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1 October 2015

Hon Robyn McSweeney MLC
Chair
Standing Committee on Legislation
Legislative Council
Parliament House
PERTH WA 6000

By email: lclc@parliament.wa.gov.au

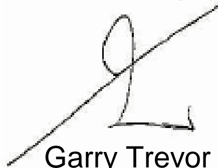
Dear Ms McSweeney

Inquiry into Bell Group Companies
(Finalisation of Matters and Distribution of Proceeds) Bill 2015
Bell Group NV (In Liquidation) Submission to the Standing Committee on Legislation

I enclose my submission to the Standing Committee on Legislation in relation to the above inquiry.

If the Committee have any queries in relation to my submission please do not hesitate to contact me.

Yours faithfully
Bell Group NV (In Liquidation)



Garry Trevor
Official Liquidator

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INQUIRY INTO THE *BELL GROUP COMPANIES (FINALISATION OF MATTERS AND DISTRIBUTION OF PROCEEDS) BILL 2015* (WA)

SUBMISSION OF BELL GROUP N.V. AND ITS OFFICIAL LIQUIDATOR MR GARRY TREVOR

INTRODUCTION

1. Bell Group N.V. (**BGNV**) is the largest senior (or unsubordinated) creditor of Bell Group Finance Pty Ltd (**BGF**) and a substantial senior creditor of The Bell Group Limited (**TBGL**), having lent those companies $464 million. BGNV was also the major funder of the Bell litigation between 1995 and 1999, providing 55% of the funding. BGNV terminated its funding in March 1999.

2. When BGNV ceased funding it continued to receive 37.5% of the funders' reward in the outcome of the Bell litigation. This was because the other funders (ICWA and the Commonwealth) and their legal advisors considered that BGNV's continued involvement as a plaintiff in the litigation was critical to the success of that litigation. In addition, BGNV also had its own separate causes of action against the banks in the Netherlands' Antilles. BGNV agreed to put that action on hold while the Bell litigation was pursued. The price for BGNV's continued involvement in the Bell litigation and agreeing not to pursue its separate claims against the banks was for the other funders to agree to pay to BGNV 37.5% of the funders' reward in the event that the Bell litigation was successful.

3. In 1999 ICWA was willing to pay that price. ICWA now appears to have had second thoughts. Partly this is because the successful outcome of the Bell litigation has resulted in BGNV ranking in priority to ICWA. Thus while ICWA is, and always has been, deeply subordinated, BGNV's success in setting aside the Banks' securities meant that BGNV went from being a

subordinated creditor, ranking equally with ICWA, to a senior, unsubordinated creditor, ranking in priority to ICWA.

OVERVIEW OF BGNV'S POSITION

4. The Bill is deeply flawed and riddled with problems. If the Bill is enacted in its current form BGNV will challenge the legislation in the High Court of Australia. BGNV is confident that the challenge will succeed and that the legislation will be struck down by the High Court as unconstitutional.

5. The Bill has many of the hallmarks identified by Kirby J in *APLA Ltd v Legal Services Cmmr (NSW)*[1] at [296]:

   In short, the Regulation is not the delicate work of a master drafter, seeking by filigreed language to avoid any risks of overreach into constitutional areas where State angels might fear to tread, an option that was open to the Parliament and about which it had been advised. The Regulation is, instead, a legal blunderbuss. It fires its shots at everything within range and beyond. It does so with a scattergun effect – indifferent to any distinction that might exist by reference to rights, privileges and procedures afforded by, and under, federal law. It is this ambit of the Regulation that should alert this Court to the constitutional inconsistency of which the plaintiffs complain.

6. There is another striking feature of the Bill, namely its *ad hominem* nature. The Act singles out a particular category of persons, namely the WA Bell Companies and their creditors, for special treatment. The Bill, like other legislation that has been found to be unconstitutional, has been tailored to address the very issues arising in litigation involving those creditors currently before the Supreme Court of Western Australia, almost as if to fit a glove around them. In particular, the Bill is designed to overcome weaknesses in ICWA's position in that litigation arising from its subordinated status.

7. The *ad hominem* nature of the Bill does not make it unconstitutional *per se.* However, it is, as Kirby J observed in *Nicholas v The Queen,*[2] at [205]:

   ... a very relevant consideration in judging whether a law amounts to an invalid legislative intrusion into the judicial domain.

[1] (2005) 224 CLR 322.
[2] (1998) 193 CLR 173.

8. The Bill is markedly different from other *ad hominem* legislation that has been struck down by the courts in one significant respect. Thus in *Liyanage v The Queen*[3] (legislation directed at participants in a coup d'etat) and *Kable v Director of Public Prosecutions (NSW)*[4] (legislation directed at a violent offender who had threatened to kill others on his release) the legislation was targeted at individuals who had engaged in unlawful conduct. In contrast, in the present case, the targets of the Bill have broken no laws and have done nothing wrong. They are simply creditors of TBGL and BGF who are parties to litigation seeking to enforce and protect their legal rights, rights which the Bill seeks to take away.

9. Why then has the State proposed such draconian legislation? The reason lies in the fact that the State (through ICWA) is a party to litigation and it is concerned, despite its protestations to the contrary, about the weakness of its position in that litigation. As acknowledged in debate, one potential (BGNV says, likely) outcome of the litigation is that ICWA will walk with very little. Having invested over $200 million in the Bell litigation that is not a risk that the State is willing to run. Hence the introduction of the Bill.

10. Various reasons have been put forward by the Treasurer and the Attorney General to justify the Bill. As will be demonstrated, those reasons are flimsy excuses designed to mask the real reason for the Bill, namely the weakness of ICWA's legal position. If ICWA's case was as strong as the government would have the Parliament believe, why is it not prepared to leave it to the Court to determine the merits of ICWA's case? Why is it necessary to pass legislation to stack the cards in ICWA's favour?

11. At the end of the day the distribution issues are legal issues. For example: is ICWA a creditor of BGF; is ICWA entitled to receive the benefit of a s.564 award; if so, will it hold the benefit of that order on trust for other creditors?[5]

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[3] [1967] AC 259.

[4] (1996) 189 CLR 51.

[5] One critical matter that the State has omitted to mention in debate on the Bill is that ICWA faces a serious problem in the event that a s.564 order is made in the terms contemplated in the funding agreements. This problem arises because the trust deeds of the bonds purchased by ICWA contain what is known as a "turnover trust". That trust means that any s.564 payment paid to ICWA (or its

Absent the Bill these questions would be answered by an independent judge after hearing argument from all affected parties. The judge would then deliver a judgment. If the judge erred, that error could be corrected on appeal. In accordance with this process, creditors would be paid according to their legal entitlements.

12. In contrast, under the Bill, decisions are not made by an independent decision maker. They are made by a person hand-picked by the State, the major beneficiary of the decision to be made. Worse still, the hand-picked umpire is only permitted to obtain legal advice from the State Solicitor, the solicitor for ICWA, the very party who stands to benefit from the Authority's decision. The Authority does not need to give reasons for its decision. Nor does it need to afford an affected party procedural fairness. And there are no rights of appeal. A decision of a Court, based on the rule of law, where persons are only paid according to their legal entitlements, is replaced by the decision of a statutory authority based on arbitrary, unfettered and unreviewable discretion.

13. One of the distribution issues that the Authority will need to determine is whether JN Taylor is a creditor of TBGL. JN Taylor has lodged a proof of debt in TBGL for about $290 million. ICWA purchased that debt,[6] thus any payment of that proof will flow to ICWA. JN Taylor is not a creditor of TBGL and therefore its proof of debt will be rejected. ICWA disputes this. Under the regime established by the Bill, can it seriously be suggested that the State Solicitor, ICWA's solicitor, can give independent, objective advice to the Authority on the question whether JN Taylor is a creditor of TBGL? The State Solicitor is in a clear position of conflict.[7]

14. A charade such as this may be standard practice in a despotic or tyrannical regime with a penchant for show trials. It is not, however, the sort of thing that one would expect from an Australian parliamentary democracy. It is

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trustee, the Law Debenture Trust Corporation plc) will be held on trust by them for, amongst others, the senior creditors. In other words, ICWA will not receive the benefit of any s.564 order.

6 While WA Glendinning has been criticised for purchasing a debt of $180 million for $175, no criticism has been levelled at ICWA for purchasing JN Taylor's debt. In fact, no mention has been made of this during debate.

7 The Hon. Mr Goiran MLC, 15 September 2015, p.6234.

therefore little wonder that the Bill has been condemned by the Western Australian Law Society, the Western Australian Bar Association, the Australian Bar Association and the Law Council of Australia, amongst others. Those organisations have expressed serious concerns that the Bill is inconsistent with the rule of law, is an attack on the separation of powers, interferes with the judicial process and creates substantial sovereign risk. The criticism of these well-respected bodies cannot simply be dismissed as the voice of "vested interests" as some have sought to do.[8]

SOME MISCONCEPTIONS AND INACCURACIES

15. Before addressing the constitutional flaws in the Bill BGNV wishes to correct a number of ill-informed, false and misleading statements that have been made by the Treasurer and the Attorney General in support of the Bill.

16. It has been suggested that the Bill is a "necessity".[9] Various arguments have been put forward to justify this assertion. Unfortunately, those arguments are premised on factual assertions that are simply untrue. BGNV has asked for a number of misleading statements to be corrected.[10] That request has been ignored. As a result, it is necessary to correct the record.

17. In what follows, the bolded sub-heading contains the untrue statement provided to the Legislative Assembly or Legislative Council. The paragraphs underneath that sub-heading contain BGNV's correction of the misleading statement. As will be seen, the Parliament has been badly misinformed about the real reason for the introduction of the Bill.

BGNV is a "Belgian distressed debt funder"[11] "owned by the Plaza group".[12]

18. Wrong.

19. BGNV is not, and has never been, owned by the Plaza group. BGNV is a wholly owned subsidiary of, and is owned by, BGF.

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[8] The Hon. Mr Mischin MLC, 15 September 2015, p.6235.
[9] The Hon. Dr Nahan MLA, 6 May 2015, p.3169.
[10] See the letter from Ferrier Hodgson to the Hon. Dr Nahan MLA dated 22 June 2015.
[11] The Hon. Dr Nahan MLA, 17 June 2015, p.4538.
[12] The Hon. Dr Nahan MLA, 17 June 2015, p.4540.

20. Nor is BGNV a distressed debt funder. BGNV was incorporated in Curaçao to enable the WA empire of Mr Holmes à Court to raise capital from the European debt market. BGNV did so by issuing bonds of AU$250 million and £75 million in the Euro-bond market. BGNV then on-lent the proceeds of the bond issues to TBGL and BGF.

21. BGNV is being wound up in Australia and in Curaçao. Mr Trevor is BGNV's Australian ancillary liquidator. The principal liquidation is conducted by bankruptcy trustees, known as curatoren, in Curaçao. Mr Trevor is responsible for collecting the Australian assets of BGNV and sending them to the curatoren. Those Australian assets comprise BGNV's proofs of debt in TBGL and BGF (in respect of the on-loans that remain outstanding) and its contractual rights to a 37.5% share in the outcome of any s.564 order.

22. Plaza is one of the holders of bonds issued by BGNV. Plaza has provided funding to BGNV to enable BGNV to recover funds for its creditors. These funding arrangements have been approved by the courts of Western Australia and Curaçao, which supervise Mr Trevor and the curatoren. Mr Trevor and the curatoren have statutory and other duties to act with independence and in the best interests of BGNV. Plaza does not control BGNV, Mr Trevor or the curatoren in any way. The suggestion that Plaza does so trivialises the role of curatoren, the role of Mr Trevor as ancillary liquidator and the role of their respective supervising courts. It also reveals a profound misunderstanding of Australian insolvency law.

23. The statements about Plaza's control of BGNV are not the result of careless error. The elision of the distinction between BGNV and Plaza is part of a deliberate strategy designed to confuse the position and (wrongly) suggest that BGNV is seeking an amount of compensation out of all proportion to its legal entitlement.

"We have tried mediation repeatedly".[13]

[13] The Hon. Dr Nahan MLC, 17 June 2015, p.4538.

24. Wrong.

25. ICWA has not tried mediation repeatedly. In fact, the record shows that ICWA did not make a **single** request for mediation since the settlement with the Banks occurred in June 2013. The record also shows that ICWA has consistently **opposed**, over the last two years, BGNV's repeated attempts to convene a mediation. Much of this record cannot be referred to because it is the subject of without prejudice communications. However, one open communication can be referred to, to make good the point.

26. Under the funding arrangements, the liquidator of TBGL and BGF was obliged to institute his s.564 application unless the funding creditors agreed to defer the application. BGNV's position was that the s.564 application should be deferred to permit the parties to mediate. ICWA **opposed** this. ICWA's position was that <u>no</u> mediation should occur until <u>after</u> the liquidator's s.564 action had been instituted and until <u>after</u> separate litigation had been instituted and progressed by ICWA.

27. In July 2014 BGNV's lawyers met with ICWA's lawyers to try and convince them to agree to mediate as soon as possible. BGNV's position was as follows:

1. *BGNV and ICWA share a common goal. They wish, if possible, to resolve the Distribution Issues by agreement and thereby avoid the estimated 14 years of litigation that would otherwise ensue. BGNV and ICWA disagree as to the strategy to be adopted to achieve this goal. In particular, they disagree about the timing of any mediation and the role that the section 564 applications will play in bringing about that mediation.*

...

3. *BGNV's position is that the applications should be deferred for six months to enable the parties to give it their best shot to negotiate or mediate the Distribution Issues and propound a scheme of arrangement. If no agreement can be reached then the section 564 applications should proceed.*

...

7. *ICWA's proposal involves a high risk strategy that is likely to make a mediated resolution of the Distribution Issues less, rather than more, likely.*

...

14. *BGNV understands and shares ICWA's frustration about the difficulties in resolving the Distribution Issues. However, BGNV is strongly opposed to ICWA's proposed course of action.*

...

16. *In making its decision ICWA should be mindful of the serious risks it runs in embarking on this process. It is a process that has the very real potential to cause ICWA substantial detriment. It is a process that BGNV would prefer to defer (for six months) while the parties exhaust the opportunity to try and resolve the Distribution Issues. If, however, the process is commenced now, BGNV will need to take whatever steps it considers appropriate to protect its interests.*

"We brought this bill in not just to help mediation, but to force mediation …".[14]

28. Wrong.

29. The Bill was not introduced to "force" mediation. The parties had agreed to mediate at a time when none of them (other than ICWA) knew about the existence of the Bill.

30. The Bill was not introduced to "help" mediation. Indeed, the introduction of the Bill had the opposite effect. The introduction of the Bill was the direct reason why three major creditors (the Commonwealth, BGNV and WA Glendinning) decided not to attend the scheduled mediation.

31. The timing of the Bill, which was introduced a few days before the scheduled mediation was due to begin, was not coincidental. It was part of a deliberate strategy on the part of the State to try and enhance its negotiating position at the mediation. That is, the Bill was designed to put pressure on the other parties and provide ICWA with leverage and a position of ascendancy at the mediation. The need to create such leverage arose due to ICWA's extremely weak legal position. The State had by this time recognised that it *"needed to*

[14] The Hon. Dr Nahan MLA, 17 June 2015, p.4538.

settle the case".[15] However, it also recognised that in order to do so on terms favourable to it, it needed to do something to improve its weak negotiating position. The Bill was the means to achieve this end. The weakness of ICWA's legal position could not be overcome other than by means of the Bill. As the Treasurer has frankly acknowledged:[16]

... the reason this bill is before the house is that we have a lower claim to the funds than Bell Group NV.

Mediation efforts were "doomed to fail" because an attempt was made "to pre-condition participation upon compromise of some parties' existing legal rights …". "Initial approaches canvassing mediation were made on the basis that [ICWA] should sacrifice legal rights even before mediation began".[17]

32. Wrong.

33. As noted above, BGNV has been pushing ICWA to mediate for several years. BGNV has never imposed, as a condition of mediation, that ICWA sacrifice its legal rights. BGNV is not aware of any other party seeking to impose such a condition.

The Commonwealth of Australia has "gone rogue".[18]

34. It is extraordinary that the State has apparently suggested, in its briefing to members of the Legislative Council, that the Commonwealth has gone "rogue".

35. What has the Commonwealth done to deserve such condemnation? It has simply taken steps to protect its legal position by issuing tax assessments to various Bell group companies and to Mr Woodings. These tax assessments would not have been issued but for the introduction of the Bill. The Bill seeks to destroy the rights of the Commonwealth and improve the position of the State over the Commonwealth. The Commonwealth simply responded to this threat in order to protect its position.

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[15] The Hon. Dr Nahan MLA, 17 June 2015, p.4538.
[16] The Hon. Dr Nahan MLA, 17 June 2015, p.4539.
[17] The Hon. Mr Mischin MLC, 11 August 2015, p.4963.
[18] The Hon. Mr Travers MLC, 15 September 2015, p.6229.

36. The suggestion that a party has "gone rogue" simply because they take steps to protect their legal position from harm intended to be inflicted on them by the State is illustrative of a broader malaise, namely the desire on the part of those who have introduced the Bill to besmirch anyone who seeks to protect and enforce their legal rights. Thus BGNV and WA Glendinning are perjoratively described as distressed asset traders and professional litigation funders[19] and, apparently, as bottom feeders.[20] This is done without any sense of irony given that ICWA is by far the largest litigation funder in this case.

"The detractors of the bill have raised a number of concerns, including that the bill overrides peoples' rights without compensating them. That is not true. It is not true that the bill proposes the removal of rights without compensation".[21] "It is certainly not the case that the bill overrides other people's rights".[22]

37. Unfortunately, it is true. The Bill does override people's rights and it does so without compensation.

38. Take the position of BGNV as an example. Presently, without the Bill, BGNV has two "rights". It has a contractual right under the Post Termination and Inter-Creditor Agreement (**PTICA**) to a 37.5% share in any s.564 order. It also has various statutory rights under the *Corporations Act* / *Corporations Law* in respect of the proofs of debt which it has lodged in TBGL and BGF. These rights include rights of appeal to the liquidator's adjudication on the proof of debt lodged in the windings up and the right to be paid a dividend *pari passu* with other creditors.

39. BGNV's contractual right under PTICA is obliterated by clause 26(1)(i) of the Bill which makes PTICA void. BGNV's statutory rights in respect of its proofs of debt are destroyed by clause 25(5). There can therefore be no question that the Bill overrides BGNV's rights.

40. It is equally clear that those rights are abolished without compensation. All that BGNV is given under the Bill is a right to lodge a proof with the

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[19] The Hon. Dr Nahan MLA, 6 May 2015, p.3169.
[20] The Hon. Mr Goiran MLC, 15 September 2015, p.6233.
[21] The Hon. Dr Nahan MLA, 17 June 2015, p.4539.
[22] The Hon. Dr Nahan MLA, 17 June 2015, p.4540.

Authority. Whether BGNV is paid anything and, if so, how much, is left entirely to the absolute, unfettered discretion of the Authority, Minister and Governor. As demonstrated later in this submission, a creditor has no right under the Bill to receive a payment. Indeed, the Bill contemplates that a creditor with a valid claim may receive nothing.

"There has been an awful lot of litigation since in various jurisdictions around the world contesting just about every aspect of the agreements that have been entered into by certain parties who were seeking to profit from not having invested in the litigation and now holding other parties and the liquidator to ransom in a sense until they get their way".[23]

41. Wrong.

42. There has not been an awful lot of litigation around the world contesting just about every aspect of the agreements. Since the settlement with the Banks six actions have been commenced. Five of those actions were commenced in the Supreme Court of Western Australia and one action was commenced in England. Of the five Western Australian actions, four of those actions were commenced **by ICWA**.[24] The fifth action was commenced by the liquidator of TBGL and BGF at **ICWA's insistence**.[25]

43. In other words, **all** of the Australian litigation of which the State now complains was commenced by, or at the insistence of, ICWA. The English proceeding involves a claim by Plaza against its English trustee under the trust deeds governing the BGNV bond issues.

44. It is ironic that litigation commenced by the State, or which it required be brought, is now being used to justify the present Bill, particularly when BGNV warned ICWA of the dangers of embarking down the path of litigation, rather than pursuing mediation.

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[23] The Hon. Mr Mischin MLC, 15 September 2015, p.6235.

[24] COR 179 of 2014 (an action seeking an order appointing ICWA to the BGF committee of inspection), COR 57 of 1996 (an application brought by ICWA to obtain confidential material filed by Mr Trevor in the winding up of BGNV. ICWA's application was unsuccessful and ICWA was ordered to pay BGNV's costs), COR 202 of 2014 and COR 208 of 2014 (actions seeking a wide range of relief said to be ancillary to COR 146 of 2014 and which replicated relief sought in other proceedings issued by ICWA in 1996 in CIV 2061 of 1996).

[25] COR 146 of 2014 – the action seeking s.564 orders in the windings up of TBGL and BGF.

45. In <u>none</u> of this litigation is anyone holding anyone else hostage until they get their own way. Nor is anyone in that litigation seeking to profit from not having invested in the litigation. All that parties are doing is seeking to protect and enforce their legal rights.

The "problem that has arisen is that various other parties that were not involved in funding the litigation have contested those [funding agreements]".[26]

46. Wrong. No person, let alone a person who was not involved in the funding, has contested the funding agreements.

The "other litigators are using litigation as a means to an end".[27]

47. Wrong.

48. As noted above, the litigation being referred to is litigation that was either commenced by ICWA or is litigation which ICWA required the liquidator to bring. Once litigation is commenced the other parties to that litigation have no alternative but to respond to it.

The "other creditors, particularly BGNV and WA Glendinning group, resisted and reneged on their previous agreements and used the processes of the law to try and unwind them completely".[28]

49. Wrong.

50. WA Glendinning is not a party to <u>any</u> agreement. It is therefore impossible for it to renege on or use the processes of the law to unwind a non-existent agreement. While BGNV is a party to a number of agreements, it has not reneged from any of those agreements. Nor has it taken any steps to unwind them.

51. It is ironic that the State should allege that others have sought to avoid their contractual obligations given clause 26 of the Bill which unwinds 15 agreements and treats them as never having been made. ICWA is a party to

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[26] The Hon. Mr Mischin MLC, 15 September 2015, p.52.
[27] The Hon. Dr Nahan MLA, 17 June 2015, p.4540.
[28] The Hon. Dr Nahan MLA, 17 June 2015, p.4538.

all but one of those agreements. If anyone is to be accused of reneging on their previous agreements it is the State.

The legal system "has not provided, and appears highly unlikely in even the long term, to be able to provide a timely return to creditors". "The law … is not perfect and it can be swayed by big money to perpetuate and use litigation to achieve an end. That end is to perpetuate the litigation and wear out the state so it walks away …".[29] "The litigation funders are essentially prepared to see these proceedings drag interminably until and unless the litigants who have secured the fund and taken the risks give them what they want, and what they demand will put the state and the people of Western Australia out of pocket beyond what has already been spent".[30]

52. The major creditors are sophisticated players. None of them is naïve enough to think that the State will simply walk away from the present litigation and therefore abandon its claims. While lawyer bashing and blaming delays on the court system may be a popular past time, it must be remembered that the litigation that is allegedly being perpetuated is litigation commenced by or at ICWA's insistence. It must also be noted that when ICWA issued its proceedings in COR 208 of 2014 it colourfully told the Court that in doing so it had thrown out the rule book. It should come as no surprise that BGNV's position is that when a party commences litigation it is not too much to ask that it should play by the rules.

53. Furthermore, the litigation of which the State complains (which it required to be brought) has only been on foot for a little over a year (the liquidator's action seeking the s.564 orders was only commenced in August 2014). To suggest that the Supreme Court will allow "big money" to prevent the timely disposal of this action is fanciful.

The Bill will ensure a "fair" and "equitable" distribution of funds.[31]

54. No it won't.

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[29] The Hon. Dr Nahan MLA, 17 June 2015, p.4539.

[30] The Hon. Mr Mischin MLC, 15 September 2015, p.52.

[31] The Hon. Dr Nahan MLA, 6 May 2015, p.3167 and the Hon. Mr Mischin MLC, 11 August 2015, pp.4963 and 4966.

55. If the Bill was intended to ensure a fair and equitable distribution of funds then it would contain provisions providing for such a distribution. It would also give creditors enforceable rights to such an entitlement. The Bill does no such thing.

56. Under the Bill the **only** "right" that a creditor has is the right to lodge a proof with the Authority.[32] But this is not a right of any substance or value. The Authority, Minister and Governor are given an absolute discretion to determine the amount to be paid to a claimant.[33] Their decision cannot be reviewed. In addition, the Bill expressly provides that nothing in the Bill *"creates any right in, or for the benefit of, a creditor of a WA Bell Company or any other person"*.[34] Finally, the Bill contemplates that a creditor with a valid claim may receive nothing. Thus clause 37A(1) provides that *"[n]othing in this Act requires the Governor to determine that any amount is to be paid to ... any person ..."*. And clause 37A(8) provides that upon the Governor making his determination *"every liability of every WA Bell Company to a person* ***to whom nothing is to be paid*** *... is, by force of this Act, discharged and extinguished"*.

57. The upshot of these provisions is that a creditor with a valid claim may receive nothing. Furthermore, even if the Authority recommended that a payment be made to a creditor there is no obligation on the part of the Minister or the Governor to implement that recommendation. Thus if, for example, the Authority recommended that BGNV should be paid $X, it would be open to the Minister, if he did not like this outcome, to recommend to the Governor that BGNV receive something less than $X, or even nothing. Thus instead of the Bill **ensuring** a fair and equitable distribution of funds to creditors, the Bill ensures that creditors will only receive a distribution based on the good grace of the Minister.

58. It is no answer to say that everyone should assume that the Minister will act appropriately in advising the Governor or that he will implement the

[32] Clause 25(1).
[33] Clauses 35(4), 36(4), 36A, 37 and 37A.
[34] Clases 35(6), 36(7) and 37A(6)

recommendations of the Authority. If this was what was intended the Bill would impose an obligation on the Minister to do so. It doesn't. In any event, no creditor can have any confidence that the State will act appropriately when the State has shown itself willing to stack the cards in its favour to the prejudice of other creditors. Why should any creditor assume that the State will deal with it fairly and equitably when that creditor stands in competition with the State in relation to the distribution of funds?

The "distribution process is limited to 12 months".[35]

59. No it isn't.

60. The 12 month distribution process was a key rationale underpinning the Bill. Indeed, it was the main reason put forward as to why the Bill was an attractive alternative to the delays associated with a court supervised distribution process.

61. Now, however, the 12 month distribution process has been abandoned and extended indefinitely into the future. How long into the future is not known because it is not known how long the objection process to the tax assessments may take to resolve. It may be many years.

62. This delay and the extension of the 12 month period is inconsistent with and undermines a key objective of the Bill. As noted in the Supplementary Explanatory Memorandum:

> *The issue of taxation assessments and the requirement to dispute them will create a delay in the distribution of funds, inconsistent with the objectives of the Bell Bill. To mitigate the delay provision is made to amend the distribution provisions to allow the process contemplated by those provisions to respond to the reality of the taxation assessments and any challenges made to those assessments.*

63. The Committee should not be hoodwinked by the suggestion that recent amendments permitting interim distributions will mitigate these delays. There is no prospect that the Authority will make an interim distribution to anyone other than ICWA while the spectre of a constitutional challenge hangs over the legislation. This is because the State will not take the risk of

[35] The Hon. Dr Hahan MLA, 6 May 2015, p.3168.

making an interim distribution to a creditor when there is no guarantee that the creditor will repay the funds to the State if the legislation is declared invalid. This risk can be illustrated using the position of BGUK as an example.

64. Assume that the State made an interim distribution of $X to BGUK. Further assume that the legislation is then declared invalid by the High Court. Upon the legislation being set aside the State will be obliged to return $1.7 billion, plus interest, to Mr Woodings. This would include the $X paid to BGUK. If the State is not to be left out of pocket to the tune of $X it will need to recover that amount from BGUK. However, BGUK, which is based in England, is insolvent. It may not be willing or able to return the funds. It may, for example, have distributed some of the funds to its creditors or used them to pay expenses of the liquidator. The State will therefore need to commence proceedings in England to recover the funds, or what is left of them. If the State is not able to do so it will have paid $X twice: once to BGUK and once to Mr Woodings when repaying the $1.7 billion. Given this risk, there is no likelihood that the State will make any interim distribution until the fate of the validity of the legislation is known.

"Provisions in the act for the authority to consider are similar in concept to section 564 of the Corporations Act 2001".[36]

65. No they aren't.

66. As already noted, the Bill gives the Authority, Minister and Governor an absolute, unfettered discretion. They can do whatever they want. In contrast, the discretion conferred on the Court by s.564 is a discretion that must be exercised judicially.

67. Furthermore, a s.564 order can only be made in favour of a "creditor" and only if that creditor has paid money to or provided an indemnity to a liquidator. ICWA is **not** a creditor of BGF. This is because ICWA's only claim against BGF is as a bondholder. But the entity which is a creditor of BGF for these purposes is LDTC, the trustee for bondholders, and not the

[36] The Hon. Dr Nahan MLA, 6 May 2015, p.3169.

individual bondholder, ICWA. Because ICWA is not a creditor of BGF, it cannot receive the benefit of a s.564 order in the winding up of BGF. Even if ICWA was a creditor, it did not provide the relevant indemnity or funding to the BGF liquidator. While it is repeatedly said that ICWA provided $200 million to fund the Bell litigation, that is only true in a colloquial sense. It is not true in a legal sense. This is because in the winding up of BGF ICWA provided its funding through a "back to back" arrangement with LDTC (in recognition of the s.564 obstacle noted above). Thus ICWA provided an indemnity and funding to LDTC and LDTC, not ICWA, provided the relevant funding and indemnity to the liquidator. This is fatal to ICWA's attempt to receive the benefit of a s.564 order in the winding up of BGF.

68. The State has recognised this. That is why the Bill seeks to overcome the problem. One way in which it does so is by defining "creditor" in clause 3 in a peculiar way to include a beneficiary of any trust. It has been settled law for more than 100 years that it is the trustee, not the beneficiary, who is the relevant creditor in these circumstances.[37] The Bill's definition overrides this accepted position. It does so solely to benefit ICWA and overcome the problem noted above that ICWA is not a creditor of BGF and is therefore not entitled to receive the benefit of a s.564 order.

69. If the provisions of the Bill were similar to s.564 then the obvious question is: why not leave it to the Court to determine the matter in accordance with s.564? The answer is because s.564 provides risks to ICWA. The State does not want to run those risks. This is so notwithstanding that the State entered into contractual arrangements pursuant to which it agreed that the distribution issues would be resolved via s.564.

This is "hellishly complex".[38]

70. In fact, it isn't. It has been made unduly complex because it is in the State's interest to do so. Then the "simple" solution of the Bill is seen to be not only desirable but the only way through the complexity and, therefore, a necessity.

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[37] *In re Dunderland Iron Ore Company Limited* [1909] 1 Ch 446 at 452.
[38] The Hon. Dr Nahan MLA, 17 June 2015, p.4538.

71. The real question facing those who are to vote on this Bill is: are the issues so complex or intractable that a legislative solution is the only available or best solution? Or should the matter be left to be resolved by the Courts, consistently with the parties' contractual arrangements? Put another way, are the issues such that the only solution is legislation that trashes the separation of powers and the rule of law and interferes in legal proceedings currently on foot to prevent the Court from resolving the present dispute?

72. What is currently before the Supreme Court of Western Australia is an application by the liquidator for an order under s.564. There is nothing hellishly complex about a s.564 application. They are routinely considered by the Courts. Various things need to be done before the Court can make a s.564 order. Thus outstanding tax issues need to be resolved and challenges to proofs of debt need to be determined. But proof of debt disputes are the bread and butter of insolvency practice. And there is nothing complex about resolving tax objections. It happens every day of the week.

73. There is another point to make in this context. When ICWA entered into the funding arrangements it did so knowing that at the end of the process, if the Bell litigation was successful, the distribution issues would be resolved by a s.564 application. ICWA was told by Templeman J that a s.564 order could not be made until **after** various "uncertainties" had been resolved. Those uncertainties included the outstanding tax issues and proof of debt disputes. The State thus went into the funding arrangements with its eyes wide open. It knew that no distribution could occur under s.564 until **after** the uncertainties noted by Templeman J had become certainties.

74. Now the State wishes to rely on those same uncertainties to justify a departure from the contractual arrangements which it entered into freely and which the other parties have observed in good faith, ordering their affairs accordingly over the last 20 years. The State may now regret entering into those contracts. The State may also regret not tying up various loose ends created by those agreements. But if that is the reason why the Bill has been introduced the Government should say so expressly and accept the sovereign risk associated with any government that rips up its contracts and fails to

honour its obligations. The Government should not seek to hide behind manufactured complexities to justify their change of heart.

75. The weakness in ICWA's position is a direct result of the poor commercial deal it struck in 1995 and its failure to address the problems that it knew existed as a result of its subordinated status. The Bill is an attempt to rewrite the commercial deal and rectify this problem. In BGNV's view, however, the Honourable Mr Travers MLC was spot on when he said:[39]

... we should not simply be removing the rights of others because certain people on behalf of the state made errors 20 years ago. We need to get fairness and equity. That will be the challenge for this committee and I look forward to the committee's report back to the house on how to achieve fairness and equity for the state, for ICWA for its contributions and for those people who have a right under the existing laws of this state.

THE BILL FAILS TO IMPLEMENT ITS OBJECTIVES

76. While the Bill contains eight identified objectives, there are, in substance, only two objectives. They are: (a) to avoid further litigation; and (b) to provide "appropriate" and "reasonable" distributions to creditors and those who provided funding for the Bell litigation. The Bill fails to implement either of these objectives.

The object to avoid further litigation

77. It has been suggested that the Bill will *"ensure an expeditious end to the Bell litigation"*.[40] This is reflected in objectives 4(a), 4(b) and 4(h). These objectives identify the object of the Bill as being to provide a mechanism to resolve, without litigation, the disputes which have arisen in relation to the distribution of the Bell litigation funds. Indeed, objective 4(h) is to:

avoid further litigation that will waste the resources of the State and other persons and consume the Bell litigation funds.

78. Rather than the Bill achieving its objective of avoiding further litigation, the Bill guarantees that there will be yet more litigation. As noted above, the

[39] The Hon. Mr Travers MLC, 15 September 2015, p.6232.
[40] The Hon. Dr Nahan MLA, 6 May 2015, p.3167.

Commonwealth only issued its tax assessments because of the introduction of the Bill. The resolution of the tax objections to those assessments will inevitably lead to review and appeal proceedings. This litigation will be the direct result of the introduction of the Bill.

79. The introduction of the Bill will also guarantee additional litigation in the form of a High Court challenge. A successful High Court challenge will be a "disastrous outcome"[41] for the State:

A successful constitutional challenge will be the worst of all outcomes as it incurs greater legal costs; consumes yet more time, and reverts parties to the intractable situation that exists at the present time, but without the opportunity for resolution provided by this Bill.

80. It will also result in significant reputational damage to this Parliament and to this Committee. It is one thing for Parliament unwittingly to pass legislation that is struck down by the High Court as unconstitutional. It is quite another thing for legislation to be struck down as unconstitutional after a Parliament has been forewarned of the risk of constitutional challenge and has asked a Committee to inquire into and report on the matter.

81. In addition, if the legislation is found to be invalid then it is almost inevitable that *further* litigation will be instituted, *additional* to that already on foot. The Bill, for example, recognises in clause 64(1)(e) that those who prepared the Bill or recommended its introduction into the Parliament may be exposed to various claims. One such claim would be a claim for contempt of court. If the Bill is struck down, clause 64(1)(e) will not operate to protect those persons from such claims.

82. Thus rather than promote the achievement of the "no litigation" objective, the Bill achieves the opposite. It will directly result in even more litigation than would otherwise be the case.

83. There is also a degree of inconsistency between this objective and statements made by the Honourable Mr Mischin MLC in the second reading speech in the Legislative Council. Objective 4(h) is premised on the assumption that

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41 Mr Wyatt MLA, 17 June 2015, p.4521.

further litigation concerning the distribution issues will consume the Bell litigation funds. However, in his second reading speech Mr Mishcin suggested the opposite. He said:[42]

The proceeds received by the liquidators of the Bell Group companies of $A1.75 billion—or A1 750 million—... is so large that creditors' legal expenses are easily dwarfed by earnings on the principal amount, making leveraging their claim through the use of, among other avenues, lawyers and the legal process relatively cheap.

84. If, as Mr Mischin says, legal expenses are dwarfed by earnings on the fund, then there is no risk that the litigation will consume the Bell litigation funds as suggested in objective 4(h).

The appropriate and reasonable distribution objective

85. BGNV has explained elsewhere in this submission why the Bill does not ensure the fair and equitable distribution of funds. The same reasons explain why the Bill, as currently drafted, does not ensure the appropriate and reasonable distribution objective.

86. There is an additional point to make in this context. Objective 4(g) states that an objective of the Bill is:

to distribute the Bell litigation funds generally in accordance with the intentions of the liquidator and the creditors who funded the Bell litigation as set out in agreements made before the enactment of this Act.

87. The Bill does not achieve this objective. How can funds be distributed in accordance with the intentions of the liquidator and creditors set out in the various agreements when the Bill, by clause 26, renders those very agreements void and treats them as if they never existed? In short, how do you distribute funds in accordance with intentions contained in agreements that do not exist and are deemed never to have existed?

88. In addition, the intentions of the liquidator and the creditors as set out in those agreements was to go to Court and obtain a s.564 order. If a true objective of the Bill is to distribute the funds in accordance with the intended

[42] The Hon. Mr Mischin MLC, 11 August 2015, p.4965.

s.564 application, how can that objective be met when the Bill prevents the Court from determining the s.564 application?

BGNV'S CONSTITUTIONAL CHALLENGE

89. Under s.109 of the Constitution, when a law of a State is inconsistent with a law of the Commonwealth, the law of the Commonwealth prevails, and the State law is, to the extent of the inconsistency, invalid.

90. There are three broad grounds of challenge to the validity of the Bill.

91. *First*, there is an inconsistency for the purposes of s.109 of the Constitution between the Bill and the *Income Tax Assessment Act 1936* (Cth) and other Commonwealth taxation legislation.

92. *Secondly*, the Bill's reliance on ss.5F and 5G of the *Corporations Act 2001* (Cth) is flawed and does not work. As a result, there is a direct inconsistency between the Bill and provisions of the *Corporations Act*. It follows that the Bill is invalid as a result of the operation of s.109 of the Constitution.

93. *Thirdly*, the Bill impermissibly interferes with the exercise of federal jurisdiction invested in the Supreme Court of Western Australia in current litigation on foot in that Court. The Bill's impairment of the exercise of federal jurisdiction invested in a State court infringes prohibitions implied from Chapter III of the Constitution.

94. It is in BGNV's interest for the Bill to be passed in its current form, without amendment, given that BGNV is confident that the legislation will be struck down by the High Court. BGNV does not therefore intend to expand upon the grounds of its challenge.

THE STATE'S PROPOSAL FOR AN AGREED SCHEDULE

95. The Treasurer has suggested that a "fair" return to creditors would be: $700m to ICWA, $480m to BGNV, $430m to the ATO, $50m to WA Glendinning and $55m to BGUK. He indicated that if these numbers were agreed he

would recommend that the government alter the legislation to incorporate those numbers in a schedule to the Bill.[43]

96. The Treasurer's stated numbers involve a sleight of hand. The bulk of the $55m to be paid to BGUK in fact flows back to Bell group entities in Australia. As a result of the Bill, those funds will now flow to the State. In addition, the total of the amounts referred to by the Treasurer total $1.715 billion. The available funds are in fact estimated by the liquidator to be about $1.795 billion at the then estimated time of distribution of 31 December 2015. If other minor creditors' claims are satisfied the balance will, as a result of the Bill, flow to the State. The "real" figure proposed by the Treasurer to be paid to ICWA is thus more than $800m, rather than $700m.

97. The Treasurer's calculation of a "fair" return is determined by calculating a return on investment based on the funds invested in the litigation. This measure is not an appropriate comparator. BGNV's rights as a creditor arise because it lent $464 million to TBGL and BGF. BGNV also provided funding of $22 million. The suggestion that a return of $480 million, based on an investment of $486 million, is fair or that it represents a staggering return on investment[44] is misconceived. On the Treasurer's figures, BGNV receives less than the principal invested and therefore no return on its investment over 20 years.

98. The Treasurer's approach only "works" by eliding BGNV with Plaza (the provider of funding to BGNV). That, no doubt, is why the incorrect statements noted above about Plaza's ownership of BGNV were made. Those making such statements know them to be wrong. However, it is in the State's interest to muddy the waters to make it appear that what is being proposed is reasonable, when in fact, it involves preferring the interest of the State at the expense of other creditors.

99. BGNV does not object to the Treasurer's proposal to amend the Bill to provide for the payment of a fixed and fair sum to BGNV and the other

[43] The Hon. Dr Nahan MLA, 17 June 2015, p.4541.
[44] The Hon. Dr Nahan MLA, 17 June 2015, p.4541.

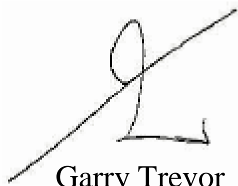
creditors. BGNV considers that this can be achieved in a way that preserves the constitutional validity of the Bill. It would, however, require major amendments to be made to the Bill. It would also require agreement to be reached between ICWA, BGNV, the Commonwealth and WA Glendinning as to the amount to be distributed between them.

100. BGNV considers that a more than fair return to ICWA, having regard to the weakness in its case, would be $670 million (being 96% of the Treasurer's "fair" assessment). BGNV also considers that a distribution to it of $650 million would be fair. Although this amount is less than BGNV's legal entitlement, it is appropriate to compromise those rights in return for a speedy distribution of funds to creditors in 2016.

CONCLUSION

101. The Committee may be aware that there is a joke doing the rounds amongst the legal and accountancy profession about the Bill. It goes like this. First Alan Bond stole the money from the Bell group. Then the Banks stole it from them. And now it is the turn of the State to steal it.

102. It shouldn't, however, be forgotten that Alan Bond didn't get away with it. Nor did the Banks. BGNV is confident that the High Court of Australia will not let the State get away with it either.



Garry Trevor

Official Liquidator

Bell Group NV (In Liquidation)

1 October 2015