

EXPLANATORY MEMORANDUM

Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015

The object of this Bill is to provide a mechanism for the prompt, fair and reasonable distribution of proceeds from the Bell litigation which until 2013 occupied the Courts of this, and other, jurisdictions, for almost 20 years.

Since settlement in 2013 it has becoming increasingly obvious the parties' thirst for litigation has not diminished, with several sets of proceedings being issued, and more threatened, seeking to increase parties' entitlements to a portion of the AUD\$1.75 billion held by the Bell Group companies' liquidator. While there has been engagement in mediation, early attempts to pre-condition participation upon compromise of some parties' existing legal rights, doomed those mediation efforts to fail.

It is the Government's - and many other interested parties' - wish, that, by this Bill, 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 another 10 or more years of Bell litigation, is avoided.

Introduction

The Insurance Commission of Western Australia (**Insurance Commission**) is a statutory body corporate established by the *State Government Insurance Commission Act 1986* as amended, and continued by the *Acts Amendment (ICWA) Act 1996*, and the *Insurance Commission of Western Australia Act 1986 (Act)*.

In May 1988 the then government of Western Australia caused the Insurance Commission to purchase 19.9 per cent of the shares in The Bell Group Limited (In Liquidation) (**TBGL**) at a cost of AUD\$162.1 million, and AUD\$150 million of bonds issued by TBGL, and a TBGL subsidiary Bell Group Finance Pty Ltd (In Liquidation) (**BGF**).

Liquidators were appointed to TBGL in 1991, and BGF in 1993 and, subsequently, many of their subsidiaries (**Liquidators**).

After preliminary investigations the Liquidators sought funding from creditors to investigate and, if advised, commence proceedings against banks who had exercised security over, and realised for their benefit, the assets of various Bell group companies including TBGL and BGF. This action was required to facilitate a return to creditors of the liquidated Bell group of companies. Otherwise those creditors would have received nothing from these liquidations.

After examining the affairs of TBGL, BGF, and the other Bell companies, and receiving legal advice, the Insurance Commission, the Commonwealth and one other creditor agreed to fund the Liquidators to commence proceedings in the Federal Court of Australia against a number of banks.

That, and a number of other litigation actions, ensued for almost 20 years, becoming colloquially known as the "*Bell litigation*".

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 at a mediation attempt in Singapore the banks and the liquidators, with the approval of funding creditors, agreed to settle the Bell litigation. That resulted in a pool of funds of AUD\$1.7 billion being made available to creditors (**Bell Litigation Proceeds**) for distribution.

It was hoped that the various creditors of the Bell Group, 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 creditors, but the aspirations of all of the parties could not be met by the pool of available funds and the wildly ambitious claims of certain parties made the prospects of settlement extremely remote.

Both litigation and mediation have therefore failed to deliver a return to creditors, to date. But in the absence of compromise, litigation is the only conventionally available option. That is the justification for legislation as the only option that will return money to creditors in a timely fashion.

Litigation as to the distribution of these funds has already been commenced and aggressively prosecuted in the Western Australian Supreme Court, and the English High Court. More has been foreshadowed. This 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 Proceedings) 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.

In doing so, this Bill relies upon Part 1.1A of the *Corporations Act 2001* (Cth) which preserves the power of State Parliaments to pass laws displacing provisions of that Act.

As the Bill refers almost solely to companies registered, and assets located in, Western Australia, the impact of this legislation upon other States and the national *Corporations Act 2001* (Cth) regime, is minimal.

State Parliaments in other States have displaced provisions of the Corporations Act for a range of reasons, the most analogous example being the *James Hardie (Civil Liability) Act 2005* (NSW), which set up a State scheme for winding up certain companies formerly part of the James Hardie corporate group.

The Western Australian community expects a positive real return on its investment in the Bell litigation. Indeed, a beneficial financial outcome has been a matter of political expectation for many years, underpinning the State's ongoing support for the Bell litigation through funding provided by the Insurance Commission. This expectation is enhanced by the costs borne by WA motorists throughout the WA Inc era as a consequence of the CTP levy.

The Government is not fearful of the outcome of litigation over Bell matters.

The Insurance Commission has robust legal and contractual rights. It has a positive view about the prospects of favourable outcomes if and when it is necessary for various courts to assess its position against those of its competitors in the allocation of the funds.

For that reason, the Insurance Commission, as a public statutory authority, is not able to agree to give away those rights in order to satisfy its more avaricious co-creditors.

The Insurance Commission will not deal with public funds in a cavalier fashion in any circumstances, and it will not do so in this instance. All other things being equal it will, as it must, enforce its legal rights over proceeds of the Bell litigation, and ensure a return to the people of this State.

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.

It is prudent to consider how the resolution of the Bell liquidations will play out in the absence of this Bill.

First, taxation matters will need to be litigated. There is a large gulf in expectation between the views of the Liquidator (and other creditors) and the views of the Australian Taxation Office as to the type and extent of tax liabilities.

The taxation matters will need to be resolved between the Liquidator and the ATO before any financial is made to creditors. The litigation that will involve will be extremely complex, appeals can be expected by parties that are not successful in initial hearings, and matters may need to be resolved up to the level of the High Court.

Estimates of time to resolve taxation matters alone run up to a decade, with up to 32 companies involved in the dispute.

Taxation matters need to be resolved before other matters can be substantively dealt with.

Matters over disputed proofs of debt also need be litigated. There will be a number of these actions, and the amounts of some are very large.

In addition to that litigation, there may be action to prevent parties who have supported various proofs of debt for over 20 years now changing their minds and challenging them.

For this purpose litigation will need to analyse and resolve the nature or characterisation of transactions that occurred in the 1980s. The Directors responsible for those transactions are now elderly, or no longer with us.

Some of that litigation will 're-run' aspects of the Bell litigation, by examining the conduct of directors making decisions about relevant, specific transactions that occurred in the 1980s. As the long-running Bell case proved, these are not straight forward matters.

Litigating the disputed interpretation of funding agreements between creditors has already been commenced. The extent and duration of this cannot be accurately predicted.

Litigation over the relative standing of the creditors and interaction with Trust Deeds for the Bonds upon which the claims of some creditors depend is central.

After all of this, litigation to determine the return to funding creditors under the provisions of s 564 of the Corporations Act will finally determine the share of the proceeds to be provided to those creditors.

It is possible that some of this litigation can be conducted in parallel. But again, as the original Bell litigation proved, many of these issues will need to be resolved sequentially.

That is why a decade of litigation may be an optimistic view in the absence of the passage of this Bill.

It is not too difficult to see a scenario where money currently held by the Bell Liquidator will be substantially diminished over the long course of the litigation that faces the creditors in the absence of this Bill. To date, over \$500 million has been spent, and not 1 cent returned to creditors.

That is in no party's interests.

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

The legal system which is generally adequate and effective in many instances has not provided, and appears highly unlikely in even the long term, to be able to provide a timely return to creditors.

Consequently, this Bill provides a framework for the dissolution of the WA-registered Bell Group companies, and the administration and distribution of the Bell Litigation Proceeds, with a view to avoiding further protracted and expensive litigation.

The Bill achieves this outcome by operating in the following way:

- a) upon the Bill coming into force, the assets of the Bell Group companies registered in Western Australia will transfer to a statutory authority headed by an Administrator appointed by the Minister, who will hold the assets as a fund;
- b) the Authority will report to the Minister on his recommendations as to liabilities that should be charged against the fund; appropriate payments to be

made to creditors of the Bell Group, and appropriate reward to be paid to creditors who indemnified the Liquidators with respect to the Bell Litigation;

- c) the Governor on the advice of Cabinet may then, by instrument in writing, determine the amounts to be paid and the Minister will provide the determination of the Governor to the Authority; and
- d) the distribution process is limited to 12 months, and any assets not distributed in 12 months will be forfeit to the State.

A clause-by-clause commentary of the Bill follows.

Part 1 – Preliminary

Clause 1: Short title

This clause provides for the short title of the Bill.

Clause 2: Commencement

This clause provides for the commencement of the Bill:

- a) Part 1, on the day on which the Bill receives Royal Assent;
- b) clause 41, on the day that is 14 days after the day on which the Fund is closed by force of clause 40;
- c) clauses 48 to 50, on 12 noon on the day before the day on which this Bill was introduced into the Legislative Assembly; and
- d) the rest of this Bill, on a day fixed by proclamation, and different days may be fixed for different provisions.

Sub-clause 2(c) is intended to ensure the purpose of the Bill may not be frustrated by actions undertaken after notice of the Bill has been given but before it is enacted.

Clause 3: Terms used

This clause defines certain terms used in the Bill, such as:

- a) **ADI** means an authorised deposit-taking institution as defined in the *Banking Act 1959* (Commonwealth) subsection 5(1);
- b) **Administrator** means the person holding the office of Administrator of the WA Bell Companies established by clause 8;
- c) **Authority** means the WA Bell Companies Administrator Authority established by clause 7;
- d) **Bell litigation** means the litigation listed in Schedule 2 of this Bill;
- e) **Fund** means the WA Bell Companies Administrator Authority Fund established by clause 16;
- f) **transfer day** means the day on which Part 3 comes into operation; and
- g) **WA Bell Company** means a corporation that existed at any time before 12 noon on the transfer day (including a corporation that was dissolved or deregistered before that day) and that is listed in Schedule 1.

There are a number of definitions for instruments which are to be voided upon the commencement of the Act to ensure the litigation in relation to them does not continue.

Clause 4: Objects of this Act

The objects of the Bill are:

- a) to provide a mechanism to resolve, without litigation, disputes which have arisen in relation to the distribution of funds received by the liquidator of The Bell Group Limited and certain of its subsidiaries as a consequence of the Bell litigation and the settlement of it in 2013;
- b) to provide a form of external administration of WA Bell Companies and require that it be carried out only in accordance with the provisions of this Bill;
- c) to provide appropriate compensation to the creditors who funded the Bell litigation taking into account the funding provided and the associated risks assumed by them;
- d) to reflect the circumstance that without the funding mentioned in paragraph (c), the Bell litigation funds would not exist and the creditors of the Bell group of companies would have received no (or only nominal) dividends in the liquidation of those companies;
- e) to make reasonable provision for the distribution of the property of the WA Bell Companies having regard to the uncertainties existing as to the nature and extent of that property;
- f) to make reasonable provision for the satisfaction of liabilities owed to creditors having regard to the uncertainties existing as to the nature and extent of those liabilities;
- g) to distribute the Bell litigation funds generally in accordance with the intentions of the liquidator and the creditors who funded the Bell litigation as set out in agreements made before the enactment of this Act; and
- h) to avoid further litigation that will waste the resources of the State and other persons and consume the Bell litigation funds.

The objects of this Bill are drafted broadly to encapsulate the breadth of functions and powers of the Authority in clauses 9 and 10 of the Bill, and the discretion that the Authority is given in the performance of those functions. This is intended ensure the Bill is interpreted broadly and pragmatically with a view to ensuring the purpose of the Bill is facilitated and achieved by not limiting the powers and functions of the Authority in relation to the determination of the most efficient and appropriate distribution of the fund, in a manner which reflects these objects.

Clause 5: Crown bound

The Bill binds the Crown in right of the State and, so far as the legislative power of the State permits, in all its other capacities.

Nothing in the Bill makes the Crown in any capacity liable to be prosecuted for an offence.

Clause 6: Extraterritorial operation

This clause provides that the Bill operates extraterritorially to the full extent of the extraterritorial legislative power of the State. That recognises that certain of the property which may fall within the operation of the Bill, upon commencement, may be located outside Western Australia, but held by, or for, a WA Bell Company

Part 2 – Authority and Fund

Division 1 – WA Bell Companies Administrator Authority

Clause 7: Authority established

This clause establishes the WA Bell Companies Administrator Authority, and defines the nature, legal capacity, obligations and rights of that body.

The Authority is to be governed by the Administrator. The Authority has the status, immunities and privileges of the State. The Authority is not an organisation for the purposes of the *Public Sector Management Act 1994*.

Note that the Authority will cease to exist upon the 1st to occur of its functions being discharged, and the 1st anniversary of the commencement of the Act.

Clause 8: Administrator Appointed

This clause establishes an office called the Administrator of the WA Bell Companies. This is not an office in the Public Service or an organisation for the purposes of the *Public Sector Management Act 1994*. This clause empowers the Minister to appoint a person as Administrator.

Clause 9: Functions of the Authority

This clause describes the functions of the Authority, and empowers the Authority to perform any of those functions in the State or elsewhere.

The functions of the Authority are:

- a) to collect, and realise or otherwise deal with, the property of the WA Bell Companies in accordance with the objects set out in the Bill;
- b) to administer, invest and manage the Fund; and
- c) to perform any other functions that are conferred on it by this Act.

Clause 10: Powers of the Authority

This clause provides the Authority with broad power to do all things necessary to perform its functions. This broad power may be exercised in relation to its functions within the State or elsewhere.

The power of the Authority is drafted broadly to ensure that it may act in any manner necessary for the achievement of the objects of the Bill as stated in clause 4.

Clause 11: Use of government staff

This clause empowers the Authority to use government staff and facilities on terms agreed between the Authority and any other parties.

Clause 12: Delegation

This clause allows the Authority to delegate any of its powers or duties, other than this power, to any other person.

Clause 13: Execution of documents by the Authority

This clause outlines the processes by which the Authority may execute documents and also provides the Authority with power to authorise an employee to execute documents on its behalf. A document purporting to be duly executed by the Authority, or bearing the Authority's seal, must be presumed to be validly executed, unless the contrary is shown.

Clause 14: Annual and final reports

This clause makes Part 5 of the *Financial Management Act 2006* applicable to the Authority as if it were an agency and the Administrator were its accountable authority. That Act requires the Authority to prepare annual and financial reports in relation to its activities.

Clause 15: Special reports

This clause gives the Minister power to require the Administrator to prepare reports on the operation of the Authority, financial statements, or any other information required by the Minister.

Division 2 – The WA Bell Companies Administrator Authority Fund

Clause 16: Establishment of Fund

This clause establishes the WA Bell Companies Administrator Authority Fund. The Fund is to be administered by the Authority. Money listed in sub-clause (3) must be credited to the Fund, and expenses and amounts listed in sub-clause (4) must be paid out of the Fund.

Clause 17: Investment of Fund

This clause empowers the Authority to invest money standing to the credit of the Fund in the same manner as money in the Public Bank Account pursuant to the *Financial Management Act 2006* section 37.

Clause 18: Administration expenses

This clause requires the Authority to pay certain administration expenses out of the Fund before all other payments.

Clause 19: Accounting for losses

This clause makes the Administrator liable for any loss incurred by the Fund because of any fraud, dishonesty, negligence or wilful failure to comply with this Bill by the Administrator. The Administrator will not be liable for any other loss. Only the Minister may take proceedings for any loss under this section.

Division 3 – Assumptions

Clause 20: Assumptions entitled to be made

This clause permits a person to make assumptions outlined in clause 21 of the Bill in relation to dealings with the Authority or dealings with any person who has, or purports to have, directly or indirectly acquired title to property from the Authority.

This clause does not apply if the person relying on the assumption has actual knowledge that the assumption is not correct or has a connection or relationship with the Authority such that they ought to know that the assumption is not correct.

Clause 21: Assumptions

This clause enumerates assumptions a person may make under clause 20.

Part 3 – WA Bell Companies
Division 1 – Transfer of property

Clause 22: Transfer of property

The principal operative provisions of the Bill come into effect on the "transfer day". At the beginning of the transfer day, the property of WA Bell Companies and related property held by other persons including liquidators, transfers and vests in the Authority.

The vesting effected by this clause applies to property situated in or outside the State. This power is intended to be of broad scope, with the transfer to the Authority taking effect irrespective of any restrictions or interests arising under contract, written law, the common law or in any other way, and with transfer or vesting being free from any encumbrance, trust, equity or interest. Upon transfer, the Authority has all the powers of an owner of the transferred property. The breadth of this provision is important given the complexity of the affairs of the Bell group, and the intermingling of the finances of the group.

A certificate signed by the Administrator certifying that property specified in the certificate has vested in the Authority is conclusive evidence that the property is so vested on the transfer day. That ensures that any property which requires registration of any interest or title can be effectively transferred, and any registrar can rely upon the Administrator's certificate to effect the necessary entries in any register.

Clause 23: Notice to property holder

This clause allows the Minister to give notice to any person whose property may be affected by the power created by sub-clause 22(1). The notice may require that the person provide records, account for dealings or do all things necessary to deliver the specified property to the Authority.

That is intended to ensure that, for example, banks which hold funds on behalf a liquidator provide information, and do other necessary formal acts to ensure that those funds are transferred to the Authority.

Clause 24: Steps to be taken to perfect transfer

This clause empowers and requires the Minister and the Authority to take all practicable steps necessary to ensure the transfer and vesting of property under clause 22 is fully effective.

Division 2 – Treatment of liabilities

Clause 25: Treatment of liabilities

This clause governs the treatment of liabilities of all WA Bell Companies, ensuring that existing liabilities provable against WA Bell Companies are dealt with as claims to be satisfied out of the Fund.

Liabilities that may be proved include any encumbrance, trust, equity or interest formerly existing over the property, but discharged at the time of its transfer to the Authority by operation of clause 22.

The clause ensures that no claim in relation to any liability may be brought otherwise than in accordance with Part 4 Division 1 of this Bill.

This differs from a conventional liquidation, in particular because of the complexity of the Bell group structure and the legal arrangements which it entered into both pre- and post liquidation. It ensures that the Authority has a great deal of discretion in ultimately quantifying the liabilities and in determining the relative priority of liabilities in relation to which payments may subsequently be made out of the Fund. Importantly, the only intended avenue for a creditor to receive any money in relation to a liability of a WA Bell Company is through a claim against the Fund, and not by continuing litigation against any person or in any forum. That is intended to ensure that the Authority can proceed expeditiously with the performance of its functions, not distracted by litigation against the Authority, or any of the other persons listed in sub – clause (5).

Division 3 – Voiding of Agreements

Clause 26: Certain agreements voided

This clause voids specified agreements, which are deemed to have always been void. Claims under the voided agreements are provable in accordance with Part 4 Division 1 of the Bill. These agreements principally concern indemnity arrangements entered into with or for the benefit of a liquidator of a WA Bell Company in connection with the conduct of the liquidation or funding of the Bell litigation.

The intention of this clause is to avoid claims one or more of the parties to the voided agreements may have had against another party, and terminate any residual claims and liabilities which may give rise to litigation between parties to these agreements. Claims in relation to the companies and of those agreements must be made, and are dealt with, as claims against the Fund.

Division 4 – Dissolution of WA Bell Companies

Clause 27: Dissolution of companies

This clause dissolves all WA Bell Companies at 12 noon on the transfer day. Dissolved companies cease to exist. At the time of dissolution, the companies will have had all the assets transferred by operation of clause 22, and many of their obligations voided by clause 26. The Authority takes the position of a dissolved company in any pending or existing proceedings in any court or tribunal or before any person acting judicially.

The Authority also takes the position of the dissolved company in any agreement or instrument to which the dissolved company was a party; or which was given to, or in favour of, a dissolved company; or refers to the dissolved company, other than those agreements which are voided by operation of clause 26 and two instruments governed by English law which impose only obligations, and confer no relevant continuing rights.

Continuing agreements or instruments will continue to have effect as if a reference to a WA Bell Company or a liquidator of such a company were a reference to the Authority.

Division 5 – Miscellaneous

Clause 28: Registration of documents to show effect of this Part

This clause defines a 'relevant official' to include the Registrar of Titles. The Administrator may give a copy of a certificate under sub-clause 22(6) to a relevant official, with a view to that certificate conclusively evidencing the vesting of the property the subject of that certificate in the Authority.

Division 5 – Miscellaneous

Part 4 – Completion of winding up of WA Bell Companies

Division 1 – Information gathering

Clause 29: Requirements on liquidator

This clause requires the liquidators of WA Bell Companies to prepare and provide to the Authority within 1 month after the transfer day, an account and statement of receipts and to give to the Authority all books of the WA Bell Companies. In addition, the Authority may require the liquidator to provide the Authority with a report about property of a particular WA Bell Company. A liquidator has 14 days to comply with any such request, and any report produced attracts qualified privilege. The costs of the liquidator will be paid out of the Fund.

Clause 30: Call for proof of liabilities

This clause requires the Authority to give to any person it reasonably believes to have been a creditor of a WA Bell Company immediately before the transfer day, a notice requiring the person to give the Authority full particulars of all liabilities of the company in relation to that creditor within 30 days of receiving the notice. The Authority must also publish the notice in a daily newspaper circulating in Australia, specifying the manner in which a liability may be proved or how the manner of proof may be ascertained.

The extended definitions of "creditor" and "liability" in clause 3, necessary because of the trust arrangements to which certain of the WA Bell Companies had entered into, mean that a broader class of claimants will be considered in the process of the administration of the Fund. Many of the claims will overlap as between claimants, and the companies to which those claims relate. Those claims will be reconciled by the Authority in the process of administration provided by this Part.

Again, while similar in concept to a process used in a conventional liquidation, the mechanics of this process will be materially different and the Authority will have a considerably greater discretion in assessing and quantifying liabilities than a liquidator. The decisions of the Authority will not be appellable to the court in the manner in which a conventional liquidator's determination of a proof of debt would be. That reflects the complexity of the group structure and its legal relationships, the prospect of overlapping multiple claims, and the requirement to reach an expeditious and pragmatic resolution of questions of liability.

Division 2 – Reports and recommendations by the Authority

Clause 31: Role of the Authority

This clause establishes that it is the role of the Authority under this Division to determine the property and liabilities of each WA Bell Company; report to the Minister in accordance with clauses 33 and 34, and make recommendations to the Minister in accordance with clauses 35 and 36.

Clause 32: Authority must seek submissions from affected creditors

This clause requires that, before finalising any determination or recommendation as required under clauses 33, 35 or 36, the Authority must prepare a draft decision (defined in sub-clause (2)) and provide that draft decision to any person who provided particulars of a liability pursuant to clause 30. A person to whom a draft decision is provided may make written submissions to the Authority within 14 days of receiving that draft decision in respect of any matter relating to that person arising out of the draft decision.

The power of the Authority to act informally, obtain information in such manner as it thinks appropriate, and receive or dispense with, written or oral submissions as it thinks necessary, under clause 68 supports the performance by the Authority of its functions under this clause.

Clause 33: Determination of property and liabilities

This clause requires the Authority to determine the property and liabilities of each WA Bell Company. The Authority must have regard to the matters listed in sub-clause (2) in considering what action to make, but, ultimately, has absolute discretion in regard to these determinations. That determination is embodied in a report under clause 34.

Clause 34: Report to the Minister on property and liabilities

The Authority must report to the Minister on the property and liabilities finally determined by it under clause 33 in relation to each WA Bell Company as soon as practicable after making the determination. This report must contain any recommendations of the Authority under clauses 35 or 36. A report by the Authority to the Minister is subject to absolute privilege. Failure by the Authority to comply with the procedural requirements of this clause does not invalidate a report made under this clause.

Clause 35: Recommendations with respect to liabilities

The Authority is required to make written recommendation to the Minister as to the amount to be paid to a person in relation to the liabilities of the Bell group to that person. For that reason, the Authority is to take an aggregate view of all amounts payable to that person by all WA Bell Companies, and deal with those liabilities as a single claim.

The Authority must have regard to certain of the matters listed in sub-clause (2), and may have regard to other matters, in considering what recommendation to make, but, ultimately, has absolute discretion in regard to its recommendation. One of the considerations the Authority must take into account, because of the objects in clause 4, is agreements made before the enactment of this Bill under which liabilities may have arisen. Another is any agreement creditors may have reached after the introduction of this Bill for the distribution of the property of the WA Bell companies. That is intended to ensure that creditors have an incentive to facilitate the work of the Authority and expedite the distribution of the Fund, by working cooperatively to endeavour to agree a basis of distribution which they may recommend to the Authority.

The recommendation of the Authority need not contain reasons. The Authority has absolute discretion as to its recommendation.

The making of a recommendation does not create any right in, or for the benefit of, a creditor of a WA Bell Company or any other person. A recommendation by the Authority to the Minister is subject to absolute privilege. A failure by the Authority to comply with this clause does not invalidate a recommendation made under this clause.

Clause 36: Recommendations with respect to funding or indemnities

This clause allows the Authority to recommend to the Minister in writing, an amount to be paid to, or property to be transferred to or vested in, a creditor of a WA Bell Company as compensation for providing funding or indemnity for the Bell litigation. Sub-clause (3) outlines matters the Authority may or must have regard to when making a recommendation. This provision is similar in concept to section 564 of the *Corporations Act 2001* but addresses a number of issues with that provision identified in the course of the Bell litigation. It involves a broad evaluative exercise, considering a number of matters, and to assess appropriate compensation for the provision of an indemnity or funding. The Authority has absolute discretion as to this recommendation.

A recommendation may provide that any amount payable to a creditor reduce to a specified extent a liability of a WA Bell Company to the creditor; be in addition to any amount otherwise payable to the creditor under this Bill, or be in addition to any payment to the creditor in respect of liabilities mentioned in clauses 25 or 26 subject to a recommendation under clause 35.

The Authority's recommendation need not contain reasons. A recommendation does not create any right in, or for the benefit of, a creditor of a WA Bell Company or any other person. A recommendation by the Authority to the Minister is subject to absolute privilege. Failure by the Authority to comply with the procedural provisions of this clause does not invalidate a recommendation.

Division 3 – Determination by the Governor

Clause 37: Governor may determine amounts and property

This clause requires the Minister to submit to the Governor any report received under clause 34, or any recommendation received under clauses 35 or 36. The Governor may then, by instrument in writing, determine the amount to be paid to, or the property to be transferred to, or vested in, a person with respect to a liability of the WA Bell Companies to that person as a creditor, and by way of compensation for providing funding or an indemnity.

The Minister must give the determination of the Governor to the Authority. The determination is not subsidiary legislation for the purposes of the *Interpretation Act 1984*.

Upon making the determination, every liability of every WA Bell Company to a person to whom nothing is to be paid and to whom no property is to be transferred and in whom no property is to be vested under the determination is, by force of the Act, discharged and extinguished. That is intended to introduce finality into the process of distribution by ensuring that there are no residual claims of any nature to be brought, and in particular no claims to be litigated, after a distribution decision has been made.

Division 4 – Giving effect to Governor's determination

Clause 38: Authority to make payments or transfer property

This clause requires that, subject to sub-clause (3), the Authority give effect to a determination of the Governor made under clause 37 as soon as practicable. The Authority may determine the means by which any payment is to be made when seeking to give effect to that determination.

Sub-clause (3) states that a person is not entitled to receive payments, or have property transferred to or vested in them, unless certain requirements are met to the satisfaction of the Authority and the Minister. In particular of this sub-clause will facilitate the imposition of a requirement that any pending or contingent collateral challenges or other litigation, anywhere in the world, be terminated and in the future prevented by way of releases, assignments or otherwise as the Minister determines to be appropriate, in order to obtain the benefit of a payment from the fund. That may be necessary to avoid international or transnational parties simply choosing to re-litigate issues associated with the Bell proceedings, and distribution issues, elsewhere in the world, frustrating the objective of the Bill.

Upon payment being made to, or property being transferred to, or vested in, a person in accordance with this clause, every liability of every WA Bell Company to that person is, by force of the Act, discharged and extinguished. Further, on the first anniversary of the transfer day, every liability of every WA Bell Company to the person is discharged and extinguished, and the determination of the Governor under clause 37 ceases to have effect. Again, that it intended to provide a strong incentive to creditors to co-operate in the process contemplated by the Bill.

Division 5 – Release of Liquidator

Clause 39: Release of liquidator

Upon dissolution of a WA Bell Company under clause 27, each person who is, or has at any time been, a liquidator of a WA Bell Company or at any time acted for or on behalf of such a liquidator is discharged from all liability arising out of or relating to anything done, or purportedly done, by them in performing their duties, including complying with obligations arising under this Bill. Again, that is intended to ensure the finality of the process of distribution and the conclusion of claims in relation to the Bell administrations by preventing collateral litigation against a liquidator.

Part 5 – Winding up of the Authority and Fund

Clause 40: Closure of the Fund

The Fund is to be closed when either the Administrator certifies that all money required under clause 38 to be paid has been paid, or on the first anniversary of the transfer day, whichever occurs first.

Any money remaining in the Fund when it is closed is to be credited to the Consolidated Account. Again, that is intended to ensure the finality of the process of distribution and the conclusion of claims in relation to the Bell administrations. It also provides a strong incentive to creditors to ensure that the process of administration proceeds expeditiously in accordance with the objects of the Bill.

Clause 41: Abolition of Authority

Upon this clause coming into effect the Authority and the office of Administrator is abolished, and all property, liabilities, agreements and proceedings pass to the State, and all records and data of the Authority pass to the Minister. By clause 2(1)(b) this provision comes into effect 14 days after the Fund is closed under clause 40.

Clause 42: Vesting of property in the State

Any property of a WA Bell Company accruing, payable or vesting after the closing of the Fund accrues and is payable to or vests in the

State. The receipt of any such money or property is solely for the benefit of the State, and not on behalf of any other person or body.

Again, that is intended to ensure the finality of the process of distribution and the conclusion of claims in relation to the Bell administrations.

Clause 43: Final Report on Authority's functions

This clause requires that, prior to the abolition of the Authority, the Administrator prepare a report outlining how the Administrator carried out the Authority's functions as outlined in clause 9 of this Bill.

The Minister is to provide this report to each House of Parliament, before the Authority is abolished.

This clause ensures the Administrator is accountable to Parliament in their management of the Authority, and is additional to the requirement to prepare a final report in compliance with Part 5 Division 3 of the *Financial Management Act 2006*.

Part 6 – Application of Corporations Act

Clause 44: Terms used

This clause defines terms used in this Part.

Clause 45: WA Bell Companies excluded from Corporations legislation

This clause relies on section 5F *Corporations Act 2001* to exclude WA Bell Companies from the operation of that Act, subject to certain exceptions in sub-clauses (2) and (3) of this clause.

Clause 46: Displacement of certain provisions of the Corporations legislation

This clause displaces the *Corporations Act 2001* to the extent any provisions of the *Corporations Act 2001* apply to a WA Bell Company. Parts 3, 4 and 5 and clauses 49 and 50(3) of this Bill are declared to be Corporations legislation displacement provisions for the purpose of the *Corporations Act 2001* section 5G in relation to the Corporations legislation.

Clause 47: Applying the Corporations legislation to WA Bell Companies

This clause provides that regulations may declare a matter relating to a WA Bell Company to be an applied Corporations legislation matter for the purposes of the *Corporations (Ancillary Provisions) Act 2001* Part 3 in relation to a specified provision or provisions of the Corporations legislation (including any excluded Corporations legislation provision or provisions), with any modifications that are specified in the declaration.

Part 7 – Offences

Clauses 48 to 60 of the Bill contain offences necessary to ensure the object of the Bill is achieved. This Part contains criminal offences with serious penalties, the imposition of which reflect the serious matter at which this Bill is directed. This Bill deals with the ultimate disposition of very large sums of money, and any attempt to hinder the achievement of the Bill's purpose should attract significant consequences. Penalties for the relevant offences have been set with reference to culpable offences under the *Corporations Act 2001*.

Because of the possibility of parties to the Bell litigation, or those who stand behind them, taking steps to avoid the consequences of the Bill upon the Bill being tabled, clauses 48 to 50 will, by sub-clause 2 (2), have retrospective effect back to the date upon which the Bill is tabled. That is an important measure to protect the integrity of the process that the Bill will put in place.

Clause 48: Scheme to avoid operation of Act or achievement of its objects

This clause creates an offence when a person seeks to avoid the operation of the Bill. The clause is drafted broadly with a view to ensuring that the Bill achieves its stated purpose.

This clause however ensures that the liquidator, in the ordinary course of the liquidation of a WA Bell Company can pay the ordinary expenses of the liquidation, and invest money with an ADI.

Penalty: a fine of \$200 000 or imprisonment for 5 years, or both.

This clause also ensures the application of the constitutional doctrine of the implied freedom of political communication, and allows for proceedings in a court to challenge the constitutional validity of this Bill.

Clause 49: Certain deregistered companies not to be reinstated

This clause makes it an offence to seek the reinstatement of a deregistered company that was a subsidiary of a WA Bell Company.

Penalty: a fine of \$10 000.

Clause 50: Dealings with property

This clause makes it an offence to conceal property that is to be transferred to, and vested in, the Authority by operation of clause 22 of this Bill.

This clause however permits the liquidator of a WA Bell Company to pay, in the conduct of the liquidation of that company, the ordinary expenses of that liquidation, and invest money with an ADI in the ordinary course of the liquidation. [as for 48]Penalty: a fine of \$200 000 or imprisonment for 5 years, or both.

Clause 51: Obstruction or hindrance of the Authority

This clause makes it an offence for a person to obstruct or hinder the Authority in the performance of its functions or a person assisting the Authority in the performance of those functions.

Penalty: a fine of \$200 000 or imprisonment for 5 years, or both.

Clause 52: Failure to comply with requirements

This clause makes it an offence to, without reasonable excuse, fail to comply with a requirement made by this Act or made by the Authority, the Administrator or an employee, agent or delegate of the Authority under this Bill. However, this clause does not apply in relation to a requirement made by the Authority, the Administrator or an employee, agent or delegate of the Authority unless, when the requirement is made, the person is informed that failure to comply may constitute an offence.

Penalty: a fine of \$50 000 or imprisonment for 2 years, or both.

Clause 53: False information

This clause makes it an offence to, in connection with a requirement made or direction given by the Authority, the Administrator or an employee, agent or delegate of the Authority under this Act, provide any information or produce any document that the person knows is false or misleading in a material particular.

Penalty: a fine of \$50 000 or imprisonment for 2 years, or both.

Clause 54: Confidentiality of information

This clause makes it an offence for a person to misuse confidential information obtained by reason of any function that person has, or at any time had, in the administration of this Act or in the course of the provision of services for the purposes of this Act.

Penalty: a fine of \$12 000 or 12 months imprisonment, or both.

Clause 55: Liability of officers of body corporate for offence by body corporate

This clause provides for an officer of the body corporate to be guilty of an offence under this Part committed by that body corporate, if the officer failed to take all reasonable steps to prevent the commission of the offence by the body corporate.

This and the succeeding provisions reflect the provisions in relation to corporate liability contained in Part 2 of the Directors Liability Reform Bill 2015 and in particular clauses 44C and 44F.

Clause 56: Further provisions relating to liability of officers of body corporate

This clause makes sure that clause 55 does not affect the liability of a body corporate for any offence under this Bill. However, an officer of a body corporate may be charged with, and convicted of, an offence in accordance with clause 56 whether or not the body

corporate is charged with, or convicted of, the principal offence committed by the body corporate.

Clause 57: Conduct on behalf of bodies corporate and principals

This clause clarifies the elements of proof of conduct or state of mind of a body corporate for the purpose of establishing any offence under this Part of the Bill.

Clause 58: Continuing offences: daily penalties

This clause provides that for the purposes of the *Interpretation Act 1984* section 71, the penalty for each separate and further offence committed by a person is –

- a) for an individual, a fine of \$1,000; and
- b) for a body corporate, a fine of \$5,000.

Clause 59: Bringing prosecutions

This clause provides that proceedings for an offence under the Act may be commenced prior to the expiry of the Act and waives the need for the prosecution notice to specify the date of the offence where it specifies the date on which the offence came to the prosecuting authority's attention.

Clause 60: Injunctions to ensure compliance with this Act

This clause allows the Administrator to apply to the Court for an injunction to ensure compliance with this Bill in situations where the act or omission in question would constitute an offence under this Bill.

Part 8 – Miscellaneous

Clause 61: Privilege

This clause explains the meaning and substance of qualified privilege referred to in the Act.

If a clause of this Bill provides that a person has qualified privilege for an act, matter or thing, the person in relation to the act, matter or thing, has qualified privilege in defamation proceedings and is not liable in defamation unless malice can be proven.

If a clause of this Bill refers to absolute privilege, that person cannot be liable to an action for defamation at the suit of a person.

Clause 62: Effect of things done under Act

This clause governs the legal effect of all things done under this Bill.

No act, matter or thing done under this Bill gives rise to any of the legal rights, liabilities, obligations, duties or any other legal remedy listed in sub-clause (2) of this clause. This provision is intended to

mitigate the prospect of collateral challenges to any aspect of the achievement of the objectives of the Bill.

Clause 63: Protection of the Minister, the Authority and others

This clause ensures the Minister, the Authority, the Administrator, the State, and any other person employed or engaged by the Authority will not be liable for anything done by them in good faith, in performance or purported performance of a function under this Bill. This is intended to ensure the finality of the process of distribution and the conclusion of claims in relation to the Bell administrations.

Clause 64: Protection of ICWA and others connected with it

This clause protects ICWA and those connected with ICWA by ensuring that all persons to whom the clause applies are released and discharged from any claim, demand or proceeding of any nature other than those arising under sub-clause (4) of this clause. This is intended to ensure the finality of the process of distribution and the conclusion of claims in relation to the Bell administrations.

Clause 65: Protection for compliance with the Act

This clause provides that no civil or criminal liability attaches to a person for compliance, or purported compliance, in good faith, with a requirement of this Bill. In particular, if a person produces a record or other information as required under this Bill, no civil liability attaches to the person for producing the record or information, whether the liability would arise under a contract or otherwise.

Clause 66: Act not to give rise to liability against the State, Authority or Administrator

This clause ensures the State or the Authority or Administrator is not liable for any action, liability or demand arising from the things listed in sub-clause (2) of this clause. This is intended to ensure the finality of the process of distribution and the conclusion of claims in relation to the Bell administrations.

Clause 67: Stay of proceedings

This clause provides that on and from the transfer day a person cannot begin or continue proceedings in a court with respect to property that was, immediately before that day, property of a WA Bell Company except with the leave of the Court and in accordance with the terms, if any, it imposes. Clause 67 is part of a comprehensive set of protections for the activities of the Authority and other relevant actors and agencies, and the protection of the integrity of the Fund, which includes sub-clause 25(5), subclause 62 (2), and clauses 63 to 66 and 68, which are intended to minimise the risk of collateral litigation to defeat, frustrate or delay the achievement by the Authority of the objectives of the Bill.

Clause 68: No appeal or review

This clause excludes any right of appeal or review against any decision made or other thing done by the Governor; the Minister; the Authority, or the Administrator, under or for the purposes of this Bill. This Bill preserves only those avenues of judicial review which, for Constitutional reasons, are incapable of exclusion on any basis. This is intended to ensure the finality of the process of distribution and the conclusion of claims in relation to the Bell administrations.

Clause 69: Conduct of inquiry

This clause empowers the Authority, when inquiring into a matter it is required to determine or recommend under this Bill, to act as informally as possible; not be bound by the rules of evidence; inform itself on any matter it considers appropriate, and receive written or oral submissions as it considers appropriate.

Clause 70: Judicial notice

All courts, judges and persons acting judicially must take judicial notice of the official signature of every person who is for the time being, and every person who has at any time been, the Administrator and of the fact that person holds or has held that office.

Clause 71: *Freedom of Information Act 1992*

This clause ensures the *Freedom of Information Act 1992* has effect as if the Authority were mentioned in Schedule 2 to that Act.

Clause 72: Power to obtain opinion

This clause entitles the Authority to seek the written opinion of the State Solicitor on questions concerning the functions or powers of the Authority.

Clause 73: Constructive notice of contents of document

This clause deems a person to whom the Authority or the Administrator gives a notice or other document under this Bill is taken to know its contents from the time notice is given to the person.

Clause 74: Translation of documents

A requirement in this Bill to give or lodge a document is, in the case of a document not in the English language, taken to include a requirement that a translation of the document be given or lodged at the same time.

Clause 75: Service of documents

This clause allows service of any document required or permitted to be served under this Bill to be given in any of the ways provided for in sections 75 or 76 of the *Interpretations Act 1984* or by electronic means of communication approved by the intended recipient of the document.

Clause 76: Approved forms

The Administrator is given power to approve forms for use under this Bill. The approved form may require information provided in the form to be verified by statutory declaration.

Clause 77: Regulations

This clause empowers the Governor to make regulations under this Bill.

Clause 78: Expiry of Act

The Act expires on the sixth anniversary of the day on which it receives the Royal Assent.

Schedules

Schedule 1: The WA Bell Companies

Schedule 1 lists the WA Bell Companies

Schedule 2: The Bell Litigation

Schedule 2 describes the various proceedings that form the Bell litigation