BELL GROUP COMPANIES (FINALISATION OF MATTERS AND DISTRIBUTION OF PROCEEDS) AMENDMENT BILL 2016

Second Reading

Resumed from an earlier stage of the sitting.

MR B.S. WYATT (Victoria Park) [2.38 pm]: As I was saying before the break, in the Treasurer's justification for the legislation, he complained about the litigation that had been commenced by the creditors and the liquidator. I want to put on the record that the liquidator commenced proceedings pursuant to section 564, because the liquidator is of course obliged to do so, and the Insurance Commission of WA is very aware of that because the Insurance Commission is a party to that particular agreement. There is no litigation on the High Court record that has started that should be a surprise to the government, other than what is already taking place and, indeed, was commenced by either the Insurance Commission or the liquidator pursuant to an agreement that the Insurance Commission is a part of.

I want to get to the consideration in detail stage, so I do not intend to speak for a full hour, but I want to make a few points. Clearly, according to the High Court submissions, it is not just, as suggested by the Treasurer, two creditors and the liquidator that have issued proceedings in the High Court. One of the main, if not the main, litigator is the Australian Taxation Office. This is not the Dutchman that we refer to; this is the Australian Taxation Office. This obviously has been somewhat unexpected by the government. This point was the subject of some debate in November last year when I asked the Treasurer whether it was his view that the ATO would challenge the validity of the bill. Clearly, there were some conversations between the Treasurer and former federal Treasurer Joe Hockey, and then perhaps Scott Morrison; I do not know. Mike Nahan, the state Treasurer said —

> I do not think there is any indication from the Australian Taxation Office that it plans to do so. Its focus so far has been to get what it perceives as its fair share … The ATO has not said anything about a constitutional challenge …

The ATO submission by the commonwealth Solicitor-General, Mr Gleeson, indicates that the tax office is a very strenuous litigator on the validity of the legislation. I do not know, but perhaps the Treasurer can tell me whether any of the amendments that we are dealing with today seek to correct any of the issues raised by the commonwealth Solicitor-General. I am not a tax expert, but it certainly appears to me that that is the case. As far as I can tell from the briefing I received from Mr Evans, the State Solicitor, we are dealing with transitional issues—that is what these amendments will do—in respect of the change to the liquidation laws in 1993 and seeking to correct, if you like, any weaknesses in the Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Act that overlap that transition from the pre-1993 changes to the liquidation laws, to the post-1993 changes to the liquidation laws.

The Australian Taxation Office has been very strong in its argument in its submission about why there is an inconsistency in section 109 of the Constitution, and that is one of the substantive issues that need to be dealt with by the High Court in due course. But, clearly, the transitional provisions are also an area of some critique and attack by the Australian Taxation Office. I want to make the point that clearly Western Australia has been caught somewhat unawares by the fact that one of the strongest litigators on the validity of the act is the ATO. It is not other creditors that may have financial interests, but the broader Australian taxpayer that is challenging the validity of this bill.

By way of interjection, the Treasurer might like to clarify one point for me. When he raised this issue with me last week, he gave me a letter that was sent to him by the State Solicitor and I want to read it. There is nothing particularly confidential about it. It states —

> I refer to my briefing note dated 10 March 2016 outlining the current status of preparation of Submissions in relation to the High Court challenge, and issues that have been identified which might require remedial action.
>
> The Solicitor General is settling the Submissions and has recommended the changes set out in the document scheduled to this letter be effected to the Bell Act, if that can be done prior to determination of the High Court challenge (listed for a hearing on 5–7 April 2016).
>
> Effectively, that would require passage at least by one chamber next week, —

That is this week —

> and by the other chamber at the latest, concurrently with the conduct of the hearing and prior to its conclusion.

My question is: is it the view of the government that the legislation has to be passed by both houses prior to the hearing commencing in the High Court on 5 April?

Dr M.D. Nahan: I can answer that in consideration in detail when I will get it from the experts, but my advice is that it has to be passed through both houses before the completion of the hearings from the fifth to the seventh in the High Court.

Mr B.S. WYATT: It is my understanding that there is a hearing on this today in the High Court. I do not know what it is about. I think the court has called that hearing.

Dr M.D. Nahan: I cannot answer.

Mr B.S. WYATT: Perhaps during the consideration in detail stage when the Treasurer is sitting with the State Solicitor, he can give us an update on what today's hearing in the High Court is about.

I made the point a couple of times in the original discussion on the substantive legislation—that is, the act—that despite what both the Premier and the Treasurer have said in the media, this is not about the WA Inc debt; this is about dealing with the inadequacy of the legislation that has been identified in submissions before the High Court. I want to point out that we are revisiting a precedent that we have not dealt with in this house in a long time—that is, passing legislation to, if you like, determine an outcome of court proceedings that are currently on foot between commercial parties. Most people would know that it is an unusual thing that we are doing. I asked the Clerk whether we have done this in Western Australia, and the last time this was done in Western Australia was in 1972. The case involved some interesting names that all members would be familiar with. It was J.D. and W.M.G. Nicholas, D.F.D. Rhodes Pty Ltd, Hancock Prospecting Pty Ltd and Wright Prospecting Pty Ltd v State of Western Australia, the Honourable the Minister for Mines and Others. I will not go into this scenario in great detail, but the appellants claimed a right in equity to occupancy over crown land to enable them to prospect for iron ore. I understand that Parliament at the time passed legislation to authorise the expiry of those reserves. In the decision of Chief Justice Jackson and their Honours Burt and Virtue, the point was made that doing that is not illegal as such. The state has a plenary constitutional power. It is broader than the power the commonwealth Parliament has, limited by its own written constitution. Chief Justice Jackson made this point —

> Section 277A —

That was the challenged section —

> was within the legislative competence of the State Parliament.

He went on to say —

> Western Australia has an "uncontrolled" constitution —

I assume that refers to the plenary powers of the Parliament —

> in the sense in which that phrase is used by Lord Birkenhead in *McCawley v. R* … and a sovereign Parliament with plenary powers limited only by the requirements that its Acts must not be repugnant to Imperial statutes extending to the State … and to the limitations imposed by the Commonwealth Constitution.

Burt went on to make the point —

> There is no restriction upon the legislative power of the Parliament of the State resulting in "a separate power in the judicature which under the Constitution as it stands cannot be usurped or infringed by the executive or the legislature".

Having said that, of course, it is unusual to do this for a commercial dispute taking place in a very well established environment of the Corporations Act. We are seeking to take this out and create our own to try to determine and resolve the outcome. Ultimately, those issues were debated in a much more fulsome way when the act that we are seeking to amend went through Parliament late last year.

There is a range of submissions on the High Court website, and I note that Western Australia's submission must have been put on the website late yesterday, because when I looked at about 6.00 pm yesterday, it was not there. It strikes me that the state has some arguments to run and some high burdens, in particular with the reading down provisions of the Bell act. It is my understanding that that is simply because it is trying to ensure it does not fall foul of section 109 of the commonwealth Constitution by being inconsistent with federal law. I will summarise the submission from the Australian Taxation Office—as a layman, as I will call myself, because I did not practice taxation law. The Western Australian Parliament is seeking to deal with money that is otherwise subject to a federal process, being the taxation legislation.

Dr M.D. Nahan: The Corporations Act.

Mr B.S. WYATT: Yes, a federal process. Therefore, the Bell act is inconsistent with that and is invalid. If I were to summarise what is a 20 or 30-page Australian Taxation Office submission, I think that is what it is effectively arguing. I am not going into the substantive issue—the Treasurer said the government is not seeking to amend or fix any of the substantive issues—but I have had a quick look through the submissions filed late yesterday by the State Solicitor on behalf of the state of Western Australia. Paragraph 198 reads —

> Section 37(1) of the *Bell Act* is to be understood to provide as follows, with the reading down underlined:
>
> > The Authority must determine the property and liabilities of each WA Bell Company …

I need to clarify that point. The point I made previously is that the state is arguing that if there is any inconsistency, as raised by the ATO, the Bell act should be read down to a point at which it is consistent. I think the Treasurer is saying in his second reading speech, which he read to me just a little while ago —

> Ancillary to those three substantive amendments are associated definitional, and transitional, amendments, intended to protect and promote the objectives of the Act. In particular, the legislation is intended to continue in operation from any date on which it is constitutionally valid, and upon any basis upon which it is constitutionally valid.

I think the Treasurer was seeking to say that if it is read down a certain level, the operation of the act will continue to confirm its constitutional validity from the point of that reading down. This is not an easy issue to get one's head around, Mr Speaker.

The SPEAKER: Not at all, member.

Mr B.S. WYATT: I come back to the State Solicitor's submission, which states —

> Section 37(1) of the *Bell Act* is to be understood to provide as follows, with the reading down underlined:
>
> > The Authority must determine the property and liabilities of each WA Bell Company <u>but that if immediately before the transfer day, a notice of assessment to which s.l77 of the *ITAA 1936* applies</u> —

I assume that is the Income Tax Assessment Act —

> <u>had been received by a liquidator of a WA Bell Company that notice is conclusive evidence of the making of the assessment and, except in proceedings under Part IVC of the TAA on a review or appeal relating to the assessment, the amount and all particulars of the assessment are correct and that the amount is a liability of the WA Bell Company or WA Bell Companies to which it relates.</u>

I refer to that because the Treasurer is seeking a very strong request that the High Court read down the Bell act in a particular way. What concerns me, which I have pointed out to the house and to the Treasurer many times, is that as opposition members in this situation, we are immediately at a massive informational disadvantage. We do not have the access to the constitutional or taxation experts who can tell me whether it is a realistic assumption that the High Court will read down the Bell act so substantially and still find it constitutionally valid. I assume that is what we are doing here, and Mr Evans perhaps can clarify that when we get to that. The point I am making is that at every point along the way, with great apprehension, the opposition has cooperated with the government on this bill, but simply on the advice of the government that this will survive a constitutional challenge. The transitional provisions were discussed very briefly in the upper house and focused on the issue of inconsistency. I referred to this issue during debate in this place when the bill came back with a raft of amendments. Attached to the upper house's Standing Committee on Legislation report on this bill was an opinion provided by Mr Pettit, SC, that he had looked at this issue around inconsistencies but, ultimately, did not address the specific arguments that have been now put out by the ATO. Mr Pettit makes the point in his advice —

> *In the time available, and in the absence of any specific contention, I have not been able to identify any inconsistency with Commonwealth taxation law.*

Effectively, Mr Pettit was countering the argument put by the ATO but he was careful to make the point "in the absence of any specific contention". The upper house put Mr Pettit's particular arguments along with the potential section 109 inconsistencies and therefore invalidities. Again, Treasurer, I am relying on the fact that Mr Evans, a lawyer of some note, has done that work and it will indeed survive the challenge in the High Court. I dare say that this will delay the hearing of this bill from 5 to 7 April. I am not a High Court practitioner, but certainly as a lawyer representing anybody, including the ATO, when making submissions on the law as it stands and a Parliament is seeking to amend that law, the High Court would be inclined to be receptive to an argument about delay, adjourning from 5 to 7 April to a further date once there is clarity around what the law is that is then

being argued. Again, Treasurer, that may be something for Mr Evans to answer. He is a much more experienced lawyer than I will ever be and hopefully he will be able to clarify that point.

I do not intend to speak much longer on this point, as I want to get into consideration in detail. The opposition's position after consideration in detail will depend on the answers we are given and the clarity we are given in respect of what these amendments will do. In particular, by way of interjection, can the Treasurer advise whether the explanatory memorandum he gave me yesterday is the same as that which has been introduced today, because I have not had a chance to prepare?

Dr M.D. Nahan: I cannot answer that because there have been a number of versions. I gave you the latest one yesterday, or my staff did, so I cannot answer that 100 per cent. A version was provided to me early this morning and that is the same one here. When did you receive it?

Mr B.S. WYATT: I have the one the Treasurer gave me when I was sitting outside.

Dr M.D. Nahan: I can't verify it, but there hasn't been a substantial change to it.

The SPEAKER: Just remember Hansard is trying to take notes.

Mr B.S. WYATT: I think that the Treasurer is being very clear and I am sure Hansard had no trouble picking that up.

One final point I want to make relates to the advice I was given by Mr Evans, which I found quite interesting. Corporations law is based on referral of powers. That referral and the capacity to withdraw from those referrals is the reason that other states have intervened on that; they are not intervening in the specific legislation but are arguing around the capacity of the states to exempt themselves from these national regimes that involve referral of powers. Mr Evans' advice to me is that this is done every five years, and that that referral is up this year. This perhaps increases the weight given in any High Court decision around the capacity of states to withdraw from national regimes, including in the example the Treasurer gave of James Hardie and the Corporations Act. I do not imagine why there would be any great appetite for a state to withdraw from a national regime on something like the corporations law for which we want a consistent regime. No doubt any decision from the High Court on this will be of some significance.

I do not intend to add any more to this issue. I have raised the concerns I have on this issue simply because we in the opposition are moving blindly through a very complicated area of constitutional taxation law without access to the sort of expertise that one can normally get. When legislation is introduced by the government, we can speak to third parties and stakeholders. This is not really a stakeholder issue about which we can speak to a third party. This is specifically focused on areas of law in very small areas of high expertise on which we are very reliant on advice from the government, which naturally makes me nervous, as we are reliant on those who advise government. My concern is that, regarding an already complicated document subject to significant challenge, we are creating potentially more areas for challenge. The more words we put into this, Treasurer, inevitably the more doubt might be picked up by those who seek to challenge. I think, ultimately, the three substantive issues are the three points of weakness and if it is going to get knocked out, it will be because of one of those. Someone will be held to account if that is the case, because that will have simply delayed things further and added further to the costs for something that has been, as we know, in play for a long time. I look forward to the answer the Treasurer gives in respect of each of those amendments we will be debating.

MR J.R. QUIGLEY (Butler) [3.02 pm]: The lead speaker for the opposition on this Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Amendment Bill 2016, the member for Victoria Park, has traversed most of the issues concerning the bill before the chamber that I would have wished to address, but I rise to put a couple of things in context. In the Treasurer's remarks both prior to and during the passage of the Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015 and perhaps to a slightly lesser extent on this bill, he has sought to cast some aspersions on the litigants themselves—that is, the creditors—casting the issue as a fight for money at the taxpayers' expense. He has recently gone a little stage further and said that the protracted nature of these proceedings is an occasion taken by lawyers seeking to generate more income. During an earlier presentation to this chamber, I quipped that that sentiment somewhat reflected the soliloquy by Dick the Butcher in *Henry VI* when he said, "the first thing we do, let's kill all the lawyers". He was seeking to blame the lawyers for the extension and the protracted nature of these proceedings. I just remind the chamber that the Bell bill itself was introduced into this Parliament when the parties were on the eve of travelling to Singapore to enter into, as I understood, five days of mediation to try to resolve all the issues outside the court and bring the matter to final conclusion. It was at that point that the Treasurer brought in this unique piece of legislation that operated to sequestrate the assets of the liquidator and put them in the hands of the authority to disburse as it saw fit. That bill, that enactment, passed in this chamber in, I think, September last year. It then went to the Legislative Council, went before the Standing Committee on Legislation and was considered in detail, as my learned friend from Victoria Park said. That committee sought opinion from Mr Ken Pettit, SC, who did not really touch upon the issue of section 109 of the Constitution of Australia in any

detail. But, as the member for Victoria Park said during the second reading debate and consideration in detail in this chamber, it was touched upon when the Treasurer, as I recall, said that the taxation department wants its money but is not otherwise that concerned with the bill. I will go to *Hansard* of 25 November when the shadow Treasurer, the member for Victoria Park, said the following —

> So the ATO may indeed challenge the bill.

To which the Treasurer replied —

> I do not think there is any indication from the Australian Taxation Office that it plans to do so. Its focus so far has been to get what it perceives as its fair share, to use its powers and also to maintain its pecking order in terms of creditors. The ATO has not said anything about a constitutional challenge or otherwise. As the member knows, one cannot preclude anything in this game.

As recently as 8 March this year, Mr Justin Gleeson, SC, on behalf of the ATO, concluded in the penultimate paragraph of his submission in paragraph 54 the following —

> The basic problem is that the drafter of the Bell Act has either forgotten the existence of the Tax Legislation, or decided to proceed blithely in disregard of its existence. No mechanism has been provided for in the Bell Act to allow for the continued operation or paramountcy of the Tax Legislation.

So there could not have been a stronger challenge. I have received texts today from senior counsel and they are much esteemed. I shall not name the people from whom I got the texts in the chamber. They took umbrage and offence at the notion that they were stringing out these proceedings to increase their incomes. They were very concerned that such a thing should be said by a senior minister of the state. I know some of the people involved and I know that the State Solicitor, Mr Paul Evans, will be at the ministerial table to advise the Treasurer during consideration in detail. I note that one of his friends, Mr Steven Penglis, was admitted to partnership at Freehills on the same day as Mr Evans. I think he retired on the same day as Mr Evans—Mr Penglis going to chambers and Mr Evans going to the State Solicitor's Office. I cannot imagine that Mr Evans would share such a view of Mr Penglis. I do not think anyone in this chamber would share such a view, for example, of our former Governor the Honourable Mr Malcolm McCusker, QC, who is also leading in this case. No-one, I am sure, would have any basis to advance that view against the Solicitor-General for the commonwealth, Mr Justin Gleeson, who himself says that this is a substantial constitutional challenge. This is what concerns me with the conduct of model litigants. This is without speaking to the actual clauses of the bill, because we will come to those in consideration in detail. What concerns me is this: it appears a bit like amateur hour in the sense that the original bill was introduced and was passed in this chamber. It went to the Legislative Council, where it was examined in detail. A report of some 140-odd pages was prepared. Amendments were then drawn. It came back to this chamber. The opposition did not offer substantial opposition to those amendments and they passed through this chamber. The matter was then set down for hearing in the High Court between 5 and 7 April. All parties got ready for this hearing, and this is a substantial hearing. This is not just two hours or half a day in the High Court; this is a substantial matter involving meaty constitutional questions. This was set down. I do not have the dates of all the submissions, but I note that the ATO's submission, as presented by Mr Gleeson, SC, was signed off on 8 March.

Subsequent to that, with people doing substantial work on this in the final stages of preparation for the hearing, this bill was quickly brought before the Parliament. I do not understand the bill, in view of the explanatory memorandum that I have read and the bill itself, but we are told by the Treasurer today that this bill deals only with ancillary matters and is brought forward only to facilitate the High Court concentrating on the meaty matters. I take up the point that the shadow Treasurer, the member for Victoria Park, raised—that the matters brought before the Parliament today are of such substance that it may involve the further delay of all these proceedings and the resolution. The government's response to that is that this is the lawyers trying to generate more money. It is shocking. In this regard, I quote from a letter from the State Solicitor's Office dated 24 March 2016, distributed to all parties. The letter notes that a notice of motion was tabled by the Treasurer yesterday for standing orders to be suspended so that this matter could be dealt with as a matter of urgency and for the matter to then proceed for debate in this house. It advises the parties that after today the next scheduled sitting days for both the Legislative Assembly and the Legislative Council are 5 to 7 April. It concludes with this paragraph —

> Unless and until the Bill in its present or any amended form is passed by the Western Australian Parliament, it will not affect the issues which are required to be determined in these proceedings. The State does not wish any party to be prejudiced and, in the circumstances, should a party request that the proceedings be adjourned, the State would not object and would be available whenever the proceedings were re-listed. An alternative course, should the Bill in due course be passed, is for programming orders to be made at that time to accommodate consequential directions that may be required such as in relation to the filing of supplementary submissions about the effect of the Bill.

The state itself envisages that if this bill is passed, a party might now wish to apply for an adjournment and the state's position is that it will not object to any such adjournment, so the matter will drag on further. I want to put this in context because the picture that has been painted so far is that the litigants themselves—the creditors, at least—are causing the delay and driving up the costs, and this tactic is also being driven by the legal practitioners who then derive more fees. If the scheduled hearing dates have to be abandoned because of the passage of this legislation, because one of them may wish it—I note that this letter goes to four parties—and then has to be brought back on, massive further costs will be involved.

This has nothing to do with the litigants themselves; this has to do with the way the state has run this matter and presented these bills to the Parliament so late in the day. We are deep into the fourth quarter and now we are going to move the goalposts. But we are only changing them in an inconsequential manner to assist the High Court in focusing on the several matters that are of more consequence. It is hard to imagine that the state would say that it will not oppose any application for an objection, if this bill deals only with a very inconsequential matter. I just wanted to put those matters on the record in terms of the context in which this matter comes before the Parliament. I do not want to take up any further time because the actual debate should take place in the course of consideration in detail. I thank the Parliament for its time.

DR M.D. NAHAN (Riverton — Treasurer) [3.16 pm] — in reply: I thank members opposite for their comments on the Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Amendment Bill 2016. I will not go through the history of this. I will not use the word "debacle", but the history of this is, firstly, how it was created in the first place in the 1980s and, secondly, when the groups decided to contest the banks, which I think started in 1993 or 1994. The Insurance Commission of Western Australia spent in the vicinity of $235 million contesting the litigation against the banks. For a time the Australian Taxation Office supported that action, and so did one of the major litigants, BGNV. BGNV and the ATO dropped out early on, at different times, and left it all to ICWA. This is a special case in Western Australian and, indeed, probably Australian history—the longest running and one of the most complicated cases.

The scheme of this operation shows that Holmes à Court had a reputation for creating very complex organisations. This is the outline of the Bell Group, and this is the outline of Bell Group (UK) Holdings Ltd, as of 1990. I counted 129 different entities involved in this. They all had interrelationships; they all had subordinate and priority debt. They go all around the world, and this goes from 1989 or thereabouts to 2014, when it was shut off. It is large in time, geography and complexity, and the fact that many of the decisions made were so long ago that the records are poor and many of the parties who made them have passed away. Just as a little snippet, one of the records won an award for being the first time everything was put into electronic format. One of the reasons for this was that it was run out of a lawyer's office in the QV1 building, on one of the higher floors. There was so much paper on that floor that it was making the building unstable, so it was converted to electronic format! My point here is that this case has a long history and it is hellishly complex. It has consumed huge amounts of not only state money, but also other money. It is highly complex and needs to be resolved.

The result was that after a range of litigation, $1.7 billion was set aside by the liquidator to be distributed. The hope of all parties, including ICWA, was that this would finally stop all the litigation and move to a distribution based on agreements that were pretty well understood at that time. That did not come to pass. After the cessation of the monumental case, parties started litigating, going back to the original one, and this was an open field day for endless litigation, because of the complexity of the case. Parties, led by ICWA and others, were trying to get resolution. All those resolutions had to go overseas because some of the parties either did not want to come to Australia or might have been endangered for side actions if they did come to Australia. ICWA tried to negotiate settlements with relevant parties. That was not going to happen. They started litigating all sorts of issues and it was clear-cut that the parties involved, though not all of them, were going to use the complexities to stretch out, through litigation and through disputes around the world, to dissipate the action and put off the final distribution to maximise their share. The number of shares involved is astronomical. The claim from BGC is over $600 million. The claim from one of the local companies that initially paid about $125 million for the subordinated debt or the asset that it is trading—I have to be careful with these terms—is over $200 million. Litigation pays and postponing pays because the payoffs are huge—more than winning the lottery. We could have sat there and just let this go by—let it litigate and dissipate—and not get a return on the $235 million that the state invested. To some extent, that sunk. Should we have done that? I do not know. If I had to do it over again, I do not think I would.

Mr B.S. Wyatt: I think you would have locked away the priorities.

Dr M.D. NAHAN: That is what they thought they did. Neither the member for Victoria Park nor I were there. A lot of money was spent under the Liberal government on a lot of the early ones and a lot was spent by the Labor government. They made the decisions at the time. I am not going to argue. That is history; it is done. The clear view of our experts, whom we sought for advice, was that this would go on and on. We came up with the bill to settle it. We used unusual legislation—the Corporations Act, the power of the state—to bring it back. It

has been done before, though not regularly. We would not do this regularly but this is an unusual case. We used it. We knew that it would be constitutionally challenged. Of course, it is up to the people. People have big pockets, and they will go to the High Court. They told us during this debate that they would go to the High Court. That is where we are. There are three substantial issues before the High Court. We are not altering those. They will be debated. I will not give our position on them because I do not know. There is one at least—the rights of the states within the Corporations Act. We have opened up a potential Pandora's box in the sense that the states periodically have to hand over their powers to the commonwealth. It is up for renewal. The Attorney General is in debate with the other Attorneys General. It is a controversial issue. I understand that the commonwealth is asking for 10 years' referral powers. If this issue fails, it will bring into question all sorts of issues. That is why the other states are making submissions on that aspect. We are not attempting to alter that issue in this amendment bill. We are not altering the rights of the commonwealth under the Constitution or the taxation powers of the ATO.

Let me make some comments about what we did before we agreed to introduce the bill. First, we contacted the commonwealth government and informed it. We contacted the then Assistant Minister to the Prime Minister, Hon Christian Porter, who knows a lot about this issue. He is a former Attorney General and Treasurer of Western Australia. We put together the draft bill. We showed it to him and we showed it to the commonwealth. We got a letter from the commonwealth saying that it supported the action. We would not have proceeded without that support. We knew that once we did that, the commonwealth, particularly the ATO, would have to become involved with any High Court issue because of the nature of it. I have been told that any case of this sort will allow the commonwealth, in layman's terms, to have a watching brief, or be an advisory to the court. We knew that. We proceeded and we got its support. There is some strong disagreement within all these parties as to the rights of the ATO. The liquidator maintains that the ATO is owed very little money. He is adamant about that. We had tight negotiations with the ATO, which was arguing for $430 million. I referred to that indicative sum in my speech on the third reading to try to give some support to the ATO. That is what it asked us to do, so we agreed. Unfortunately for us, the ATO, contrary to the direction or advice of the Assistant Treasurer, Kelly O'Dwyer, who has responsibility delegated through from the Treasurer for the ATO —

Mr B.S. Wyatt: They can't direct the ATO.

Dr M.D. NAHAN: That is right. The ATO is independent, and it exerted its independence in this case. That is where it is at. It could do so for many reasons. I am not party to the rationale. All I can say is that I have been advised that we still have strong grounds on three others.

The reason we are making these amendments and the reason we are doing it late is that our advisers—the Solicitor-General and the State Solicitor—waited for the various parties to the High Court action to express their arguments. Lawyers are very creative. We did not know whether they would go wide or narrow—stick to the three substantive issues or go wide. I understand that some have gone very wide. It is to our advantage that they went out wide right away. One of the concerns was that by going wide and dealing with collateral issues, the High Court would have to deal with these collateral issues before it got to the substantial issues, therefore dragging out the process. I would never accuse lawyers of dragging out the process unnecessarily. That may be a purpose but that would have been the result. That is all I can say. Since they are not substantial issues, the Solicitor-General and the State Solicitor advised us that we would maybe not strengthen our case but get clarity and a result earlier and deal with the substantial issues if we put this case through. As soon as I got that report, I did not like it.

We have a lot of work to do in this Parliament. Sometimes advisers do not understand the political process and the pain we have to go through, such as we are going through today, and make requests. I will not refer to anything in particular. I thought about the report. I did not like it. As soon as I got it, I gave it to the member for Victoria Park and said, "Here is the issue." I described my understanding of it in very simplistic terms; I think I used the word "gobbledegook". I have disentangled the gobbledegook since then. I cannot say that I am an expert on it. I understand it more clearly. I would not want to be in consideration in detail by myself; I could not do that. I gave it to the member for Victoria Park out of respect. He looked at it. He has never practised in this area of the law so, quite rightly, he needed to get advice. I gave him access to the State Solicitor immediately, and I am sure he has taken advantage of that. We are faced with a situation in which we want to resolve that issue. We have to get a resolution through the High Court. I will not make comments about the High Court's decision. All I can say is that I got advice from the state's key legal advisers—the State Solicitor and the Solicitor-General—that this amendment bill will not enhance our chances in the substantive issues but hone the debate, the discussion in the High Court, on the substantive issues, and stop it from dragging out further. That is the whole purpose of the act and therefore the bill—to stop it from dragging out longer. In the meantime, we have exerted a great deal of effort to try to get the ATO to negotiate but we have not done that. The ATO is a power unto itself, and it is continuing that. It has pursued it in a very forceful manner, though lawyers are very often forceful in stating their case.

The member for Victoria Park said that this is not unprecedented. It has been done before, through similar things in both Western Australia and New South Wales. However, it is an unusual act; it is because this is an unusual case and it warrants it. The member also referred to reading down the act. I will leave that issue to the consideration in detail stage as I really do not understand it. The member for Victoria Park referred to an informational disadvantage. Yes, he is at an informational disadvantage, and so am I to some extent. I have to rely on my advice. If I did not have confidence in the State Solicitor and the Solicitor-General I would never have gone down this path, but I do. I am following the path that they have pointed out. The member said that the action will result in delay. The member can ask the State Solicitor. That may or may not be the case. The High Court acts in the way it does but we do not think it will result in delay, but we will clarify that. Maybe some more information has come to pass. The Corporations Act has opened a Pandora's box, and I can tell members that the commonwealth—not the Australian Taxation Office but the rest of them—was very worried about opening that up because that is a really big issue. If the member wanted to, he could read the submissions from the other states on that.

I think the member for Butler indicated that just before the Bell act was brought to this house, there was a chance of a resolution. I can assure the member that if there was any chance of a resolution, we would not have put through the Bell act. I do not participate in all the negotiations, but all my advice was that this is staged to go on and on for another decade or more. Looking at the evidence, that was indeed the case.

Again, the second reading speech outlined the purposes of the legislation. I will just explain our rationale for it. We are seeking to hone down the issue in the High Court so we get an outcome, and then we can get on to distributing the funds. I am confident that down the track the ATO will come on board, if we get it through the High Court challenge and start negotiating an outcome. I am sure the administrator set up under the act —

Mr B.S. Wyatt: If it survives the High Court challenge, it is done. Then your process is valid.

Dr M.D. NAHAN: Yes, probably. Then the administrator, shortly after the hearing period of 5 to 7 April, will come up with a preliminary distribution. If the High Court case is postponed beyond that, the ATO might look at that and be unhappy or more aggressive; I do not know. Anyway, the bill is as we described it. I expect to go into consideration in detail now and I will be Mr Evans' puppet on this case and the member can ask all the questions that he wants.

Question put and passed.

Bill read a second time.

Consideration in Detail

Clause 1: Short title —

Mr B.S. WYATT: The member for Butler referred to a letter from the State Solicitor that I think was sent to the parties involved. I am not sure who it was sent to, but it relates to my question about what has happened at today's hearing, which would be over by now in Canberra. What has happened there and does it have any impact on the timing of the litigation?

Dr M.D. NAHAN: In short, no. The hearing was about the form of the submissions that had already been lodged.

Mr B.S. Wyatt: So there was no-one asking for adjournments or the like?

Dr M.D. NAHAN: The matter was mentioned, but no application was made.

Mr B.S. WYATT: Again, I have a question about the hearing dates of 5 to 7 April. Is that the final hearing when the three issues will be dealt with, assuming this is passed in time, and then a judgement will be handed down at some point in the future? Are we expecting another hearing date or is this it?

Dr M.D. NAHAN: At this stage, no.

Clause put and passed.

Clause 2: Commencement —

Mr B.S. WYATT: Clause 2 provides, in part —

> sections 4 to 10 are deemed to have come into operation on 27 November 2015;

I note in the minister's second reading speech he said —

> In particular, the legislation is intended to continue in operation from any date on which it is constitutionally valid, and upon any basis upon which it is constitutionally valid.

Can the minister just explain to me how these two interact? We are obviously concerned that there may be a period of constitutional validity at a date other than 27 November.

Dr M.D. Nahan: That is correct.

Mr B.S. WYATT: If the minister could just explain it. Does that mean that perhaps if these amendments make it constitutionally valid, it comes into operation from the passage of this bill through Parliament?

Dr M.D. NAHAN: If our arguments hold and it is constitutionally valid, it will be deemed to have come into operation back on 27 November when the bill was passed. Otherwise, it will come into operation on the passage of this bill or when, in the future, it is determined to be constitutionally valid.

Clause put and passed.

Clause 3: Act amended —

Mr B.S. WYATT: I just want the minister to put something on the record. I had a briefing with the State Solicitor, but I would like the minister to again explain something to me. I am looking back at my notes from my meeting with the State Solicitor around the transitional provisions and I am not entirely sure I had the proper understanding. My notes say that it matters that the key companies involved were liquidated prior to 1993 when the law around liquidation changed. Is it the 1993 transition to the national scheme that has caused the problems that we are trying to resolve with this bill? If so, can the minister explain, in layman's terms, the evil that this is trying to resolve?

Dr M.D. NAHAN: The amendment applies to only section 25 of the Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Act. It is a response to an argument made by one of the parties that the old liquidation provisions still apply in a way that the Bell act did not address.

Mr B.S. Wyatt: The act itself created a fairly authoritative regime. What is the fear about possibly pre-1993 applying? What is the weakness?

Dr M.D. NAHAN: The argument—we do not accept it—is that under the way the act is being interpreted, the key creditors could not claim.

Mr B.S. Wyatt: Under the regime that is created by the Bell act?

Dr M.D. NAHAN: Yes. We do not accept that but that is not the purpose. The whole purpose is for them to have claims and be distributed accordingly.

Clause put and passed.

Clause 4: Section 3 amended —

Mr B.S. WYATT: I will ask similar questions on some of these clauses. Why was Maranoa Transport, which I think is one of the plaintiffs in one of the cases, missed? Remember, quite an extensive list of companies was caught up as the Bell companies so defined in the act. Why was this missed and how has this been identified simply because of the litigation?

Dr M.D. NAHAN: First, we pulled together the Western Australian Bell Group. The focus was on Western Australian firms, operations and liabilities. Notionally, Maranoa is in Queensland, although most of its activities are Western Australian.

Mr B.S. Wyatt: Who was Maranoa; what was its connections?

Dr M.D. NAHAN: It is a subsidiary of the Bell Group. Remember, I told you that the complex of subsidiaries looked like spider webs everywhere.

Mr B.S. Wyatt: Is the reason it was listed as a plaintiff simply because it was not listed in the Bell act?

Dr M.D. NAHAN: Yes. The liquidator is acting through that company. The liquidator is acting on behalf of Maranoa Transport. The liquidator probably had coverage of them all, including Maranoa. It is not included in our act, so we are pulling it in.

Mr B.S. Wyatt: Once that happens, will Maranoa fall off?

Dr M.D. NAHAN: It will, but arguably, by the time this bill is passed, it probably will have done so already.

Mr B.S. Wyatt: The argument had been run.

Dr M.D. NAHAN: Yes.

Clause put and passed.

Clause 5: Part 3 Division 1A inserted —

Mr B.S. WYATT: This will insert proposed section 21A in part 3. Can the minister explain the purpose of this amendment and what the argument is that has created this amendment?

Dr M.D. NAHAN: It addresses an issue that no-one has raised yet but one that the High Court might raise: what is the nature of these companies under the act?

Mr B.S. Wyatt: Nature in what way?

Dr M.D. NAHAN: As continuing corporations.

Mr B.S. Wyatt: This then says what, about the nature of those corporations?

Dr M.D. NAHAN: It says they are continuing corporations under the act.

Mr B.S. Wyatt: Under the current Corporations Act?

Dr M.D. NAHAN: Under the Bell act.

Mr B.S. Wyatt: Under the Bell act?

Dr M.D. NAHAN: Yes. The Bell act had to keep these things alive, if you wish, to have a distribution.

Mr B.S. Wyatt: You say it has not been raised yet; it is an issue that has come up. Is this simply saying, effectively, something that we all implied in the bill, to clarify that point?

Dr M.D. NAHAN: Yes; it is to make it clear so we do not have disputation on something that could be interpreted as not clear in the act. We put that in to make sure we are purposely keeping these things alive, and under the act they are alive. The act intends to keep them alive and does keep them alive.

Dr A.D. BUTI: The minister said it keeps them alive. It keeps what alive?

Dr M.D. NAHAN: It will keep each of the corporations mentioned in the act alive as continuing body corporates.

Dr A.D. BUTI: When the Bell act was passed last year, I assume that was not an issue that the minister had put his head to because it has come up since. Reading from the memorandum of understanding and the second reading speech, this is included because the minister mentioned the need for its continuing existence. Presumably the companies were de-registered when the Bell act was passed last year. How can the minister now bring them back alive? They now have a legal status and people have shares. Surely that was concluded when the Bell act was passed last year. Maybe it was not addressed. Is it the minister's argument that because it was not addressed last year, the status of these companies was ambiguous and now he is trying to clarify the situation or will this have retrospective effect?

Dr M.D. NAHAN: It is strictly meant as clarification. The State Solicitor is confident that the intent is clear enough in the act, but from reading various submissions, he came to the conclusion that some of the submissions could be interpreted as leading down this path, so we are making it clear.

Mr B.S. WYATT: Can the minister remind me—I am sure we have dealt with this once; effectively the assets are transferred—whether the Bell companies will then be dissolved under this regime or will they fall back under the Corporations Act when they are dissolved?

Dr M.D. NAHAN: At first go they will dissolve under this act but we had to keep them going for tax purposes. In future, it will depend on the resolution of the High Court issue. They will dissolve under this act or the Corporations Act, depending, I suppose, on the High Court's decision and which of those acts is relevant.

Mr B.S. WYATT: Because I can, I will ask the minister and the State Solicitor: the ATO's argument, as I understand it—I think the State Solicitor is sitting up the back—to simplify it, is to say that we are trying to deal with money that is otherwise subject to a federal process, therefore, there is a conflict, to summarise it. I understand that triggering the ATO's argument is that we cannot take these Bell companies out of the Corporations Act because the federal corporations law is governing how that money is distributed, therefore, there is a clash. Have I got that understanding right at this point?

Dr M.D. NAHAN: The Australian Taxation Office has not started proceedings to challenge the act; it is seeking to intervene in other proceedings.

Mr B.S. Wyatt: But it is clearly challenging the validity of this act.

Dr M.D. NAHAN: Its argument is that there are some provisions that protect its position. It is intervening on the other arguments. Some provisions of the tax office give powers that are not adequately recognised in the tax act.

Mr B.S. WYATT: So this amendment is not seeking to deal with the substantive issue around section 109 of the Constitution.

Dr M.D. NAHAN: No. But just to clarify it, nothing in this bill attempts to deal with any of the ATO's tax issues.

Clause put and passed.

Clause 6: Section 25 amended —

Mr B.S. WYATT: This clause seeks to amend section 25 of the act. The Treasurer might give a similar answer to the one he just gave on clause 5. Section 25(1) will state —

> If, immediately before the transfer day, a liability of a WA Bell Company was admissible to proof against the company in the winding up of the company …

It will no longer refer to "company under the Corporations Act". What is the point of this amendment and what argument has been raised that has clearly triggered this amendment?

Dr M.D. NAHAN: It deletes a reference to a proof under a specific provision of the Corporations Act because of an argument from one of the parties that the old debts are permissible under a different provision.

Dr A.D. BUTI: Going by the Treasurer's answers, as relayed to him by the State Solicitor, this seems to be a purely reactive piece of legislation in response to submissions made in the High Court. I find it a bit disconcerting that Parliament is reacting in this manner to submissions that have already been made in the High Court. What will happen when there is oral argument in the hearings and other arguments are raised that have not been referred to or canvassed in the written submission? Will the government then rush back here with further amendments that it wants to be passed before the High Court makes its decision? I find this really disconcerting. Why did the government not get it right last year? It is absurd that every time a party makes a submission that the government has not thought about, it brings new legislation into Parliament.

Dr M.D. NAHAN: The member is right. This amendment bill is a response to arguments made in the High Court—not substantive arguments but peripherals. The whole objective is to home in on these issues. I have been advised that this is not as unusual as it appears to the member—it does not appear to be unusual to me because I have not thought about this. Something similar happened last year in the case of the waste management company Eclipse Resources Pty Ltd. The arguments at the oral stage usually flesh out all the issues and new ones are seldom introduced after that stage.

Dr A.D. BUTI: As a member of the Liberal Party, the Treasurer is a strong believer in the rule of law and the certainty of law. People start litigation based on the law; they will not start litigation if they do not think they will be successful. Expensive litigation has been started before the High Court based on the law at the time. The Treasurer has said that it is not unusual. It is not that usual. The waste management case is one example that he has raised. This is unusual and it is a worrying situation. Our rule of law is based on certainty, yet the government is changing the goalposts as it goes along. I find that very troubling, especially from a Liberal Party that believes in the rule of law and also the preservation and protection of property rights.

Dr M.D. NAHAN: The member is right. Substantive issues need to be resolved in the High Court. We are not attempting to change those. Again, we are trying to look at the arguments that have been made. In these cases, there is a history of wideranging issues, often of a procedural nature or not related to the main issue. If the High Court makes the decision on the basis of those, we are trying to clarify it so that the High Court sticks to the main issues rather than going on to collateral issues that would just require us to get clarification and go back to the High Court.

Dr A.D. BUTI: Is it correct to label it as a procedural issue? It may be a collateral issue, but it is not a procedural issue. The continuing legal status of a company is not a procedural issue; that is a substantive issue. I agree that it may not be the main game, but it is more than a procedural issue.

Dr M.D. NAHAN: The member is right.

Mr B.S. WYATT: I want to clarify one point on that matter. Just so I understand it, this amendment to section 25 will mean that the treatment of liabilities will still stand, regardless of what the court finds in respect of whichever regime those claims arise under.

Dr M.D. Nahan: Yes.

Clause put and passed.

Clause 7: Section 30 amended —

Mr B.S. WYATT: This clause will insert proposed subsection (1A) into section 30, "Dissolution of companies". The explanatory memorandum indicates that it is proposed to insert subsection (1A) to clarify that if the WA Bell companies have a continued corporate existence under the Corporations Act, section 30(2), which permits dissolution of the WA Bell companies as opposed to deregistration as contemplated by the Corporations Act, will not have effect. Why are we worried about that particular scenario?

Dr M.D. NAHAN: This technical amendment addresses a possible inconsistency if the proper constitutional basis for the continuation of WA Bell companies is not as the state contends under the Bell act. In that case, those companies must continue under the Corporations Act and probably will be extinguished by deregistration under the corporations act; and the provision for WA Bell companies to cease to exist upon dissolution under the Bell act is accordingly repealed. This is a direct consequence of the insertion of proposed new section 21A.

Mr B.S. WYATT: So, it allows for corporations law to deal with finalisation of some companies?

Dr M.D. NAHAN: If the Bell act does not dissolve it, then the Corporations Act does. If they are not dissolved under the Bell act, then it fills a hole, for whatever reason, for them to be dissolved under the Corporations Act.

Mr B.S. Wyatt: If in the end the court makes a decision around the scheme for a dissolution, the corporations law then captures that.

Clause put and passed.

Clause 8: Section 50 amended —

Mr B.S. WYATT: A couple of amendments here insert the definition of "matter" as the meaning given in section 55F(6) of the Corporations Act. I will deal with this before I get to the other one, which is a typographical error by the look of it. What is "matter" as defined in section 5F(6) of the Corporations Act and why do we need to introduce it into this bill?

Dr M.D. NAHAN: Under corporations legislation "matter" includes an act, omission, body, person or thing.

Mr B.S. WYATT: It seems that the definition of "matter" in the Corporations Act is the same as in in any other act. Why are we introducing it here? What has triggered this particular problem that needs it to be introduced?

Dr M.D. NAHAN: It has become apparent in the course of the development of the arguments in the High Court that the state may have adopted too conservative a position in relation to the exclusion of the provisions of the act from the operations of the Corporations Act, in doing so by reference to the companies that are the subject of the act rather than those companies in the matters with respect to those companies. Amendments to section 50 simply adopt the definition of "matter" in section 5F of the Corporations Act as the basis for prescription of the exclusion of those matters from the ambit of sections 51 and 52 of the Corporations Act.

Mr B.S. Wyatt: And then that comes into play under the next section of those amendments; is that right?

Dr M.D. NAHAN: Yes.

Clause put and passed.

Clause 9: Section 51 amended —

Mr B.S. WYATT: This provides a more substantial amendment to section 51 of the act. The draft explanatory memorandum provided to me states —

> This amendment ... clarifies the number and scope of matters —

There is that word —

> excluded from the operation of the Corporations Act for the purposes of the Act, and that these include not only the WA Bell Companies, but also acts done and things affected by the Act which relates to those companies.

That is, companies being excluded from the operations of the Corporations Act. Has this come out of a review of the act as a result of those arguments, and what is the weakness we are trying to protect ourselves from here? It obviously flows from the definition of "matter" and I assume it is to broaden "company" to include companies' activities. Perhaps the Treasurer can explain that to me.

Dr M.D. NAHAN: The member is right. It is things that are done under the act rather than just the companies themselves.

Mr B.S. Wyatt: Is this a weakness that has been raised by anyone in particular?

Dr M.D. NAHAN: There are elements of the issue pregnant in the arguments raised.

Mr B.S. WYATT: It will be a very interesting High Court hearing, regardless of the outcome I think.

Clause put and passed.

Clause 10: Section 52 amended —

Mr B.S. WYATT: This is the displacement provision; that is, displacement of certain provisions of the corporations legislation. This section has effect if and to the extent than an excluded corporations legislation provision has any application as a law of the commonwealth in relation to a WA Bell company. It strikes me that

is something that we would still want included. I am a bit uncertain why that is being deleted and perhaps the Treasurer could clarify that for me.

Dr M.D. NAHAN: It arises because of the change in definition of scope and matter in sections 50 and 51. That limitation is no longer relevant.

Mr B.S. WYATT: I will be very frank. I do not understand what the Treasurer said to me. Could he explain the link between that deletion in section 52 back to sections 50 and 51? This section has effect to the extent an excluded corporations legislation has any application as a law of the commonwealth in relation to WA Bell Companies. If it is redundant, I can understand why it has been deleted, but I need to understand what has made it redundant.

Dr M.D. NAHAN: We made the changes at section 51 that expanded the definition of "matter".

Mr B.S. WYATT: I think I may have twigged to it. I refer to the inclusion under clause 9 of proposed section 51(1A) —

> Each other matter the subject of this Act is declared to be an excluded matter for the purposes of the Corporations Act ..."

By broadening proposed section 51(1A), should proposed section 52 not react to that broadening?

Dr M.D. NAHAN: This is a corresponding provision. Proposed section 52 broadens the provisions of the act as well as the matter. In proposed section 51 we dealt with the matter and in proposed section 52 we will deal with all the provisions in relation to the matter.

Mr B.S. WYATT: I will pretend I understand that for the minute. Just in respect of that, further, proposed section 52(2) will refer to "provisions of this Act other than this Part" to replace "provisions of Parts 3, 4 and 5 and sections 55 and 56(3)" of the corporations legislation displacement provisions. Is this simply to create a number of amendments to create flexibility in the event that it is not corporations legislation that applies? Is that what is being done there?

Dr M.D. NAHAN: Proposed section 51 relates to section 5F on the Corporations Act. Proposed section 52 relates to section 5G of the Corporations Act. We are opening up the liquidation to all the provisions of the act to rely on section 5G.

Clause put and passed.

Clause 11: Section 53 amended —

Mr B.S. WYATT: Again, my understanding of this is that some specific provisions are being made for regulations. Again, the draft explanatory memorandum states —

> The Government proposes this sub-section be amended to permit regulations to be made in relation to WA Bell Companies which have effect from the transfer day or a later date to ensure that any continuity or transitional issues that arise can be effectively addressed to avoid uncertainty.

That is, as the applicable regime. Obviously, now it is thought there will be a requirement for regulations. Is this again as a result of something that has been identified or simply to allow the government the flexibility to create a regulatory regime post passage of the bill? Why was this not included originally?

Dr M.D. NAHAN: Because these amendments bring into question the operative date of the amendments, so we might have to go forward or backwards from these amendments. Remember that the issue is when we start on 27 November —

Mr B.S. Wyatt: Or at a point when it has been deemed to be constitutionally valid?

Dr M.D. NAHAN: Yes.

Clause put and passed.

Clause 12: Section 53A inserted —

Mr B.S. WYATT: Presumably, this clause deals with the issue around validity, on the basis that the High Court finds that constitutional validity comes at a different point from 27 November. The explanatory memorandum states —

> This clause is intended to provide the Act with continued existence in the face of any inconsistency with Commonwealth law leading to the invalidity of the inconsistent provision pursuant to section 109 … on the basis that, upon any inconsistency ceasing … the Act continues in force.

I understand that. In the event of the reading down of the Bell act to a point at which it still survives in some form, this clause will just confirm that validity. Is this really just protection in the event that if there is a finding

under section 109 of the commonwealth Constitution, it does not knock out the act completely, it is just simply read down to exclude other provisions?

Dr M.D. NAHAN: The member's arguments are correct. It also provides that if we find another means of ensuring the constitutional validity of the act, we can avail ourselves of it.

Mr B.S. Wyatt: So if there is any form of constitutional invalidity under section 109?

Dr M.D. NAHAN: Yes, any form of validity.

Mr B.S. Wyatt: Invalidity?

Dr M.D. NAHAN: Any form of validity that overcomes invalidity.

Dr A.D. BUTI: The member for Victoria Park is a much better man than I, because I do not understand this at all. I have read and reread proposed section 53A. It states —

> … section 12 comes into operation section 22 is not valid because of section 109 of the Constitution of the Commonwealth but, afterwards becomes valid …

That is what I do not understand. If it is invalid on constitutional grounds under section 109, how can it become valid?

Dr M.D. NAHAN: There is a possibility that the basis for invalidity might change due to changes to this act or the commonwealth act.

Mr B.S. Wyatt: So our changes may invalidate this?

Dr M.D. NAHAN: For instance, we might change our act to take away the conflicting provisions, and there might be changes to the commonwealth law. The act does not disappear and when confronting inconsistency, it remains dormant until that inconsistency is taken away and then it comes back to life. There are options under sections 5F, 5G or 5I of the Corporations Act that might be pursued to overcome inconsistency.

Dr A.D. BUTI: I must say this is a new constitutional lesson if the Treasurer is saying that something invalid under section 109 of the Constitution still remains in existence and just becomes dormant. No, it is invalid. Of course, it does not invalidate the whole act; it severs the inconsistency so the remainder of the act may be valid. It is only invalid to the extent of the inconsistency, but it does not make it dormant. It is invalid—end of story.

Dr M.D. NAHAN: While the inconsistency remains valid, so the act is there —

Dr A.D. Buti: Invalid?

Dr M.D. NAHAN: I am trying to interpret this. The act is there if there is an invalidity. That act remains there, but if the invalidity is taken off, it becomes valid again.

Dr A.D. BUTI: I can see the remaining parts of the act remaining valid—I get that—but a section that is invalid on constitutional grounds is invalid—end of story. It does not then miraculously become valid. There has to be a new section that might be consistent with the Corporations Act or any other commonwealth act. It cannot become dormant. I think the Treasurer also mentioned that it remained valid until it was determined constitutionally not to be valid, but actually that is not correct. It was always constitutionally invalid, it just had not been determined by the court. If the High Court decides that something is constitutionally invalid, it has always been invalid, it is just that the High Court has decided on that day that that is the law.

Dr M.D. NAHAN: The member's argument is right but the commonwealth cannot repeal the laws of the state. These laws remain on the statute book of the state.

Dr A.D. Buti: But they do not have operational effect.

Dr M.D. NAHAN: Whilst there is an inconsistency or invalidity.

Dr A.D. BUTI: Yes, I understand that. A classic example of this is the native title legislation and the Racial Discrimination Act, whereby the constitutional invalidity was always there; it just had not been determined. If we say that something is invalid and the act is operational but it is decided by the High Court that it is unconstitutional, we run the risk of anything done under that provision being constitutionally invalid and therefore we bear whatever consequences arise from that.

Dr M.D. NAHAN: We accept that, and we will do everything in our powers for it to come into effect on the day it is validated, to the extent that we can.

Mr B.S. WYATT: That is the inherent limitation on this. We are validating to the extent that the state can validate, which of course cannot be to override the High Court decision. I think we have finally got there.

Clause put and passed.

Clause 13: Section 83 amended —

Mr B.S. WYATT: The explanatory memorandum that the Treasurer gave me is the last one but I dare say the new explanatory memorandum might have some more information dealing with regulations. Proposed section 83(2)(g) states —

> matters of a transitional, application or savings nature, including matters relating to the coming into operation of a provision of the *Bell ... Act*

What has triggered this amendment and why was it not included in the original act? Again, that relates to a conversation we just had with the member for Armadale. Subsection 83(2) states —

> Without limiting subsection (1), regulations may be made as to the following —

Proposed subparagraph (h) states —

> matters relating to a provision of this Act that is partly or wholly invalid because of section 109 of the Constitution of the Commonwealth ceasing to be invalid, partly or wholly, including matters of a transitional, application or savings nature.

I hope the member for Armadale is listening. He can ask questions about what that sentence may mean.

Dr M.D. NAHAN: In part, this is because we made amendments to the act that may affect the date that it comes into effect. It also picks up the Corporations (Ancillary Provisions) Act 2001. These are the sorts of provisions that are in that act.

Mr B.S. WYATT: Has this arisen because of a weakness identified or simply because of amendments made already?

Dr M.D. NAHAN: It is just because of the amendments already made.

Clause put and passed.

Clause 14: Section 85 inserted —

Mr B.S. WYATT: This is a substantial amendment. Somewhere in my notes is the explanatory memorandum that the Treasurer tabled today. I cannot find it but I will ask the Treasurer to take me through it. This is probably the most substantial amendment that we are making. I would like an explanation of the intent of this amendment and why it has been brought on.

Dr M.D. NAHAN: This provision is inserted to ensure that if the amendments effected by this bill are not effective from the transfer date under the original Bell act, they are effective from the commencement of the amendments effected by this bill. A protective provision is inserted in subsection (3) to ensure that the liquidator, Maranoa Transport Pty Ltd, and those who assist the company do not commit an offence under part 7 of the Bell act because of any retrospective operation brought about by the commencement of these amendments with the effect from the transfer date. I suppose—I am freelancing here, which is dangerous—because we have widened the scope to include Maranoa Transport, we have to make sure that it is brought into the coverage of the act with no penalty.

Mr B.S. Wyatt: And obviously looking at that, to validate any activity that took place in between that time.

Dr M.D. NAHAN: Yes.

Clause put and passed.

Title put and passed.

Leave granted to proceed forthwith to third reading.

Third Reading

DR M.D. NAHAN (Riverton — Treasurer) [4.27 pm]: I move —

> That the bill be now read a third time.

MR B.S. WYATT (Victoria Park) [4.27 pm]: I think I speak for all of us in this place when I say that I hope this bill does not come back to the house. This has been a matter of some controversy, as was explained by me and the members for Armadale and Butler today. The members for Butler and Armadale went through some of the reasons. The member for Armadale made the point that it is more unusual for a Liberal Party to introduce legislation that seeks to effectively determine a judicial outcome of what is effectively a commercial dispute between parties currently litigating through a process that is well established and well known and has been around in its current form with various amendments since 2001. It is a well-established regime. This is unusual. I outlined in the second reading debate the fact that it is not so much a precedent that we are creating but we are certainly reliving a precedent.

The Treasurer referred to the case involving waste, which I think was the waste levy decision. In terms of the law in Western Australia, it was set in a decision I referred to during the second reading debate involving Nicholas v the State of Western Australia and Hancock Prospecting back in 1972, which confirmed that even though it is controversial, what the state is doing is not illegal. The Western Australian Parliament has plenary power to do these things, regardless of what parties outside may think. My questions just focused on getting the Treasurer to explain what each amendment was about because unless one has a thorough understanding of the matter, not so much the history, which has been fleshed out in some detail, not just in this Parliament but in dozens of different books written at that time, known as WA Inc, I understand that the purpose of this is simply to try to remove other areas of debates or argument in the High Court to ensure that the High Court discussions focus on the three substantive constitutional issues, some of which we have gone through today—for example, section 109 of the Constitution.

I note the point made by the Treasurer that the Australian Taxation Office is not a party yet but it is seeking to intervene and, without pre-empting the High Court, no doubt will be given leave to intervene. It involves a process that is seeking to take money out of a federal process. No doubt the ATO will be given a fair hearing in that respect. Regardless of the outcome of the validity of this act, whether it is held to be entirely invalid and knocked out or invalid in part, that has been the purpose, I think, of most of these more substantial amendments—to try to protect against partial invalidity and then try to make other parts work in a way that then protects the regime that is effectively being created under the Bell act. If it is knocked out in its entirety, the court has made a very definitive decision around the capacity to try to remove from a federal legal process, being corporations law, the transfer and allocation of moneys by way of that process. There has been some disgruntlement—again, we have all gone through this during the debate on the substantive legislation—around the other parties involved. Clearly, there was some expectation at some point along the way, from advice given by federal parliamentarians, about what the Australian Taxation Office may or may not do. As we know, the ATO is an independent body that tends to act very strongly in protecting its interests and the interests around moneys it sees as outstanding to the Australian Taxation Office. I went through, in a bit of detail, as the minister knows, the submissions filed on behalf of the federal Commissioner of Taxation. They purport to take a very strong view, and once the ATO is given leave to intervene, as I am sure it will be, it has made a very strong point. The member for Butler quoted, in his second reading contribution, the final paragraph of the submission from Mr Gleason, SC, which reads —

> The basic problem is that the drafter of the Bell Act has either forgotten the existence of the Tax Legislation, or decided to proceed blithely in disregard of its existence. No mechanism has been provided for in the Bell Act to allow for the continued operation or paramountcy of the Tax Legislation.

No doubt that will be a stand-off between the Solicitor General of the commonwealth and the State Solicitor of Western Australia that will be resolved in the High Court between 5 and 7 April. Regardless of that, that judgement will be of significant interest, regardless of the outcome, for the reasons outlined, I think around the fact that a five-year referral to create the national corporations regime is now up. I am not surprised that the commonwealth is pushing for 10 years. Five year strikes me as quite a short period in the way that these things play out, but no doubt every state, including Western Australia, is keen to keep the national corporations regime working. It is actually very important that we keep it working, because I do not think anyone really wants to go back to a state-by-state regime such as existing prior to the referral of those powers.

The Treasurer did his best to explain to me what the difference is, but I still do not fully understand it. I think that is probably an issue for the Attorney General to resolve. But clearly there is some concern if all the states are intervening to be heard on that point. For that very reason alone, the decision of the High Court will be one of some note when the judgement is finally given.

I do not intend to speak for long. This is, as I said, controversial legislation that revisits a precedent that we last dealt with, according to research that I have done, back in 1972, involving the Minister for Mines and some very familiar names that we see in the iron ore sector today. I hope that we do not see this again. As I said, the original bill was heavily amended in the upper house and we then had to deal with the amendments back here, and now we are amending it again. I dare say that with each amendment we are probably creating more complexity in an area that is already complicated and controversial enough, and the decision will be a decision by the High Court around what it views as the power of the executive and the Parliament of Western Australia to do these things regardless of the fact that a federal scheme is operating. I guess the validity of exempting ourselves, to pull ourselves out of that federal process to create our own, will be the decision on which this piece of legislation will either rise or fall.

I thank the State Solicitor for his briefing on Monday. I will not say that I understood the briefing in its entirety but, as I said before, this is an extraordinarily complicated and very specific area of law, and one needs to have spent many years deep within it to have a thorough understanding of what we are doing. I am very much reliant,

as the Treasurer is, on the advice of the State Solicitor and I hope, in that hearing on 5 to 7 April, or whenever it is held, subject to any adjournments, that the rigour of this legislation is upheld so that ultimately those moneys can be distributed accordingly, and we do not have to deal with legislation, or this issue, in this house again.

DR A.D. BUTI (Armadale) [4.35 pm]: I will just make some very brief comments on the third reading of the Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Amendment Bill 2016. This is a very complex area. I am sure that the Treasurer's wife, who used to be a work colleague of mine at the University of Western Australia law school, will be judging his performance in the legal answers to the member for Victoria Park.

Dr M.D. Nahan: I am sure she will.

Dr A.D. BUTI: She may have done a better job on the legal issues.

I raised in consideration in detail that it is disturbing that this bill has come before the house while we have ongoing litigation in the High Court. The oral hearings are only two weeks away, and submissions have already been made by the parties. I refer to a 2009 decision in the case of AON Risk Services Australia Ltd v the Australian National University. It dealt with the issue of case management. The High Court had a clear message that case management principles are very important to ensure that the interests of justice are served in minimising costs and delay for parties involved with litigation. The costs are not such a big issue for the parties to this dispute, but it is an important issue for the process of litigation and the court trying to manage the caseload before it.

If we are going to have a situation in which the executive and then the Parliament in many respects intervenes through a legislative process, interrupting litigation that has commenced, that is a worrying sign. The Treasurer mentioned that that is not unusual, but I think it is unusual, and I hope it is unusual, because I do not think anyone really wants a situation in which, after litigation has commenced and submissions have been made, the goalposts are moved. In the ANU decision, it was an issue about one party being able to lodge a late amendment to its pleadings. The court did not look at that favourably. Here, we are going beyond that. We are going beyond that situation to where, while the state government is an intervening party, as all the states are for the various constitutional or other issues, it is not actually a party germane to the substantive issues of the litigation. Here, the government is trying to move the goalposts. I understand that there may be arguments for it, but I think it is something that we have to be careful about.

Let us hope that this is the end of the matter and that we are not back here, after the oral hearings in the High Court between 5 and 7 April, to try to fix up another issue that was brought to the minds of the High Court justices. It would be interesting to see whether the High Court makes any comment on the process that is being followed here. It may remain silent.

Mr B.S. Wyatt: I am sure it will.

Dr A.D. BUTI: That is right—it may remain silent. It will be interesting to see how the barristers who appear in the case handle the matter. Let us hope that this brings the bell down on the Bell litigation legislation.

DR M.D. NAHAN (Riverton — Treasurer) [4.38 pm] — in reply: I want first to thank everybody for their expeditious and enlightening discussion on the Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Amendment Bill 2016. As I said, my problem was communicating the complexity while not even trying to understand some of it as it flowed out of my mouth. This is important legislation. I share the members' view. I hope we do not see this legislation, or any other subsequent legislation relating to amending it, in this house again. We hope that this sees the end of the Bell litigation, and we get to a point of equitable and quick distribution of money set aside to be distributed to the claimants. Again, I thank everybody for their contribution to this debate, and we will pass the matter on to the upper house.

Question put and passed.

Bill read a third time and transmitted to the Council.