

**RESPONSE TO
REPORT 30
STANDING COMMITTEE ON LEGISLATION
BELL GROUP COMPANIES (FINALISATION OF MATTERS AND
DISTRIBUTION OF PROCEEDS) BILL 2015**

On 10 November 2015 the Legislation Committee of the Legislative Council tabled its Report in relation to this Bill, and I thank the Committee for its diligent efforts in considering a substantial Bill, and the submissions put to the Committee in the limited time available for its inquiry.

The Committee made 29 recommendations in relation to the Bill. Some of those proposed specific changes to the Bill; some changes were described but not specified, and some areas were identified which the Committee considered the Council would be assisted by the provision of further information in relation to the Bill.

In large part, Government has adopted the recommendations of the Committee. In addition, the Committee process through the submissions provided by interested parties, has identified one or two areas for drafting improvement in the Bill.

As a result I table an amended notice paper responding to the Committee's Report, containing those amendments that the Government proposes to move to the Bill during consideration in detail.

I also take this opportunity to respond to the Committee recommendations: both to the extent the Report proposed specific amendments and, in relation to amendments proposed where Government has accepted the proposal in principle, but proposes to move the amendment in another form.

RECOMMENDATION 1:

Recommendation 1: The Committee recommends that the Attorney General inform the Legislative Council, should regulations be made pursuant to section 5F(3) of the Corporations Act 2001 (Cth), how clause 46 of the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015* would operate.

The Commonwealth, through the former Treasurer, confirmed prior to introduction of the Bill that the Commonwealth did not propose to propound regulations under s. 5F(3) of the *Corporations Act 2001* (Cth) so the issue is unlikely to arise.

Independently of section 5F, however, the Bill is supported under s. 5G(8) which permits the exclusion of Chapter 5 of the *Corporations Act*, dealing with the administration of *Corporations Act* companies under State specific legislation. The provisions of the Bill, which provide a State specific regime for the external administration of those companies, supervenes the *Corporations Act* to that extent. That includes matters relating to the control of assets; the person in control of those assets, and the proof and ranking of claims, priorities and distributions, which are the subject of Parts 3, 4 and 5 of the Bill.

RECOMMENDATION 2:

Recommendation 2: The Committee recommends that the Attorney General inform the Legislative Council whether there are any amendments that could be made to clause 2 of the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015* that could address concerns raised about the timing of the commencement of clauses 48 to 50 of the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015*.

This recommendation is not supported by the Government as it would be contrary to the Government's intention that persons do not engage in schemes to avoid the operation of the Act or the achievement of its objects, prior to the enactment of the legislation.

Rather, an amendment is now proposed so that the Act, other than sections 41, 48, 49 and 50 will commence on assent, or on the day after assent, reflecting the minority recommendation. That provides certainty for the commencement of the operative provisions.

Minority Recommendation 1:

A minority of the Committee comprising Hon Ken Travers MLC and Hon Lynn MacLaren MLC recommends that:

The *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015* be amended to ensure all clauses of the Bill are proclaimed within six months of the Bill receiving Royal Assent failing which the Act expires.

RECOMMENDATION 3:

Recommendation 3: The Committee recommends that the Attorney General inform the Legislative Council whether the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015* practically excludes any opportunity for judicial review due to the operation of provisions such as 33(3), 34(4), 35(8) and 36(9).

The question of whether the Bill "*practically*" excludes any opportunity for judicial review is one of judgement. The intent of the Bill, as is made plain in the Second Reading Speech and the submissions by Government to the Committee, is to minimise the opportunities for litigation, including by way of judicial review, in order to achieve the objects set out in, in particular, sections 4(a) and (h) of the Bill.

To that end, a number of protective provisions are included to minimise the risks that the process of distribution will be further protracted by challenges to the recommendations of the Authority and the determination of the Governor.

RECOMMENDATION 4:

Recommendation 4: The Committee recommends that the amount determined by the Governor to be paid to the Insurance Commission of Western Australia be made public.

This recommendation suggests a report, after the determination has been made and effected. The Government accepts this recommendation and proposes amendments to clause 43 which will make provision for the determinations made by the Governor to be published as part of the reporting process at the end of the administration of the companies.

This also encapsulates the minority recommendation.

Minority Recommendation 2:

A minority of the Committee comprising Hon Ken Travers MLC and Hon Lynn MacLaren MLC recommends that:

The *Bell Group Companies (Finalisation of Proceeds and Distribution of Proceeds) Bill 2015* be amended to ensure the amount determined by the Governor to be paid to The Insurance Commission of Western Australia is made public.

RECOMMENDATION 5:

Recommendation 5: The Committee recommends that the Attorney General explain to the Legislative Council why any other amounts which are determined by the Governor to be paid should not be required to be made public, given the public interest in the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015* and the fact those receiving payments are not precluded from making this public.

The response to Recommendation 4 also addresses Recommendation 5, although the Government notes that it is of course ordinarily a private matter for the parties which receive money to disclose whether they have received money and in what amount, but, on balance, the issue of public interest is best addressed through the reporting process.

RECOMMENDATION 6:

Recommendation 6: The Committee recommends that clause 3(1) of the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015* be amended as follows:

Page 6, lines 9 and 10—To delete "includes a provisional liquidator appointed to, and holding office with respect to," and insert:

means a liquidator of a WA Bell Company and includes a provisional liquidator of

This recommendation is accepted.

RECOMMENDATION 7:

Recommendation 7: The Committee recommends that clause 4(a) of the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015* be amended as follows:

Page 9, lines 10 and 11 —To delete "mechanism to resolve, without litigation, disputes which have arisen in relation to" and insert:

mechanism, that avoids litigation, for

This recommendation is also accepted.

RECOMMENDATION 8:

Recommendation 8: The Committee recommends that the Attorney General explain to the Legislative Council the intent of the reference to the "uncertainties" described in clauses 4(e) and (f) of the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015*, and whether it is necessary for such reference to remain.

The Committee was briefed extensively on the nature of the current Bell distribution litigation, and the materials in relation to that briefing have been published.

It is sufficient to say, for the purpose of identifying the object of the Bill, that the nature of the issues joined, and to be joined, in the Bell distribution proceedings, and the structure of the Bell Group itself, creates in relation to many companies in the Bell Group present uncertainty as to the property held by that company, or which might be held by that company in the future as a result of the process of liquidation.

That is a consequence of the way in which the money flows through that group depend upon the resolution of distribution issues before the distribution of funds by the Bell Group to, ultimately, its creditors.

RECOMMENDATION 9:

Recommendation 9: The Committee recommends that clause 4(g) of the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015* be amended to remove the conflict identified in paragraph 7.12.

The Report does not provide the proposed drafting of the recommended amendments. The Government proposes to amend this clause to state the objects of the Act include distributing the Bell litigation funds in accordance with the commercial substance of the agreements (which of course included that a portion of the Bell litigation funds would be distributed to funding creditors in particular proportions).

Reference is made to the commercial substance of the agreements, and not the terms of the agreements themselves, as the construction and operation of the agreements is subject to dispute between the creditors and it would be contrary to the Bill's purpose to replicate a judicial function of interpretation of those agreements and vest that function in the Authority.

RECOMMENDATION 10:

Recommendation 10: The Committee recommends that the Attorney General assure the Legislative Council that the Administrator of the WA Bell Companies will have relevant qualifications and/or experience.

I can assure the Council that the Administrator of the WA Bell Companies Authority will have relevant qualifications and experience to discharge that function. The Government made plain in its submission that being unduly prescriptive about qualifications or experience in the Bill would unduly complicate the process of identifying and selecting that Administrator.

However it is the Government's intention that the Administrator should be somebody whom has relevant qualifications and/or experience to perform the functions of that office.

RECOMMENDATION 11:

Recommendation 11: The Committee recommends that the Attorney General assure the Legislative Council that anyone to whom powers or duties are delegated pursuant to clause 12 will have relevant qualifications and/or experience necessary for the power or duty delegated.

The same is true for Recommendation 11.

RECOMMENDATION 12:

Recommendation 12: The Committee recommends that the Attorney General assure the Legislative Council that the Authority will advertise appropriately to ensure that all potential creditors are given notice of the call for proof of liabilities under clause 30 of the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015*.

I can give that assurance and Government propose a minor amendment to clause 30 to reinforce that intent.

Precisely what means will be used to inform creditors will be a matter for the Authority to determine, after consulting with relevant stakeholders to identify the most effective means of ensuring that communication.

RECOMMENDATION 13:

Recommendation 13: The Committee recommends that the Attorney General assure the Legislative Council that clause 32(2) of the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015* covers information on all persons with respect to whom the Authority intends to make recommendations.

The Government does not accept this recommendation, because it fixes upon a matter upon which certain creditors are, regrettably, fixated – that is how much other creditors will receive as a result of the distribution, rather than how much an individual creditor should receive.

The question for the Authority is, in relation to each WA Bell Company, and ultimately the WA Bell Companies in aggregate, what is the amount which should be paid to each creditor? I would expect that each creditor will inform the Authority of the amount to which that creditor contends it is entitled (and the basis upon which that entitlement is asserted). The basis upon which the entitlement is asserted may inform

the consideration by the Authority of the amount which may consequently fall to be distributed to another creditor, because of the basis for the asserted entitlement.

However, it is no proper function of a creditor in these administrations, or any other administration, to advocate for both their entitlement and that of another creditor, but rather to assert, properly, their own claim.

RECOMMENDATION 14:

Recommendation 14: The Committee recommends that clause 32(3) of the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015* be amended to provide for a timeframe within which a draft report is provided to a person who gave particulars of a liability of a WA Bell Company in relation to that person.

The Government has accepted this recommendation and proposes an amendment to clause 32(3) to provide a timeframe of 150 days from the date of receipt of particulars. In doing so the Government recognises that it may impose some logistical stresses upon the Authority, and have resourcing and cost implications.

However, consistent with the objective of the Bill to expedite distributions, Government accepts that a limitation upon the time for recommendations will impose an important discipline upon the process.

RECOMMENDATION 15

Recommendation 15: The Committee recommends that the Attorney General confirm to the Legislative Council that it is not the intention of clause 32(4) of the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015* to confine a person to making a written submission on liabilities of a WA Bell Company to that person, rather than on liabilities to other persons.

The response to Recommendation 13 addresses this matter.

RECOMMENDATION 16:

Recommendation 16: The Committee recommends that clause 36(1) of the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015* be amended as follows:

Page 31, line 8 — to delete "litigation" and insert:

litigation, whether directly or indirectly

That recommendation is accepted and proposes to amend clause 36(1) as recommended.

RECOMMENDATION 17:

Recommendation 17: The Committee recommends that the Attorney General advise the Legislative Council whether it is the intention of the *Bell Group Companies (Finalisation*

of Matters and Distribution of Proceeds) Bill 2015 to pool assets for the purposes of recommending distributions to any person.

The substantive effect of the Bill is to pool the assets of the Group for the purposes of distribution. The process contemplated by the Bill is this:

- (a) The Authority assesses and determines the liabilities of each WA Bell Company, which includes intra company liabilities. It also determines the assets of each company. There is necessarily and properly a measure of judgement involved in making those assessments and it is for that reason that a broad discretion is given in relation to these determinations.
- (b) Having determined those assets and liabilities, the Authority then recommends:
 - (i) first, an amount to be paid to the creditors who funded the recovery of the litigation proceeds, to compensate them for that funding; and
 - (ii) then, a distribution of the residue amongst the creditors.
- (c) A single sum will be paid from a single fund. In doing so the Authority will doubtless have regard to the position which would eventuate had the liquidations proceeded, attended by the uncertainties of litigation, to a conclusion some time in the distant future and make a determination of the amount which reflects a fair distribution having regard to those matters, which process is embodied in the objects of the Bill in clause 4.

In that sense, the assets are pooled for the purpose of distribution, and that of course is the effect of the vesting of those assets in a singular fund.

RECOMMENDATION 18:

Recommendation 18: The Committee recommends that clause 38(1) of the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015* be amended to provide for notice of the Governor's determination of any amounts to be paid or property transferred to or vested in a person to be given to a person in whose favour a determination has been made.

This may be effected in the following manner:

Page 34, after line 12 — To insert:

- (aa) notify each person specified in the determination to or in whom the Governor has determined an amount is to be paid or property is to be transferred or vested; and

The Government accepts Recommendation 18 and proposes to amend clause 38(1) as recommended.

RECOMMENDATION 19:

Recommendation 19: The Committee recommends that, should the Legislative Council consider the amendments in the Supplementary Notice Paper No. 134, that 34/38 of Supplementary Notice Paper No. 134 be replaced with the following:

Page 34, line 26 to page 35, line 12 — To delete the lines and insert:

- (4) Subsection (5) applies to a person covered by the determination of the Governor under section 37(2).
- (5) At the end of the period of 3 months beginning on the day on which notice of the determination of the Governor under section 37(2) is given to the person —
- (a) every liability of every WA Bell Company to the person is, by force of this Act, discharged and extinguished; and
- (b) if the person has not given a duly executed deed in accordance with subsection (3) in relation to a determination of the Governor under Division 3 — the determination ceases to have effect.
- (6) Subsection (7) applies to a person covered by a determination of the Governor under section 36A(2) but not covered by the determination of the Governor under section 37(2).
- (7) At the end of the period of 3 months beginning on the day on which the Governor makes the determination under section 37(2) —
- (a) every liability of every WA Bell Company to the person is, by force of this Act, discharged and extinguished; and
- (b) if the person has not given a duly executed deed in accordance with subsection (3) in relation to a determination of the Governor under section 36A(2) — the determination ceases to have effect.
- (8) A reference to a person covered by a determination of the Governor is a reference to a person to or in whom the Governor has determined an amount is to be paid or property is to be transferred or vested.

The Government accepts Recommendation 19 and proposes to amend and insert clause 38(4)-(8) as recommended, subject to a minor drafting change to new subclauses (5)(b) and (7)(b) to clarify that, if a person does not execute the required deed — the determination ceases to have effect *in relation to the person*.

RECOMMENDATION 20:

Recommendation 20: The Committee recommends that, should the Legislative Council consider the amendments in the Supplementary Notice Paper No. 134, that 35/40 of Supplementary Notice Paper No. 134 be replaced with the following:

Page 36, line 8 — To delete "first anniversary of the transfer day." and insert:

end of the period of 5 months beginning on the day on which the Governor makes the determination under section 37(2).

The Government accepts this recommendation but, having regard to the need for the Authority to wrap up the administration of the companies, prepare final reports, and effect payment to creditors in whose favour a determination is made, proposes the period be set at six rather than five months.

RECOMMENDATION 21:

Recommendation 21: The Committee recommends that the Attorney General explain to the Legislative Council how clause 38(3) of the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015* will operate in circumstances where there is a determination to make payments to bondholders who cannot be readily identified.

Clause 38 (3) will operate in its terms in relation to a bondholder if a determination is made to make payments to a bondholder, such that the bondholder will not be entitled to receive monies until they present a deed in a form satisfactory to the Minister.

I would anticipate that payment will be made against surrender of the bearer bond (which is the exclusive proof of the entitlement of the bondholder), and the deed. Any difficulty lies not in the operation of clause 30(3), but in the identification of bondholders who may be entitled to claim, and communications with them. A minor amendment to clause 30 in response to Recommendation 12 is proposed to facilitate that process.

RECOMMENDATION 22:

Recommendation 22: The Committee recommends that the Attorney General clarify whether the Government's policy of precluding a legal challenge to distributions, and that no reasons need be given for the Authority's recommendations, applies to clause 43 of the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015* and the contents of the Authority's final report.

While the Government accepts the appropriateness of reporting upon the distributions ultimately made, it would be an anathema to the objects of the Bill to detail in that report the reasoning underlying that determination. The prospect of litigation being commenced, after the distribution of funds, to upset that distribution is one that, having regard to the objects of the Bill, cannot be countenanced, and the Government is not disposed to accept any measures which would increase, in any way, the prospect of litigation at the hands of a disappointed creditor to reopen decisions made and implemented under the Bill.

RECOMMENDATION 23:

Recommendation 23: The Committee recommends that the Attorney General advise whether clause 43 of the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015* requires the final Authority report disclose whether the Governor's determinations under clauses 36A and 37 implement or deviate from, the Authority's recommendations.

The Government has accepted the minority recommendation and proposes an amendment which requires the final report disclose both the recommendations of the Authority and the final distribution determined by the Governor.

Minority Recommendation 3:

A minority of the Committee comprising Hon Ken Travers MLC and Hon Lynn MacLaren MLC recommends that:

The WA Bell Companies Administrator Authority's final report should disclose whether the Governor's determinations under clauses 36A and 37 implement or deviate from, the Authority's recommendations.

RECOMMENDATION 24:

Recommendation 24: The Committee recommends that clause 43 be amended to clearly legislate the Government's intention on the contents of the Authority's final report.

The Government accepts this recommendation to the extent reflected in its response to the preceding recommendation. As the Authority has statutory reporting obligations under the *Financial Management Act 2006* (WA) in relation to matters dealt with by that Act it is likely the "final" report will involve a description of the activities of the Authority and the challenges it has faced in achieving the objectives set by the Bill, and the outcome of that undertaking, together with the amounts recommended by the Authority and determined by the Governor to be distributed. There is likely to be little more requirements for reporting and such further requirements as there may be can be left to the discretion of the Authority.

RECOMMENDATION 25:

Recommendation 25: The Committee recommends that clause 43 of the Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015 be amended to provide for yearly interim reports.

This may be effected in the following manner:

Page 37, lines 19 to 21 — To delete the lines and insert:

(2) The Administrator must —

(c) within 3 months of each anniversary of the commencement of Part 2 — prepare a report on how the Administrator carried out the Authority's functions as outlined in section 9 in the year prior to the anniversary; and

(d) prior to the abolition of the Authority — prepare a final report on how the Administrator carried out the Authority's functions as outlined in section 9.

Page 37, lines 23 and 24 — To delete "the report referred to in subsection (1), prior to the abolition of the Authority." and insert:

a report under subsection (1)(a) within 14 sitting days after the preparation of the report; and the final report under subsection 1(b) prior to the abolition of the Authority.

The amendment proposed in this recommendation poses some difficulty by allowing little or no time for the Authority to prepare a final report to enable the Minister to table it.

An amendment is proposed to reflect the substance of the recommendation but overcome these difficulties, by providing that the final report under section (1)(b) must be laid before each House of Parliament 14 sitting days after the abolition of the Authority.

RECOMMENDATION 26:

Recommendation 26: The Committee recommends that the Attorney General provide an explanation to the Legislative Council whether clause 48(6) of the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015*:

- is intended to criminalise all legal challenges other than challenges to the constitutionality of the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015*
- is inconsistent with clause 68(4) of the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015*
- and if so, whether this effect is disproportionate to the objects of the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015*.

If the Attorney General's advice is that clause 48(6) is not intended to criminalise other legal challenges to the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015* then the Committee recommends that clause 48(6) be amended to make this clear.

This may be effected in the following manner:

Page 42, lines 4 and 5 — To delete "to proceedings in a court to challenge the constitutional validity of this Act." and insert:

to —

- (c) proceedings in a court to challenge the constitutional validity of this Act; or
- (d) proceedings in a court contemplated by this Act.

Examples for this subsection:

For the purposes of subsection (6)(b), proceedings referred to in section 67 and 68 are examples of proceedings contemplated by this Act.

The policy position which has been consistently maintained is that it is not the intent of the Bill to prevent the taking of legitimate proceedings, but only measures, by the interposition of entities, the rearrangement of assets or liabilities, etc. which would avoid the intent of the Bill.

Consequently, the Government accepts the recommendation and the amendments proposed to that effect.

RECOMMENDATION 27:

Recommendation 27: The Committee recommends that the Attorney General explain to the Legislative Council why potential creditors of WA Bell Companies have not been

given the same protection as the Insurance Commission of Western Australia in clause 64 of the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015* and whether the Insurance Commission of Western Australia has, as a consequence, an advantage over other potential creditors.

The Government contemplates that similar protections will be afforded through the releases which are to be obtained under clause 38(3) of the Bill for the benefit of each relevant creditor.

Protections in clause 64 are introduced specifically, and particularly, because of the prospect that the State, in moving the Bill, will attract adverse action from other creditors, directly or through the Insurance Commission of Western Australia.

RECOMMENDATION 28:

Recommendation 28: The Committee recommends that clause 68(1)(c) of the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015* be amended as follows:

Page 55, line 10 — to delete "certiorari" and insert:

Certiorari, or a remedy having the same effect as a remedy that could be provided by means of such writ,

The Government accepts this recommendation and moves an amendment to that effect.

RECOMMENDATION 29:

Recommendation 29: The Committee recommends that the Government amend clause 72 of the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015* to provide that the Authority be required to seek independent legal advice on any question concerning its functions or powers.

This may be effected in the following manner:

Page 56, line 16 — After "is" to insert:

not

Page 56, lines 18 and 19 — to delete the lines.

The Government has not accepted this recommendation. The interpretation of statutes for Government, generally, is a core function of the State Solicitor's Office.

To the extent that that advice can be properly given, it involves no conflict of interest which would raise any issue of professional conduct for those giving the advice. That is the appropriate forum for advice for the construction of the statute to be given.

The advice about functions of powers, of course, does not extend to advice about distribution issues, where different considerations may apply.

The recommendation is not accepted.