amendment (compared to the amendment to Clause 48 (5)) indicates that the draftsman realised that, without the amendment, the Bill imposed a criminal sanction on those who would dare to challenge its constitutional validity.

Clause 48.3 provides that it is an offence against the Act if the plan, proposal or action, course of action or course of conduct is carried out at any time before the enactment of the Act. In addition, the purpose of defeating, avoiding, preventing or impeding the operation of the Act or the achievement of its objects need not be the only purpose or even the dominant purpose – it is enough if it is a substantial purpose (ie... it is not an insubstantial purpose).

Comment – This act provides for retrospective criminal liability – potentially rendering a person liable to five years' imprisonment. Clause 48 is an echo of the Axones of Draco.

52. Clause 51 provides that a person must not obstruct or hinder the Authority or any person assisting the Authority in the performance of its functions. Again, the punishment is five years' imprisonment or a $200,000 fine.

Comment – The punishment is set even for hindering ie... not preventing the performance of the functions of the Authority. Delay is a form of hindrance so causing delay makes one liable to five years in durance vile.

53. Clause 52, in a similar way, provides that a person must not, without reasonable excuse, fail to comply with a requirement made by the Authority, an Administrator, an employee, an agent or a delegate of the Authority or face a potential of two years' imprisonment or $50,000 by way of fine.

Comment – The only nod to decency in this provision is that liability cannot arise unless the person in question is told that a failure to comply constitutes an offence. It is a staggering provision of power to give a public servant the ability to say "Do what I tell you or you become liable to two years in prison."

54. Clause 54 provides that a person must not misuse confidential information obtained by reason of any function that person has in the administration of the Act. Any person who does so is liable to 12 months' imprisonment.

Comment – It is the logical extension of a Bill of this nature that it not only criminalises certain conduct by those impacted by it, but also ensures that the operations of the Authority are kept completely secret. This clause crushes the would be whistleblower who simply discloses any information at all that has not been already made public. There is no test of materiality or importance – simply an absolute blanket ban on the disclosure of all information obtained by reason of a function performed under the Act.

55. Clause 55 provides that an officer of a body corporate is also guilty of the offence committed by the body corporate if that officer fails to take all reasonable steps to prevent the commission of the offence by the body corporate. It is sufficient if the officer ought to have known (although he did not know) about the commission of the offence by the body corporate and was in a position to influence the conduct of the body corporate in relation to the commission of the offence.

Comment – This is taking the punishment of conduct within commercial transactions to an almost ridiculous extreme. It goes so far in Clause 56 (4) as to provide that an officer of the corporation has the onus of proving his defence – even if he did not in fact know about the commission of the events but ought to have known.

If, therefore, an offence is committed by the corporation the maximum punishment is a $200,000 fine while if an officer is held liable for the same matter (even if he didn't know it was being committed by the corporation) the maximum penalty is five years' imprisonment.

56. Under Clause 57 (6), a person may be guilty of an offence under the Act and be liable to five years' imprisonment even if that person did none of the things referred to in Clause 48 but an employee or even an agent of that person did one or more of those acts – even without the knowledge of the person – so long as that person failed to take reasonable precautions or exercise due diligence to ensure that the employee or agent did not do any of things referred to in Clause 48.

Comment – This seems to require that a creditor to any one of the WA Bell companies is required to, at the very least, advise all employees and agents (lawyers and other advisors) not to take any of the steps referred to in Clause 48 and thereafter ensure from time to time that the employees and agents have complied with that advice.

It is difficult to think of a thinner basis for criminal liability than is set out in this sub-clause.

57. Clause 59 sets out that proceedings for an offence under the Act can only be commenced prior to the expiry of the Act.

Comment – This section seems to establish, beyond any reasonable doubt, that the State is not concerned about the prevention of wrongdoing by any corporation or person in relation to the Act but only about ensuring that the provisions of the Act are carried into effect. This is because a person may well commit the gravest possible offences under the Act but they are not to be the subject of a prosecution after the 12 month period has expired – even if the commission of the offences has been brought to the attention of the Authority. After the money has been distributed according to the State's wishes, it simply doesn't matter any more!

58. Clause 60 provides that the Administrator may apply to the Court for an injunction, restraining a person from doing something that would or would be likely to contravene an offence provision of the Act or from aiding, abetting, counseling or procuring such a contravention or from conspiring with others or attempting to do so.

The Court is empowered by subsection (4) to grant such an injunction, even if it is found that the person is not likely to contravene any provision of the Act. The Court is entitled to issue an interim injunction but cannot require that the Administrator give an undertaking as to damages or costs in return for the issue of the interim injunction.

Comment – These provisions continue to demonstrate the fact that the provisions of this proposed legislation are slanted in favour of the State and constantly against the interests of the creditors. In normal circumstances, it would be necessary for the party seeking the injunction to show that the injunction is necessary because the party to be injuncted is either contravening or threatening to contravene the provisions of the Act. The test under this clause is that the party against whom the injunction is sought "might" contravene the Act or "has contravened the Act in the past" or "is the sort of person who might contravene the Act".

59. Clause 61 provides that the Authority and the Governor have absolute privilege against all defamation arising out of the work they do under the provision of the proposed legislation (refer Clause 34 (3), Clause 36 (7) and Clause 37 (9).)

Comment – This is a real tilting of the tables in favour of the State against its citizens. The Authority and the Governor can say what they please with complete immunity regarding the unsecured creditors but the unsecured creditors cannot respond for fear of defamation or, worse still, criminal charges under the Act.

60. Clause 62 then sets about completely altering the rights of a potentially large group of unknown persons. Nothing done by the legislation or pursuant to the legislation can be taken to be;

a. A breach of contract, a breach of confidence or any other civil wrong;
b. A breach of any law of the State, the common law or equity;
c. A breach of any provision of any agreement;
d. Permitting any person to exercise a right or remedy or to terminate an agreement;
e. Providing any remedy to a party to a contract or an ability to terminate any contract;

f. Causing a contract to become void or unenforceable or frustrating any contract; and
g. Releasing any surety from any obligation.

Comment – The potential reach of this Clause is simply unfathomable. All sorts of unknown contractual arrangements may have been entered into by a multitude of persons. All rights and obligations under those contracts are effectively set aside without the author of the legislation even knowing they exist.

61. Clause 63. This clause protects the Minister, the Authority, the Administrator and any person employed or engaged by the Authority. They are not liable for anything done by them in good faith in the performance or the purported performance of the Act. The clause also relieves the State of any liability.

Comment – The degree to which this Act goes to protect those operating under the Act seems indicative of a knowledge in advance that what is being done is highly unusual and certainly highly unfortunate.

62. Clause 64 protects ICWA and anyone connected with ICWA. It covers the conduct of the Bell litigation, the negotiation and execution of any agreement referred to in Clause 26, the liquidation of any WA Bell company, the settlement of the Bell litigation and the preparation of the bill and the recommendation of its introduction into Parliament.

Comment – The necessity for protecting ICWA from its urging of the Government to pass the draconian provisions of this bill have given rise to a most unusual clause which protects ICWA from "preparing the Bill for this Act or recommending its introduction into the Parliament." Why on earth would it be thought necessary to provide statutory protection for such conduct?

This provision effectively gives ICWA a retrospective carte blanche for its conduct over the 20 years of the litigation. No such reciprocal protection is given to any other of the multitude of persons involved in those transactions. ICWA can accordingly sue BGNV but BGNV cannot even counterclaim by way of defence against ICWA.

Clause 64 (2) protects ICWA, any managing director of ICWA, any member of the board, any officer or employee, any agent, custodian, broker or attorney.

Comment – By Clause 63 (3), every such person is released and discharged from any claim, demand or proceeding of any nature whatsoever under any law of the State or any principle or rules of common law or equity when carrying out any of the conduct referred to.

Comment – Again, it is highly unlikely that the author of the bill understands just what any of these persons have done which would otherwise make them liable so this completely blanket release would cover even the most serious of transgressions committed by ICWA or its associates. At the same time, of course, it expropriates the rights of the persons who were damaged by that conduct.

63. Clause 66 protects the State, any State Authority or officer of the State including the Crown, the Government, Ministers, and statutory corporations. All of these parties are protected from any action, liability or demand arising from the "enactment, commencement or operation of the Act or the making, commencement or operation of any subsidiary legislation made under the Act."

Comment – This clause adds more personnel into the ringfenced arena. It is extremely difficult to determine how an officer of the State could be liable for anything done by him or her in relation to the enactment of the Bill? These perils are in the mind of the draftsperson but are also indicative of the fact that the draftsperson knew exactly what was being done and the enormity of it. His riding instructions were clearly to protect as many people as possible from as many claims as possible and to put the operations of the Act completely beyond public scrutiny.

64. Clause 67 provides that a person may not begin or continue proceedings in a court with respect to property that was the property of a WA Bell company except with the leave of the Supreme Court and in accordance with the terms, if any, that the Court imposes.

Comment – This clause seems to prevent any proceedings in the Federal Court or even the High Court unless the Supreme Court of Western Australia gives leave for the commencement of those proceedings. There are no explicit grounds for the provision of that leave so presumably leave would not be given if to do so would enable the applicant for leave to directly or indirectly defeat, avoid, prevent or impede the operation of the Act or the achievement of its objects (as per Clause 48 of the bill.)

Comment – It does seem at least probable that this clause prevents free access to the High Court to challenge the constitutionality of the Bill because that challenge would inevitably be "with respect to property" that was the property of a WA Bell company. It would be unusual if a litigant required the permission of the Supreme Court to make application to the High Court to declare the whole or part of the Bill unconstitutional.

65. Clause 68 provides that all decisions and other things done by the Governor, the Minister, the Authority and the Administrator is final and conclusive, must not be challenged, appealed against, reviewed, quashed, called into question in any Court and is not subject to review or remedy by way of prohibition, mandamus, injunction, declaration, certiorari in any court on any account.

Comment – It cannot be said of the draftsperson that they have not exhausted their imagination in repealing every possible avenue of redress normally available to citizens materially impacted by legislation such as that contained in this Bill. The ringfence around the Authority and its operators has been drawn as tight as can be.

66. Clause 67 (3) excludes the rules of natural justice in relation to doing or omitting to do anything under the act by the Governor, the Minister, the Authority or the Administrator.

Comment – These rights are basic. To take them away is a last step taken only in extremis. To take them away solely in order to advantage the State is a retrograde step providing an awful precedent foretelling similar future conduct.

67. Clause 71 provides that the Freedom of Information Act 1992 will have effect as if the Authority were mentioned in Schedule 2 to that Act.

Comment – The Authority is not, of course, mentioned in Schedule 2 and one can clearly see why that is so once the entities already in Schedule 2 are identified. Schedule 2 is a list of exempt agencies which do not have to provide any information to anyone under the Act. There is no entity even remotely similar to the Authority that has found its way into this exempt status. There is a common thread binding the entities in Schedule 2 together. The Authority does not belong in that schedule.

68. Clause 72 provide that the Authority is entitled to seek the written opinion of the State Solicitor concerning the functions or powers of the Authority under the legislation.

Comment – This clause originally provided that the Authority could take the advice of the State Solicitor on questions relating to a determination or recommendation made under Part 4 of the Act and the State Solicitor was required to give such an opinion. That had the State being advised by the State in relation to the State as a creditor.

The furore which erupted against the inanity of this original provision led, inevitably, to its removal.

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Mr Neil Griffiths
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EC4M 7WS

17 July 2015

By Post and Email

Dear Parties

BELL GROUP COMPANIES

As you are aware, we act for W.A. Glendinning & Associates Pty Limited (**WAG**).

This is an open letter.

We refer to:

1. the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015* (**Bill**);

2. the mediation held in Singapore between 9-10 June 2015 (inclusive) attended by the principal creditors of the Bell Group Companies (**Principal Creditors**);

3. the Treasurer' s statements in the Legislative Assembly on 17 June 2015 as to what he has been '*advised*" to be "*a sensible outcome for the Bell litigation for the five creditors*"

We note the following:

DLA PIPER

1. WAG has, together with Principal Creditors other than ICWA, been placed in an invidious position by the State Government's introduction into Parliament of the Bill as it seeks to usurp the legal framework in which the Principal Creditors had, prior to the Bill's inception, been operating within.

2. Accordingly, WAG hereby states what it considers to be a sensible outcome for the Bell litigation for the five creditors in those circumstances (**WAG Proposal**), namely that the liquidation proceeds of the Bell Group Companies be distributed as follows:

ICWA	$ 650,000,000
Bell Group N.V.	$ 520,000,000
Australian Taxation Office	$ 380,000,000
Bell Group UK	$ 100,000,000
WAG	$ 100,000,000
Total	$1,750,000,000

3. The WAG Proposal provides for WAG receiving an amount which is 45% less than its undisputed legal entitlement of AUD183,000,000.

4. The WAG Proposal is advanced on the basis that it is agreed to and adopted by the other Principal Creditors on or before 17 September 2015 (**Proposal End Date**).

5. The WAG Proposal is premised upon the funds being distributed to the Principal Creditors prior to the Proposal End Date and any residual liquidation proceeds (post satisfaction of amounts owed to any non- Principal Creditors) being distributed pro rata to the Principal Creditors.

6. In the meantime, WAG reserves its full legal rights and entitlements.

Yours sincerely