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

Receipt and First Reading

Bill received from the Assembly; and, on motion by **Hon Michael Mischin (Attorney General)**, read a first time.

Second Reading

HON MICHAEL MISCHIN (North Metropolitan — Attorney General) [8.24 pm]: I move —

That the bill be now read a second time.

By way of background, it may assist members if I provide a brief history of events that created the unique and extraordinary circumstances that caused 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, then known as the State Government Insurance Commission, to purchase $162 million worth of shares and $150 million worth of bonds of the Bell Group companies. Those companies went into liquidation not long afterwards. As the Bell Group companies had no assets, the liquidators sought funding from creditors to investigate and, if so advised, commence proceedings against some 20 leading Australian and international banks that had taken possession of the Bell Group companies' assets, relying on questionable securities. The Insurance Commission, the commonwealth and one other creditor agreed to fund the liquidators, who ultimately commenced court proceedings against the banks. In the absence of that funding and those court proceedings, there would be no return to creditors of the Bell Group companies. It is that return, and actually achieving that return for creditors, which is the subject of this bill.

The litigation commenced by the liquidator ensued for almost 20 years, becoming colloquially known as the "Bell litigation", comprising some 30 separate proceedings in four countries. Within Australia, this litigation was conducted in several different jurisdictions in several courts, including the Federal Court, the Supreme Court of Western Australia and its Court of Appeal, and the High Court. Over that period, the funding creditors paid more than $223 million to the liquidators to conduct the Bell litigation, of which the Insurance Commission contributed almost $200 million. 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 the remaining creditors. It was hoped that these creditors, who had generally worked together against the banks in the lengthy Bell litigation, would thereafter cooperate to bring about a swift and equitable distribution of those funds. Sadly, that has not been the case.

Initial approaches canvassing mediation were made on the basis that the Insurance Commission should sacrifice legal rights even before mediation began. This was not a reasonable basis for mediation. Two efforts at mediation were made after the announcement of the introduction of this bill. One failed because only the liquidator, the Insurance Commission, and one other creditor turned up. A second attempt featured all these creditors, but the aspirations of some were so extreme that settlement was made impossible. Litigation over the distribution of these funds has already commenced and has been aggressively prosecuted in the Western Australian Supreme Court and the English High Court. More has been foreshadowed. That litigation threatens to consume more time and resources of this state, judicial and otherwise, with no prospect of resolution in the short term.

This government is not prepared to allow the continuation of a third, or possibly fourth, decade of expensive Bell litigation consuming the judicial and government resources of this state. Therefore, the government has introduced the Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015. This bill ensures a fair and expeditious end to the Bell litigation, providing for an equitable distribution of funds held by the liquidator to be generally in accordance with agreements reached and relied upon by the funding creditors throughout the Bell litigation. This bill provides a framework for the dissolution of those Bell Group companies registered in Western Australia, and the administration and distribution of the Bell litigation proceeds to avoid the perpetual litigation that appears to be inevitable on any issue 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 circumstances such as these, in particular for company insolvencies. The bill will bring the Bell companies back within the scope of Western Australian law for the resolution and finalisation of the affairs of those companies. As the bill refers to and operates upon 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, or on the 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 New South Wales James Hardie (Civil Liability) Act 2005, which set up a state scheme for winding up companies formerly part of the James Hardie corporate group. There has been comment

in the press promoted by interested parties suggesting that this legislation has been introduced because the government fears the outcome of the Bell litigation. Nothing could be further from the truth.

The Insurance Commission of Western Australia is confident that it is in a strong position with respect to its legal and contractual rights. It considers that its prospects of success in court proceedings, if this is the ultimate outcome, are extremely good. As a public statutory authority, the Insurance Commission is not able to agree to waive its rights in order to satisfy its more avaricious co-creditors. It is the extreme stances taken by these other creditors that ensure long and expensive litigation in the face of the Insurance Commission's formidable and well-founded claims. Accordingly, although the Insurance Commission has already funded the Bell litigation for 20 years, it is prepared to continue to do so to protect its interests, if required.

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

(a) upon the bill coming into force, the assets of the Bell Group companies registered in Western Australia will transfer to the WA Bell Companies Administrator Authority established by the bill to collect and deal with property and assets of the Bell Group companies. This authority will be headed by an administrator appointed by the minister, who will hold the assets in a fund;

(b) creditors will be invited to make submissions to the authority;

(c) taking into account those submissions, and the various relevant agreements and other matters set out in the bill, the authority will make recommendations to the minister about appropriate payments to be made to creditors of the Bell Group, and appropriate reward to be paid to creditors who indemnified the liquidators for the costs of the Bell litigation;

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

(e) the authority will then distribute the funds; report to Parliament, and wind up; and

(f) the distribution process is limited to 12 months, and any assets not distributed in 12 months will be forfeited to the state.

The objects of the bill are as follows —

(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 companies as a consequence of settlement of the Bell litigation in 2013;

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

(c) to provide appropriate compensation to creditors who funded the Bell litigation, taking into account 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 creditors of the Bell Group companies would have received no, or only nominal, dividends in the liquidations of those companies;

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

(f) to make fair and 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 consume the resources of this 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 that 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 Group companies' assets will transfer to the fund. Bell Group companies' liabilities will become liabilities that may be claimed against the fund.

To avoid ongoing disputes about funding agreements put in place many years ago, those agreements will be voided. This bill will dissolve the Bell Group companies, which will cease to exist. The authority will take the position of dissolved companies in proceedings in any court. The authority will also take the position of dissolved companies in any agreement or instrument to which the company was party, and the position of the liquidator of the company in any agreement or instrument to which the liquidator is not party. Any continuing agreements or instruments will continue to have effect as if a reference to a Bell company or the liquidator were a reference to the authority.

The authority will issue notices to creditors of a Bell Group 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 to assess and quantify liabilities than a liquidator, and to reach an expeditious and pragmatic resolution upon 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 consideration the authority will take into account in discharging its functions is agreements made before the enactment of the bill. Agreements that creditors may reach after the introduction of this bill for the preferred distribution of the property of the Bell Group 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 distribution of the fund, by working co-operatively 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 Group company as compensation for providing funding or indemnity for the Bell litigation. Provisions in the bill 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 assessing 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 Group company matters. This arrangement, and the time limitation on the operation of the authority, is the best way for resolution to be reached on Bell company matters. Any alternative proposition would perpetuate the layers of litigation in various courts over many years into the future.

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 Group company to that person is, by force of the bill, discharged and extinguished. Further, on the first anniversary of the transfer day, every liability of every Bell Group 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 a limited and specific form of 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 makes it clear that these provisions do not infringe any constitutional doctrine of implied freedom of political communication, and do not apply to proceedings in a court to challenge the constitutional validity of the bill.

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. They operate from the date of the tabling of the bill; that is, the date from which they are disclosed to, and known by, those parties that will be affected by them. In no sense are these provisions retrospective by criminalising conduct that was unknown, or unanticipated, at the time of commission.

Each creditor will be entitled to make a submission to the authority about any matter relating to the distribution of funds. One consequence of the lengthy liquidation and litigation process to date is that the parties are well aware of each other's position on many of the issues around the liquidation, although new issues continue to be raised and old issues revisited.

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 particular person. The authority will then give effect to any Governor's determination as soon as practicable and may

determine how payments are made to give effect to that determination. The liabilities of each Bell Group company are then extinguished. There are no appeal provisions in this bill.

The fund will close when the administrator certifies all moneys have been paid, or on the first anniversary of the transfer day, whichever occurs first. The administrator must prepare a final report detailing how the administrator carried out the authority's functions. Prior to the abolition of the authority, the minister is to lay that report before each house of Parliament. The authority will then cease to exist 14 days after the fund is closed, with any remaining assets or liabilities of the authority passing to the state.

I trust that all members of this chamber will recognise the necessity for this bill to resolve the affairs of companies registered in this state that were insolvent about 25 years ago now and remain so. 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 the outcome is in very few people's interests.

The proceeds received by the liquidators of the Bell Group companies of $A1.75 billion—or A1 750 million—is such a significantly large pool of funds that parties with any reasonable claim to a portion of those funds are aggressively agitating to increase the quantum of their claim. The amount is so large that creditors' legal expenses are easily dwarfed by earnings on the principal amount, making leveraging their claim through the use of, among other avenues, lawyers and the legal process relatively cheap. To some claimants time is less of an imperative and more a tool to be used to impel others to compromise their position.

Prior to and over the years of the liquidation of the Bell Group companies, the legal rights and entitlements of and between creditors and the Bell Group company liquidators have become increasingly complex and, in some cases, fractured to the point that if the various parties were now forced to resolve the myriad issues that existed, it would make the Bell litigation, which took almost 20 years to resolve, look comparatively simple. The best current estimate of the time it would be likely to take, based upon modelling of the various issues, is at least 10 years. That course of action would further burden our already strained court resources and would certainly not be in the interests of the people of Western Australia or the motorists of this state, given that the $250 million the Bell case has already cost this state and the massive further cost another 10 years or more of Bell litigation would cost if distribution remained dependent on the outcome of this litigation.

Numerous objections have been raised by those deprived of the opportunity to litigate for the next decade or more, including that —

(a) The bill expropriates creditors' rights, and/or deprives them of their rights without compensation. That is not correct. Clause 4(f) of the bill specifically provides that one of the objects of the bill is "to make fair and 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". As members may have noticed from comments made in the other place by my colleague the honourable Treasurer, in his view, which I share, each of the creditors stands to receive a considerable return from the process contemplated by the bill.

(b) The bill prevents parties using the courts to delay distribution of the Bell litigation proceeds. It does not prevent constitutional challenge to the bill, but it does otherwise to ensure the fulfilment of its object of an expeditious distribution of funds. Unless a provision of this kind is included, further litigation and delay will ensue.

(c) The bill creates retrospective criminal offences. It does not. To protect its objects the bill creates certain offences which come into effect on the day the bill was introduced into Parliament. That ensured the parties could organise their affairs in the light of the provisions of the bill. The bill does not criminalise conduct committed before the bill was introduced.

(d) The bill is unconstitutional. Part 1.1A of the Corporations Act 2001 specifically entitles the states to do what is done by this bill. In the circumstances, the government thinks this bill is a good use of this entitlement.

(e) The bill is universally condemned. I can say emphatically that it is not; the majority of people with whom I have spoken, professional and otherwise, have been supportive of the bill. It is primarily those with an interest in extending the life of the Bell litigation and the funds to hire professional lobbyists who have sought to voice their objections through the media and other means. The bill in fact represents a wonderful opportunity to ensure a fair and equitable distribution of the Bell litigation proceeds and a swift end to this matter to the benefit of this state.

This government is not willing to permit the continued expenditure of the resources of this state in circumstances where, by this bill, it has an opportunity to finalise the Bell matter with a fair and reasonable distribution of proceeds received from the Bell litigation.

Pursuant to Legislative Council standing order 126(1), this bill is not a uniform legislation bill. It does not ratify or give effect to an intergovernmental or multilateral agreement to which the government of the state is party, nor does this bill by reason of its subject matter introduce a uniform scheme or uniform laws throughout the commonwealth.

I commend the bill to the house and I table the explanatory memorandum.

[See paper 3073.]

Debate adjourned, pursuant to standing orders.