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

Introduction and First Reading

Bill introduced, on motion by **Dr M.D. Nahan (Treasurer)**, and read a first time.

Explanatory memorandum presented by the Treasurer.

Second Reading

DR M.D. NAHAN (Riverton — Treasurer) [12.14 pm]: I move —

That the bill be now read a second time.

For the benefit of members who may be new to this place, or may not have even been adults when this saga began, I will provide a potted history of events that led the government to introduce the Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015. In May 1988, the then government caused the Insurance Commission of Western Australia—the State Government Insurance Commission at the time—to purchase $162 million in shares and $150 million worth of bonds of Bell Group companies. Those companies went into liquidation not long afterwards. The liquidators of the Bell companies then sought funding from creditors to investigate and commence proceedings against some 20 leading Australian and international banks—later referred to as "the banks"—that had taken possession of Bell companies' assets. The Insurance Commission, the commonwealth and one other creditor agreed to fund liquidators to commence court proceedings against the banks. In the absence of that action there would be no return to creditors of the Bell companies. Litigation ensued for almost 20 years, becoming colloquially known as the "Bell litigation". Over that period the funding creditors paid more than $224 million to the liquidators to conduct the Bell litigation, of which the Insurance Commission contributed almost $200 million. Litigation was conducted in several different jurisdictions in several courts, including the Federal Court, the Western Australian Supreme Court and its Court of Appeal, and the High Court. In June 2013, the banks agreed to settle the Bell litigation, resulting in a pool of funds of $1.7 billion being made available to the liquidators for distribution to creditors. It was hoped that after the settlement, the creditors of the Bell companies would cooperate to bring about a swift and equitable distribution of those funds. That hope has not been realised. Litigation over the distribution of these funds has been threatened and run since settlement, occupying the Western Australian Supreme Court and the English High Court, and threatening to consume a great deal more time and resources of this state. After two decades of incredibly expensive litigation, the government is not inclined to let a third decade of litigation pass. The government is also not inclined to have the funds of taxpayers, or motorists' insurance funds, utilised to pay for the legal system to further delve into, at great expense, the affairs the Bell companies in the 1980s.

The government therefore proposes the Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015 to ensure an expeditious end to the Bell litigation and the equitable distribution of the pool of funds. This bill provides a framework for the dissolution of the WA registered Bell companies and the administration and distribution of the Bell litigation proceeds to avoid the perpetual litigation that appears to be inevitable on any matter associated with these companies. This bill uses existing provisions in part 1.1A of the commonwealth Corporations Act 2001, which preserves the power of state Parliaments to pass laws displacing the operation of the Corporations Act, in particular for company insolvencies. The corporations law operating for the Bell companies was the Western Australian Corporations Law. The law when the Bell companies went into liquidation was the Western Australian Corporations Law. The bill will bring the Bell companies back under the scope of Western Australian law for the resolution of the affairs of those companies. As the bill refers to legal relationships governed only by the laws of Western Australia and companies registered in Western Australia, this legislation has little or no effect on other states and the national Corporations Act 2001. State Parliaments in other states have displaced provisions of the Corporations Act for a range of reasons, the most analogous example being the NSW James Hardie (Civil Liability) Act 2005, which set up a state scheme for winding up certain companies formerly part of the James Hardie corporate group.

A short description of the mechanisms by which the bill will achieve its intended aim to finalise matters associated with the Bell companies and distribute proceeds is —

(a) upon the bill coming into force, the assets of the Bell Group companies registered in Western Australia will transfer to a statutory authority headed by an administrator appointed by the minister, who will hold the assets in a fund;

(b) the authority will report to the minister on liabilities that should be charged against the fund, appropriate payments to be made to creditors of the Bell Group and appropriate reward to be paid to creditors who indemnified the liquidators with respect to the Bell litigation;

(c) the Governor on the advice of cabinet may then, by instrument in writing, determine the amounts to be paid and the minister will provide the determination of the Governor to the authority; and

(d) the distribution process is limited to 12 months, and any assets not distributed in 12 months will be forfeited to the state. The bill establishes the WA Bell Companies Administrator Authority to collect and deal with property of the Bell companies.

The objects of the bill are —

(a) to provide a mechanism to resolve, without litigation, disputes that have arisen in relation to the distribution of funds received by the liquidator of the Bell Group Ltd and certain of its subsidiaries as a consequence of the Bell litigation and the settlement of it in 2013;

(b) to provide a form of external administration of WA Bell companies and require that it be carried out only in accordance with the provisions of this bill;

(c) to provide appropriate compensation to the creditors who funded the Bell litigation, taking into account the funding provided and the associated risks assumed by them;

(d) to reflect the circumstance that without the funding mentioned in paragraph (c), the Bell litigation funds would not exist and the creditors of the Bell group of companies would have received no, or only nominal, dividends in the liquidation of those companies;

(e) to make reasonable provision for the distribution of the property of the WA Bell companies having regard to the uncertainties existing as to the nature and extent of that property;

(f) to make reasonable provision for the satisfaction of liabilities owed to creditors having regard to the uncertainties existing as to the nature and extent of those liabilities;

(g) 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 legislation; and

(h) to avoid further litigation that will waste the resources of the state and other persons and consume the Bell litigation funds.

The objects of this bill are drafted broadly to encapsulate the breadth of functions and powers of the authority and the discretion of the authority to perform those functions. The bill is intended to be interpreted broadly and pragmatically with a view to ensuring the purpose of the bill is facilitated and achieved by not limiting the powers and functions of the authority to determine the most efficient and appropriate distribution of the fund.

To deliver those objects, this bill will establish the WA Bell Companies Administrator Authority Fund. The fund will be administered by the authority. Bell companies' assets will be transferred to the fund. Bell companies' liabilities will become liabilities that may be claimed against the fund. To avoid ongoing disputes about the funding agreements put in place many years ago, those agreements will be voided.

This bill will cause the Bell companies to be dissolved and cease to exist. The authority will take the position of dissolved companies in any proceedings in any court. The authority will take the position of dissolved companies in any agreement or instrument to which the company was a party. Any continuing agreements or instruments will continue to have effect as if a reference to a Bell company were a reference to the authority. The authority will issue notices to creditors of a Bell company requiring creditors to give the authority full particulars of all liabilities of the company to that creditor within 30 days of receiving the notice. The process adopted by the authority will be similar in concept to that used in a conventional liquidation, but the mechanics of this process will be materially different. The authority will have considerably greater discretion in assessing and quantifying liabilities than a liquidator in order to reach an expeditious and pragmatic resolution of questions of liability. The only mechanism for a person to receive any money from a Bell company is through a claim against the fund.

One of the considerations the authority would take into account in discharging its functions is agreements made before the enactment of the bill. Agreements creditors may have reached after the introduction of this bill for the preferred distribution of the property of the Bell companies would also be taken into account. That is intended to ensure that creditors have an incentive to facilitate the work of the authority and expedite the distribution of the fund, by working cooperatively to endeavour to agree a basis of distribution which they may recommend to the authority. Another consideration the authority will take into account is the amount to be paid to, or property to be transferred to or vested in, a creditor of a Bell company as compensation for providing funding or indemnity for the Bell litigation.

Provisions in the act for the authority to consider are similar in concept to section 564 of the Corporations Act 2001. It involves a broad evaluative exercise, considering a number of matters, and to assess appropriate compensation for the provision of an indemnity or funding. The authority has absolute discretion in regard to its

recommendations. That is intended to introduce finality into the process of distribution by ensuring that there are no residual claims or future litigation over Bell companies matters. This arrangement, and the time limitation on the operation of the authority, and this act, is the best way for resolution to be reached on Bell companies matters. Any alternative proposition would perpetuate the layers of litigation in various courts over many years. No moneys will be paid to an entity unless litigation by that party or its associates anywhere in the world is terminated and releases provided by the relevant parties. Upon payments being made to a person, every liability of every Bell company to that person is, by force of the act, discharged and extinguished. Further, on the first anniversary of the transfer day, every liability of every Bell company is discharged and extinguished. Again, that is intended to provide a strong incentive to creditors to cooperate in the process contemplated by the bill.

There are several provisions in this bill that will have retrospective effect. These are penalty provisions that will apply to any party that makes efforts to thwart the application of this legislation before it takes effect. The bill contains other provisions that are intended to minimise the risk of collateral litigation to defeat, frustrate or delay the achievement by the authority of the objectives of this bill. The process to be followed after the authority has determined the property and liability of each Bell company is for the authority to report to the minister. The report to the minister will include written recommendations to the minister as to the amount to be paid to a person after taking an aggregate view of all amounts payable to a person by all Bell companies. The minister is to then submit to the Governor the reports and recommendations of the authority. The Governor may then, by instrument in writing, determine the amount to be paid to a person. The liabilities of the Bell companies are then extinguished. The authority would then give effect to any Governor's determination as soon as practicable. The authority may determine how payments are made to give effect to that determination. There are no appeal provisions in this bill. The fund will be closed when the administrator certifies that all moneys have been paid, or on the first anniversary of the transfer day, whichever occurs first. The authority will then cease to exist 14 days after the fund is closed, with assets and liabilities of the authority passing to the state.

I trust that all members of this chamber, and those of the other place, will recognise the necessity for this bill to resolve the affairs of companies that appear to have gone broke about 25 years ago now. I trust also that members recognise that the alternative to this bill is many more years of participation in court action with distressed asset traders and professional litigation funders, and that outcome is in very few people's interests. That course of action is certainly not in the interests of the people of Western Australia or the motorists in this state given the cost to motorist insurance funds since those funds were invested in Bell Group companies in 1988. I commend the bill to the house.

Debate adjourned, on motion by **Mr D.A. Templeman**.