

EXPLANATORY MEMORANDUM

Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Amendment Bill 2016

In November 2015 this Parliament passed the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Act 2015 (Act)* to provide a mechanism for the prompt, fair and reasonable distribution of proceeds from the Bell litigation which until 2013, had occupied the Courts of this, and other, jurisdictions, for almost 20 years.

It is the wish of the Government - and many other interested parties - that by that Act the Bell litigation is brought to a close, funds are distributed equitably, and the cost and expense to the people of this State and creditors, of many more years of Bell litigation, is avoided.

That Act was necessary as, despite hopes the creditors of the Bell Group companies who had generally worked together through the lengthy Bell litigation would continue to work cooperatively together to bring about a swift and equitable distribution of those funds, that proved not to be the case.

As parties manoeuvred to increase their entitlement to a portion of the AUD\$1.75 billion held by the Bell Group companies' liquidator, it became increasingly obvious the parties' thirst for litigation had not diminished, with several sets of proceedings issued, and more threatened.

And so despite the hope that accompanied passage of the Act that it would finally dispose of this matter, with unfortunate predictability two creditors and the liquidator have issued proceedings in the High Court, seeking to challenge the Act.

Those matters are scheduled to be heard by the High Court on 5 – 7 April this year. They raise 3 areas of constitutional conflict which were foreshadowed in the course of the Act being passed. The submissions of the parties also identified a number of collateral issues in relation to the operation of provisions of the Act, and transitional provisions in prior legislation which should be addressed by Parliament, to ensure the High Court can focus on those 3 areas of constitutional conflict

In response to arguments raised by creditors, and the liquidator of the Bell Group (as liquidator of one of the Bell Group companies not presently within the scope of the legislation), and to ensure issues before the High Court focus upon those constitutional issues which are substantively in dispute, the Government proposes three substantive amendments to the Act, which are intended to address peripheral issues raised by parties contesting the Act in the High Court. 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.

These amendments are intended to ensure the Act achieves its objectives of ensuring all creditors maintain rights to prove their claim against the Fund; ensure the full scope of the Act's operation is caught within the protective provisions of the Corporations Act to the greatest extent permitted, and that the companies the subject of the Act continue in existence (although no one has yet disputed that).

For that purpose the three substantive amendments are these:

- (a) First, the insertion of a new section 21A which confirms the existence of companies the subject of the Act as bodies corporate under the Act, having a share capital, in which the shares continue to be owned by the holders immediately before the transfer day. Associated with that is an amendment to section 30 to deal with the validity of subsection 30(2) if the Corporations Act 2001 applies to the existence of those companies, rather than the Act.
- (b) Secondly, an amendment which deletes reference to the *Corporations Act 2001* in section 25. An argument has been raised that this improperly narrows the scope of those who can lodge claims against the fund in accordance with this legislation. If that argument is correct the consequence is unintended and should be addressed.
- (c) Thirdly, related amendments which remedy the circumstance that the legislation as originally drafted took a conservative or narrow approach to the ability to withdraw subject matter from the operation of the *Corporations Act 2001* by reference to the companies to which the Act relates. The *Corporations Act 2001* provides for the withdrawal of acts, omissions, bodies, persons or things from the Commonwealth jurisdiction by State laws. There is no reason why the State should restrain itself by reference only to persons or bodies, rather than invoking the full scope of that provision. Further, the legislation as originally crafted was restrained in not including one company which has a not insignificant role in the Bell Group within its scope, when certain of the assets of that company were plainly intended to be included. On further consideration there appears to be no constitutional reason for being so restrained. That company, which has strong connections with Western Australia is to be added. That leads to the inclusion of a definition of that company, and of the term "matter" conforming to the definition of the Corporations Act, and amendments to the scope of the exclusion provisions for the purposes of sections 5F and 5G of the Corporations Act to make use of the more expansive definitions.

The balance of amending provisions protect the validity of the original provisions and any changes proposed by the amending Bill, with limited retrospectivity back to the commencement of the Act for that protective purpose, and provisions to deal with transitional issues to the extent there is any prospect of invalidity. The purpose in that regard is plain, and supports the original intention of the legislation: this Bill and the Act it amends are to be effective at all times from 27 November 2015 and at every time thereafter the Act can be constitutionally valid, and on every basis that it can be constitutionally valid.

Proposed amendments

Words and phrases used in this part are the same as those used and defined in the Act.

	section	reason for amendment
1.	amend sub-section 3(1)	To further the objects of the Bill set out in section 4 of the Act, it is proposed to include a further Bell Group company (Maranoa Transport Pty Ltd (In Liquidation)) within the ambit

		of the Bill. It is the last known material asset holding company of the Bell group with only 2 known creditors – the Australian Taxation Office and The Bell Group Ltd.
2.	insert sub-section 3(4)	The amendment to this section is intended to ensure the inclusion of Maranoa in the Bill is limited to the extent of the State's constitutional ability to exclude that company from the operation of the Corporations legislation.
3.	insert a new section 21A	When the Bell Bill passed this House in June 2015 it contemplated dissolution of the then registered WA Bell Companies, on the transfer day. Shortly after the Bell Bill initially passed this House the ATO issued taxation assessments to the WA Bell Companies' liquidator, which necessitated the continued existence of the WA Bell Companies. It was then considered the Bell Bill sufficiently dealt with the continued existence of the WA Bell Companies. The contrary has not been contended in the High Court proceedings, but to clarify the nature of the continued existence of the WA Bell Companies for the purpose of the Act, the Government now proposes to insert clause 21A which confirms the existence of the companies as bodies corporate having a share capital, and that the shares continue to be owned by the holders immediately before the transfer day.
4.	amend sub-section 25(1)	It is proposed to amend this section to confirm and ensure the claims of all creditors including claims which arose before 23 June 1993, may be considered and dealt with by the Authority. That is intended to quell an issue, based upon an interpretation of certain transitional provisions of the Corporations Act which suggests that is not the case, which does not reflect the intention of the Act.
5.	insert sub-section 30 (1A)	This sub-section clarifies that if the WA Bell Companies have a continued corporate existence under the Corporations Act, rather than under the Act, ss.30(2) permitting " <i>dissolution</i> " of the WA Bell Companies (as opposed to " <i>deregistration</i> " contemplated by the Corporations Act), does not have effect.
6.	amend section 50	This amendment imports a definition of "matter" from section 5F of the Corporations Act for use in the subsequent amended provisions of sections 51 and 52.
7.	amend sub-section 51(1), insert sub-section 51(1A)	This amendment includes Maranoa as an excluded matter, and clarifies the number and scope of matters 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.
8.	amend section 52	This amendment, which corresponds substantively to the amendment to section 51, provides for a broader range of provisions of the Act to displace operation of the Corporations

		Act.
9.	insert sub-section 53(4)	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.
10.	insert section 53A	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 of the Commonwealth Constitution on the basis that, upon any inconsistency ceasing (which may arise in a number of ways), the Act continues in force. This is supported by the amendments to sections 53 and 83.
11.	amend section 83	As with the proposed amendment to ss.53(4), this amendment is intended to permit regulations to be made in relation to WA Bell Companies which have effect from the transfer day or a later date on matters other than those which relate specifically to the Corporations legislation.
12.	insert section 85	This section preserves the validity of the amending provisions of this Act; ensures the inclusion of Maranoa Transport in the Bill does not render a person criminally liable for a thing done or omitted to be done in relation to Maranoa Transport before this Bill commences operation; deems amendments made by sections 4 to 9 of the Amendment Act to have come into effect on 27 November 2015; validates anything done or purportedly done on or after that day as it would have been had the Amendment Act come into operation on that day, and preserves the effect and operation of sections 4 to 9 of the Amendment Act if they do not have effect on and from 27 November 2015.