STANDING COMMITTEE ON LEGISLATION

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

TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
WEDNESDAY, 14 OCTOBER 2015

Members

Hon Robyn McSweeney (Chair)
Hon Lynn MacLaren (Deputy Chair)
Hon Donna Faragher
Hon Dave Grills
Hon Ken Travers (substituted member)

Hearing commenced at 11.41 am

Mr ROD WHITHEAR
Chief Executive, Insurance Commission of Western Australia, sworn and examined:

The CHAIR: On behalf of the committee, I welcome you to the meeting. Before we begin, I must ask you to take either the oath or affirmation.

[Witness took the affirmation.]

The CHAIR: You will have signed a document entitled "Information for Witnesses". Have you read and understood that document?

Mr Whithear: I have.

The CHAIR: These proceedings are being recorded by Hansard. A transcript of your evidence will be provided to you. To assist the committee and Hansard, please quote the full title of any document you refer to during the course of this hearing for the record. Please be aware of the microphones and try to talk into them. Ensure that you do not cover them with papers or make noise near them. I remind you that your transcript will become a matter for the public record. If for some reason you wish to make a confidential statement during today's proceedings, you should request that the evidence be taken in closed session. If the committee grants your request, any public and media in attendance will be excluded from the hearing. Please note that until such time as the transcript of your public evidence is finalised it should not be made public. I advise you that publication or disclosure of the uncorrected transcript of evidence may constitute a contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege.

Would you like to make an opening statement to the committee?

Mr Whithear: No, thank you.

The CHAIR: You are just ready for the questions—very good!

Mr Whithear: Hopefully!

The CHAIR: Please describe the role played by ICWA in the drafting of the bill, including the amendments that are the subject of supplementary notice paper 134 of 14 September 2015. Please include in your answer references to specific clauses for which you had input.

Mr Whithear: The Insurance Commission was not the drafter of the bill. It was certainly aware of its production and supportive of its production. I do not think there is any particular provision that I could claim that the Insurance Commission drafted or owned.

The CHAIR: When was ICWA first aware of that legislative proposal for the administration of the property of the WA Bell companies contained in the bill?

Mr Whithear: I understand legislation had been contemplated as a solution to some of the intractable problems associated with Bell maybe in the mid-2000s. That was not proceeded with. In this specific circumstance, the first time I heard about the prospect of doing it was either very late December last year or in January this year.

Hon KEN TRAVERS: It is not clear in my head. So the bill was not initiated from within ICWA in anyway?

Mr Whithear: As I said, we were aware, involved, but we were not the drafters.

Hon KEN TRAVERS: I understand that you were not the drafters —

Mr Whithear: Sure.

Hon KEN TRAVERS: — but I am asking: Where was the initiation for the bill? Where did it start? Did that start in ICWA?

Mr Whithear: No.

Hon KEN TRAVERS: Do you know where it was initiated?

Mr Whithear: Yes; the State Solicitor's Office.

Hon KEN TRAVERS: Right. How was it communicated to ICWA?

Mr Whithear: I think in discussion and then in various forms of correspondence as the shape of the bill evolved.

Hon KEN TRAVERS: Discussion between who?

Mr Whithear: The State Solicitor's Office and the Insurance Commission.

Hon NICK GOIRAN: It is the case that the State Solicitor's Office represents the Insurance Commission of Western Australia in the litigation?

Mr Whithear: Yes.

Hon NICK GOIRAN: So when you say that the genesis of the bill was the State Solicitor's Office, was that in the State Solicitor's Office capacity as chief lawyer for the Insurance Commission or in its own individual right?

Mr Whithear: You will have to ask the State Solicitor's Office that, but I will add that the entities created by Parliaments for state governments mean that a State Solicitor often has a couple of hundred clients in the state government and all its organs. So, I do not see that as particularly new or controversial. I know others have complained about the State Solicitor having to act in various capacities. I do not think the various organs of the state in obtaining advice from the State Solicitor have any complaints about the State Solicitor acting in those various capacities. It is only others that have that.

Hon NICK GOIRAN: It is the case, though, that the State Solicitor when it is acting as the chief lawyer for the Insurance Commission needs to seek instructions from its client.

Mr Whithear: They will.

Hon NICK GOIRAN: So in this case, did they seek instructions from the Insurance Commission about a proposal to draft this bill?

Mr Whithear: They would have consulted us and on occasion, I am sure, sought instructions on parts of it. Again, this line of questioning is probably best addressed to the State Solicitor or his office, but, anyway, I am answering.

Hon NICK GOIRAN: Can you just confirm when you started your role at the Insurance Commission personally?

Mr Whithear: Mid-2012; June, I was appointed.

Hon NICK GOIRAN: So when you say that the Insurance Commission was made aware of this matter in late December 2014 or January 2015, you were there?

Mr Whithear: Yes.

Hon NICK GOIRAN: When you say that the Insurance Commission was made aware, were you personally made aware?

Mr Whithear: I was aware of it at the time, either December or January, yes.

Hon NICK GOIRAN: Okay, but you cannot confirm for the committee if being made aware of it was by way of the State Solicitor seeking instructions from its client or not?

Mr Whithear: No, I cannot because my recollection was that there was a concept raised and that concept was the withdrawal of the referral that state Parliaments had made to the commonwealth for the purposes of the Corporations Law in 2001, I think it was. So, that concept was floated, that that referred power may be drawn back by the state and the liquidation or winding up of certain WA-registered companies would be brought back under Western Australian law. That concept was, I guess, being thrown about at that time to see whether that is what should occur.

Hon NICK GOIRAN: The Singaporean mediation that has been referred to, was the State Solicitor present at that mediation on behalf of the Insurance Commission?

Mr Whithear: Yes.

Hon NICK GOIRAN: Were you personally present?

Mr Whithear: Yes, at both mediations.

[11.50 am]

Hon NICK GOIRAN: Would it be the understanding of the State Solicitor's Office that when they are getting instructions from the Insurance Commission at any time that you are the individual whom they should get the instructions from?

Mr Whithear: And my colleagues, yes.

Hon NICK GOIRAN: Okay, when you say your colleagues, in the Insurance Commission, they are your subordinates?

Mr Whithear: Sure, yes, so the Insurance Commission will give instructions from time to time on an insurance matter or a Bell matter.

Hon NICK GOIRAN: Are you able to take it on notice to clarify who in the Insurance Commission gave instructions to the State Solicitor's Office to seek for the drafting of this bill?

Mr Whithear: Yes, I can. It will be interesting to see whether we find a single document that does that or, as I said, this concept was floated and we debated its merits for quite some time, but sure.

The CHAIR: Please outline the status of each of the claims by ICWA to the funds the subject of the bill, including whether they have been admitted by the liquidator. In particular, what is the status of the claim of JN Taylor of $301 230 257 purchased by ICWA. The committee understands it is under review by the liquidator. If so, is ICWA aware of the basis for this review? So there are a few parts to that question.

Mr Whithear: I certainly have not come prepared to prosecute every claim the Insurance Commission has.

The CHAIR: No, and we do not expect that.

Mr Whithear: Okay. The first part of that question went pretty close to that. I guess in high-level terms, the claims the Insurance Commission has are as a result of its $200 million of funding provided to liquidators that enabled the recovery of the $1.7 billion and the exit of the banks from the liquidations; claims under section 564 of corporations law that confer an advantage to creditors funding litigation and liquidations in order to recover proceeds for creditors. There are various other agreements with creditors that also confer rights and claims to us. We have a debt for unpaid rent. We have an interest in shares in a Bell company obtained during the prosecution of the claims against the banks. We also have claims for the bonds. You specifically asked about JN Taylor. That claim has been admitted by the liquidator, as have other debt claims by others. They, in our view, are valid, or that claim is valid. We have no doubt that our opponents will be agitating for it not to be valid or for it no longer to have been accepted by other creditors. I might add that it is one of a number of examples where other creditors have sat beside the Insurance Commission and the liquidator and prosecuted cases and claims against the banks. There were a whole range of grounds for the banks settling and reaching this $1.7 billion settlement. We now have a number of our co-

creditors that are saying, "While we supported that claim for 20 years, we now do not, because we see we can do the Insurance Commission out of funds if we do not." I am not necessarily complaining about that; that is the nature of the beast. The Insurance Commission is the frog that has carried the scorpions across the river and the scorpions are now stinging because that is their nature.

The CHAIR: A very good analogy, that one.

Hon NICK GOIRAN: Can I follow up on the claim. The Insurance Commission's first claim, if I can call it first claim—my words—is the recovery of the costs that it has expended in getting the $1.7 billion even into the pot for distribution.

Mr Whithear: Yes, indeed.

Hon NICK GOIRAN: How much would those costs be?

Mr Whithear: The costs advanced to the liquidator—I can give you exact amounts, but the amount of funds advanced or lent to the liquidator to prosecute these cases is very close to $200 million even. The amount the Insurance Commission has spent is approaching $250 million, because it has to fund its own costs, as it is doing now. It is one of the things that agitates me most about the Insurance Commission being involved in this thing. It just keeps bleeding money. We had some speculative litigation kicked off in England a year ago. That cost us $4 million just to defend that, and we were not even the party sued, but as a result of indemnities given in the past, we are on a financial hook for those things.

Hon NICK GOIRAN: So that I am clear and the committee is clear, $200 million of money has been provided by the Insurance Commission to the liquidator to recoup the moneys from the bank, but, in addition to that $200 million, the Insurance Commission has also spent roughly $250 million —

Mr Whithear: No, an additional 50. Sorry; I may not have been clear.

Hon NICK GOIRAN: No, that is fine. In rough terms, $250 million altogether—in total. Now, as you understand it, in terms of priority in terms of the distribution, the $200 million that in effect the Insurance Commission has lent to the liquidator, is that a first right of recovery over and above anything else?

Mr Whithear: Yes.

Hon NICK GOIRAN: Is that statement in dispute by any of the other creditors?

Mr Whithear: The behaviour of some of the other creditors would suggest so, and because this has occurred on my watch, I am not referring to history. The liquidator first came into funds of $728 million, I think it was, in December 2012. I asked the liquidator to repay those funds. One of our co-creditors, despite being entitled to a large sum of their own moneys back, said to the liquidator that we will sue you personally if you pay the Insurance Commission's money back. Now, this gets me quite exercised because, as you are aware, we run an investment fund to meet our insurance liabilities. We have done pretty well over the last three years. We know that that decision by one of our co-creditors has cost us well over $60 million, but if that $200 million was in our investment fund, that money would be returned. So, we think it is quite clear that the first obligation of the liquidator to repay from December 2012 or, on an alternative view, from when the 1.7 was paid, neither of which have occurred, and I have correspondence from creditors saying, "Liquidator, please don't pay the Insurance Commission money back or we'll sue you because we aim to gain the interest at the expense of the Insurance Commission."

Hon DONNA FARAGHER: And you have correspondence to that effect.

Hon NICK GOIRAN: You said "creditors", plural. As I understand it, there are five main creditors. Can you elaborate?

Mr Whithear: I can. I guess, we are in an awkward spot on the confidentiality space, I guess. I read in the paper this morning that confidentiality agreements only apply unless you are offended by something. If they are the rules we are playing by, maybe I can speak outside the bounds of some of —

The CHAIR: We can go into a private hearing.

Hon NICK GOIRAN: I am happy to withdraw the question for the time being.

Hon DONNA FARAGHER: Or you could ask to go into a private hearing.

Hon NICK GOIRAN: Maybe at a later stage. Just to conclude on that point, there is the $200 million in costs. Are there any creditors, other than the Insurance Commission, who accept that that is a first right of recovery?

Mr Whithear: I think there are. As ever on Bell, it is often good to ask people's position at the time, because they may have had a position a week before that may have changed.

Hon NICK GOIRAN: Then, what is your understanding of the priority of the recovery of the additional $50 million that you have spent?

Mr Whithear: That is—on my view, I do not think it is covered by the funding agreements, so that is potentially sunk money.

Hon NICK GOIRAN: In terms of priority, the $200 million comes first?

Mr Whithear: Yes.

Hon NICK GOIRAN: And then the debts that the Insurance Commission are owed come second and the costs that you have spent then, the $50 million, that would be last, if I was to put it in those three broad categories?.

Mr Whithear: I cannot predict what a court would decide, but in terms of the funding agreements, that $50 million is not really catered for under the agreements. There is a hierarchy and the parties' own costs are not covered under that.

Hon NICK GOIRAN: In terms of predicting what the court might or might not do, of course, if this bill comes into effect, there will be no need for a prediction, because the government will just simply determine what the outcome is.

Mr Whithear: The Insurance Commission will be in largely the same boat, but hopefully a situation that costs a lot less and takes a lot less time in that the Insurance Commission will put its claims to the administrator, the authority, and hopefully our claims will be recognised and returns will be made. The bill, as I see it, involves replacing the liquidator with an administrator. There is discretion for that administrator. I will have to make our case as well as we can and try and maximise our return, just as other creditors would be doing.

[12 noon]

Hon NICK GOIRAN: The final determiner will be the Treasurer.

Mr Whithear: Yes. The authority has to take into account a range of things including agreements entered into in the past to fund these things and make recommendations.

Hon NICK GOIRAN: Recommendations to who?

Mr Whithear: To the government and the Governor, but the discretion that I see that a liquidator or a court would apply is what the administrator would be applying.

Hon NICK GOIRAN: Would that be a decision of cabinet before it goes to the Governor?

Mr Whithear: Good question. I guess I am focused on the authority being the entity that would be exercising the discretion, and yes, there are approval processes after that, but that is the court.

The CHAIR: So this is how it works: there is ICWA, ATO, BGNV, WA Glendinning and Associates and BGUK. The ATO wants $298 million back. You obviously want your $200 million-plus back. It goes to the administrator, the administrator sorts out where he thinks the money should go—and that is just to the five principal remaining creditors. Then, I suspect—having been a former minister—that it goes to cabinet, but the Governor gets the final say-so, as in most legislation, but in this it is the Governor's sign-off on that. But there is a process there.

Hon KEN TRAVERS: I think in your last statement—correct me if I have got you wrong—you said you expected that the administrator would take into account the same, I think you said, issues or matters as the court or the liquidator would. Is that your understanding of the policy of the bill? That, effectively, we are trying to get the administrator to distribute the money in the same way as the courts and the liquidator would, but without the need for extended litigation and cost to ICWA, the state and all of the other parties?

Mr Whithear: I think simplistically, yes. At some point during this hearing, I hope to expand on what I see as execution risk and litigation risk.

Hon KEN TRAVERS: I am happy to go there reasonably soon, if you like. In my reading of the detail of the bill, there are a couple of areas where the law, under 564, is altered where—again, in a very simplistic sense—the courts would need to determine what is just, whereas under this legislation the terminology has changed to "an appropriate". I am not a lawyer and I do not understand the details of it, but that is a significant alteration.

Mr Whithear: I think, certainly from the Insurance Commission's perspective, we are after a just outcome.

Hon KEN TRAVERS: Would one of the matters then, if that is the case, need to be the process that was followed over the history of this in terms of determining what was just? Is one of the matters that would be considered in terms of what was just is whether or not all of the creditors had the same opportunities to fund the litigation as you had?

Mr Whithear: In the three years I have been doing this, I have not found the opportunity to fund this litigation as any sort of benefit to the Insurance Commission. It has been a curse, which is potentially—if this bill is not passed and it is not solved, this millstone will hang around the Insurance Commission's neck for another —

Hon KEN TRAVERS: We are not looking at the policy of the bill. It is about the detail of how that occurs; if the bill is passed, how does that occur, and whether or not we are making changes to the law that applied at the time these matters were commenced by the actions of this bill. One of the issues that has been raised with the committee—I do not have any debate that initially, WA Glendinning was given the opportunity of funding the litigation and declined. You then went to the courts for a 564 order, seeking two-thirds of any claim being paid to the funders. Again, this is just a simplistic analysis of it, but Templeman basically said, "Look, I can't make that decision at this point because I don't know all of the terms to be able to reach a decision on the basis of just." Why would you not, as ICWA, after that point—did at any point after that decision of Templeman, WA Glendinning make an offer to be a party to the funding of the litigation?

Mr Whithear: They may have and that may have been a wise and opportunistic pursuit because a lot of money had already been spent and perhaps some risks of the litigation were better known at that point.

Hon KEN TRAVERS: I would suggest that the risk profile actually went through the roof at that point because you no longer had your two-thirds; you were going to continue to fund without any definite outcome. So, in fact, whilst some risks may have been reduced; ICWA's risk went through the roof. Are you able to take on notice those two points: did WA Glendinning make an offer to ICWA after Justice Templeman's decision, and also how much had ICWA expended at that point? One of the key things I would have thought in this litigation is that under a just system, the courts

would be able to consider whether or not it was just to deny WA Glendinning a role in the funding of that litigation. I would also welcome, if you can take it on notice, why ICWA did not seek to allow WA Glendinning to share that risk. My reading of the legislation, following the history, is that at that point ICWA's risk significantly increased. Is that not accurate?

Mr Whithear: I do not think anyone had a full appreciation of the risk involved in this case or the scale of it. I have seen budgets prepared that this would cost $15 million, it will cost $25 million, it will cost $40 million and maybe it will cost $60 million. These are the evolution of where the risk of this was going. I do not think many parties at all had the wisdom of seeing where this could go. Although, if I may, I might quote Mr Prior from an article in May 2000 —

> Yet Mr McLernon, who is one of the nation's most aggressive litigation funders, declined the opportunity to participate in funding the legal action.
>
> He said the case involved an extraordinarily complex set of facts and an opponent which was well-funded.

In quotation marks, from Mr McLernon, I assume —

> "Creditors take hold of the tiger by the tail if they try to fund this type of litigation once you grab a tiger by the tail, there is no letting go for dear life," he said.
>
> "There's no stopping."

That was written in May 2000. I am greatly amused to see that somebody is now complaining that they missed an opportunity to spend $30 million to $50 million, of which they still would have no return and that was somehow unfair.

Hon KEN TRAVERS: That is a matter that would be tested in a court, though. That would be your opportunity to put the case.

[12.10 pm]

Mr Whithear: I would not have thought that section 564—again, I am not a lawyer either; I was only told on the way in here that this provision was originally created by the Western Australian Parliament decades ago and it was then adopted by other states and the commonwealth—that provision, is to provide a reward to creditors who have stumped up money to fund the recovery of proceeds for creditors. I do not think it has anything to do with: did a syndicate get together and who was in and who was out? It is only a one-line provision, so —

Hon KEN TRAVERS: I understand that. It does not give a great deal of guidance, although there is some case law that gives further guidance of how that operates. I guess the fundamental question is why is this bill changing it from making a decision on a "just" basis to an "appropriate" basis, which will have significant legal implications for how it is distributed, if the policy is to effectively distribute the money as was originally intended under the legislation?

Mr Whithear: Again I am not qualified to answer definitively, but I suspect that there are certain processes, including appeals and so on, that go with the concept of "justice". I suspect that word, like the bill, has been designed to give every creditor an opportunity to press their claims and those claims to be arbitrated by the authority and for this matter to be dealt with. Again, I am not saying this is definitive, I see that change of wording as not significant, in terms of changing the operation of 564, or see it as perhaps more significant in saying whether this can be dealt with once and not go through layers of appeal courts, which is what the bill is designed to avoid.

Hon KEN TRAVERS: There is no court of appeal under the administrative process; why could they not use a "just" basis as opposed to an "appropriate"?

Mr Whithear: I suspect that would open up those other avenues. Again, this is not —

Hon KEN TRAVERS: But you cannot appeal the administrative decisions of the administrator under this bill.

Mr Whithear: I suspect, depending on the provisions you put in the bill, you may open some of that up.

Hon KEN TRAVERS: I guess my final question, and I am happy for others to ask further questions, is: does ICWA have any concerns that under a just distribution of funds, the fact that they may have declined the opportunity at any stage for WAG to be involved that that would impact, if you went through the courts, the payout that you would get, and it may be less than the two-thirds that was part of the original agreement? The original agreement was to seek it from the courts.

Mr Whithear: Ignoring the irony of a litigation funder saying litigation funders should receive a lower return, I see the converse in that that creditor is running the argument that their debt is pure and whole and must be paid in full. That is all right —

Hon KEN TRAVERS: I did not ask you that. I asked you whether or not you had concerns that a court could reduce your payout because you did not allow that to happen.

Mr Whithear: The converse; I see that if that avenue is opened up and there was an argument about the two-thirds, there will be a clear argument that the—section 564 is all about risk. There is no question about the risk assumed here. The fact that after the event, with the wisdom of wonderful hindsight, that somebody said, "I would've liked to have been in that", that is good; maybe they could have been, maybe the liquidator did not want them in, I do not know. That two-thirds, in our view, is an appropriate recognition of risk and then there will be claims against the one-third. I think if anyone should be concerned in a court, if we wind up there, about whether their debt holds up, that debt—remembering this is a court of justice and applying just terms—is it just for an entity that has outlaid 100 bucks or a —

Hon KEN TRAVERS: No —

Mr Whithear: This is all justice—you have asked me about justice. Is that just versus the two-thirds? We are pretty confident about what any fair-minded court would conclude in terms of what is a just outcome.

Hon NICK GOIRAN: Or not so confident because the bill is now before the Parliament.

Hon KEN TRAVERS: You still did not quite answer my question. What you gave me was a moral case for why you should get —

Mr Whithear: No, no; just justice. You talked about justice; I am talking about justice.

Hon KEN TRAVERS: But I asked: does ICWA have any concerns that there is a risk, as a result of your denial of the opportunity for WAG to be involved in the funding of the litigation, that your payment would be reduced because you refused that?

Mr Whithear: I do not know whether we did deny, and I also would see the liquidator as the primary determinant of who the liquidator seeks funding from and on what terms they seek that funding.

Hon KEN TRAVERS: But that changed once Templeman gave their decision. But anyway, I am happy to leave it there. If you can answer those questions about, one, whether you did and, two—I think there were some earlier ones—but also why, if there was an offer made and it was refused, what were the reasons for the refusal?

Mr Whithear: We will have to address whether it was ICWA that made that decision or the liquidator.

The CHAIR: Proposed new clause 37A, "Determinations: general provisions", says —

> (1) Nothing in this Act requires the Governor to determine that any amount is to be paid to, or any property is to be transferred to or vested in, any person on any account whatsoever.

That is a rider at the bottom of the bill. When I said before that it would go to cabinet and the minister, if I can just read —

> As a matter of policy, underlying the Bill and for the purpose of achieving the object of minimising future collateral litigation, the Government has determined that the Minister does not require reasons for the purpose of transmitting the recommendation of the Authority to the Governor for consideration.

When I said it went to cabinet, it is implied that the minister would take it to cabinet, but the minister has the say-so and then it goes to the Governor. Then I have read out to you 37A.

Hon NICK GOIRAN: As I understand it, the minister being referred to there is the Treasurer.

The CHAIR: The Treasurer, yes.

Hon NICK GOIRAN: So my earlier question to Mr Whithear is that I understand that the Treasurer is your ultimate authority in your role at the Insurance Commission of Western Australia. The same individual that is responsible for directing you is going to be the same individual who receives the report from the administrator. I can only hope that that individual would absent themselves from the cabinet process because if there was ever a conflict of interest, that is staring us in the face.

Mr Whithear: I think this is up to governments and administrative arrangement orders, or whatever they are called in WA —

The CHAIR: Yes, it is a matter for government.

Mr Whithear: — as to which ministers have which portfolio responsibilities.

Hon NICK GOIRAN: Back to my earlier question about the $200 million, I could hear from you that you understandably—I share your frustration—that the $200 million was not paid to you back in 2012. There is this outrageous set of circumstances where some individuals are seeking to block that. Had that $200 million been paid in 2012, would the Insurance Commission still be of the view that this bill is necessary?

Mr Whithear: Unfortunately, yes. It is but one example of what we see as our co-creditors not standing behind their contractual commitments. There are many others, some of which have occurred during my tenure. I recall one settlement agreement being reached and somebody changing the terms of it before we had even left the room—within hours. I can refer to others where not only did it take six months to actually document an agreement that was reached, we were then asked to set aside the terms of that agreement in order to attend a mediation. The execution risk on it is just inconceivable. I have been asking since August 2012 for a set of draft schemes of arrangement for these Bell companies. Remember this is Robert Holmes à Court's corporate structure overlaid with Alan Bond's corporate structure. These guys, you know, the 80s were pretty wild, as we all know —

The CHAIR: We can see that.

[12.20 pm]

Mr Whithear: These guys were corporate raiders. They had incredibly complex structures. There are preference shares and intercompany debts flowing all the way through these companies. The opportunity to litigate around the edges of any one of those companies is almost infinitesimal—it can go forever. So I have asked for schemes of arrangement that would show how the money will be sorted out. Even if the parties came together, as I have hoped since certainly settlement with the banks, and the smell of money would change the behaviour and people would reach agreement and we could agree on an outcome, giving effect to that agreement is incredibly difficult. None of the lawyers involved have been able to articulate to me in the last three years how the schemes of arrangement for all these companies would work. I still cannot get a straight answer as to how

many schemes of arrangement will be required. Given the form of people who have litigation as their profession, but not unreasonably litigating quite readily, even reaching agreement as to five numbers, having those five numbers carry through and given effect to, and those five parties receiving those five numbers, I would have almost zero confidence of that execution occurring. Others have recognised that execution risk. They may not be as sensitive to it as I am, having seen how the Insurance Commission has been out-manoeuvred on occasion. This bill provides essentially a risk-free execution mechanism, particularly, as some of us had hoped, if the parties could agree and you as the lawmakers could legislate those five numbers and they could be distributed. That is the best possible outcome. Failing that, I am of the view, and the Insurance Commission's view, is that this bill is needed to overcome some of the execution risk issues that I just outlined.

Hon DONNA FARAGHER: Earlier you referred to correspondence which you have, where it has been put that people should not receive what you have already put out. Are we able to have a copy of that correspondence? It may well be private, you may ask for it to be private, but if I could ask for that.

Mr Whithear: I would certainly like to give it to you, and I will just check the terms and whether that risks waiving privilege for —

Hon DONNA FARAGHER: Sure.

Hon NICK GOIRAN: Madam Chair, can I just pull up on this $200 million?

The CHAIR: Yes, you can.

Hon NICK GOIRAN: Mr Whithear, just back to the $200 million, is your evidence to the committee today that the rights of the Insurance Commission to the $200 million recovery of costs it has paid to the liquidator is, on any reasonable person's basis, a locked in amount that should have already been paid to the commission whereas any other money that might flow to the commission pursuant to this bill or any other scheme is a debatable point?

Mr Whithear: I once asked somebody could we draft a contract that would deliver some of these things, and somebody close to this said, "You cannot draft an agreement that these people will not contest; that is their profession." So for me to say —

Hon NICK GOIRAN: Has that been put to them or are we just making the assumption?

Mr Whithear: I have seen the level of —

Hon NICK GOIRAN: Past history, of course, yes, but specifically on this point though?

Mr Whithear: It will be argued. The approaches have been to take every possible point, and some impossible ones, and run them, so you have 60-odd arguments against the Insurance Commission and ask for a 10 per cent discount on each one in favour of settling it. The Insurance Commission is a bit hamstrung by acting reasonably. It cannot have the confidence that others would.

Hon NICK GOIRAN: Are you aware that there have been public hearings run by this committee?

Mr Whithear: I am aware that there have been hearings. I am not aware of the content of most of them.

Hon NICK GOIRAN: Have you read the transcript of the hearing with WA Glendinning and Associates from 6 October?

Mr Whithear: They are not public.

The CHAIR: No, they are not public.

Hon NICK GOIRAN: I am informed that it is not publicly available. But it is public evidence which I can refer to now, Madam Chair. Mr Whithear, WA Glendinning, Mr McLernon attended before the —

The CHAIR: Excuse me, I just need some advice on this.

Hon NICK GOIRAN: Can I refer to the uncorrected transcript?

The CHAIR: Yes, you can refer to an uncorrected transcript in general terms, or not? I think we might need to clear the room and go into private session because I need to get this sorted out. If we could clear the room for a few minutes.

Proceedings suspended from 12.24 to 12.29 pm

The CHAIR: My apologies.

Hon NICK GOIRAN: Mr Whithear, I just want to quote from the uncorrected *Hansard* of a hearing that took place on Tuesday, 6 October 2015. The witness was Mr McLernon, who you know. I quote from the uncorrected *Hansard*. My question to him was —

> Last question, Mr McLernon. If the bill was amended to only allow for this scheme to take place for the distribution of the cost recovery of the Insurance Commission, and then allowing the rest to follow the natural course, would your company object to that?

He responded —

> We would applaud, not object.

I continued and said —

> Thank you very much.

And Hansard recorded him saying —

> Because it is there.

Although I have to say to you that it is an uncorrected version and my recollection of what he actually said was "because it is fair" not "there"—I think that is a typo. But the purpose of me quoting that to you now is just to get clarification from you: what would be the problem from your perspective with this bill being amended to simply constrain its extraordinary measures to ensure that the commission gets back its reasonable costs, which you have told us the $200 million, and allow the rest of the dispute to take the natural course as it would in any other matter?

Mr Whithear: Because I would applaud anything that returned those funds, and I appreciate if Mr McLernon said that, that is great. He is not the creditor who has been opposing us on this front, so his agreement is great but that is one of a number of creditors. To answer your question, the primary problem I would have with that is that the majority of the problem remains, the litigation prospect remains, the execution risk problem remains —

Hon NICK GOIRAN: Indeed, but the rest of it is not the Insurance Commission's money. The $200 million is legitimately your money that you have taken out of your pocket and given to the liquidator in which you rightfully and justly should have back, but the rest of it is a debatable point whether it should be two-thirds uplift or one-third or whatever other percentage, which should be dealt with before the Supreme Court.

Mr Whithear: Who should be entitled to that money, the Insurance Commission's share of the two-thirds?

Hon NICK GOIRAN: That is a matter for the court, is it not?

Mr Whithear: No. There are three indemnifying creditors, one of which is the Insurance Commission, so getting our costs back that is good, but really quite terrible having regard to the time value of money —

Hon NICK GOIRAN: Sure; agreed.

Mr Whithear: But anyway, it is still a very large sum of money. The return to the indemnifying creditors, I am not sure why we could have only two of those going forward. The Insurance Commission would still need to be there for its claim, which is more than half of that two-thirds.

Hon KEN TRAVERS: But I think what the member is saying is that you could still make that claim to the court for your just return for your risk, but you get your money. I think the State Solicitor put it eloquently in his submission about the difference between claims and rights —

Mr Whithear: Sure, yes.

Hon KEN TRAVERS: You have a right to your $200 million, even though someone is disputing it. I think most people accept that there is a right to the money you put up; beyond that, it is a claim and you are no different to any other claimant.

The CHAIR: But the fact is we have a bill in front of us at the moment and that is what we are discussing, so it is not discussing whether we give the $200 million back.

Mr Whithear: The $200 million is the first of five or more rights under the funding agreements. The $200 million is the first one and the fifth one is the two-thirds, of which the Insurance Commission is entitled to 53.5 per cent.

Hon KEN TRAVERS: Except it was to make application, and they did that, so that has been fulfilled.

Mr Whithear: Yes, but I am actually trying to have somebody source Justice Templeman's quote, which I think was something like, "I cannot make that determination because I do not know the quantum of the assets and rights." Here we go: but he said —

> … it seems there is no reported case in which a post-judgment application has failed. The allegations made by the applicants in the Federal Court proceedings are extremely serious. If the applicants were successful at trial, or achieved a substantial settlement, I have little doubt that they would qualify for an advantage under s 564.

So the decision by Templeman not to reach a conclusion that the two-thirds was right and just does not mean, as that quote shows, that he had any doubt that we would be entitled —

Hon KEN TRAVERS: You would get something. It is the quantum—what he could not determine was the quantum.

Mr Whithear: Sure. So we can debate.

Hon KEN TRAVERS: What the quantum is, which is a matter for the court.

Mr Whithear: It is, and the Insurance Commission. I write off a lot of insurance debtors every year, along with our board, and we hate doing it because our responsibility is to look after the finances of the Insurance Commission. Unfortunately, that responsibility has driven this organisation for the last two decades. I am not sure where I would get support from to let those other claims go.

Hon NICK GOIRAN: No, sorry, I want to make clear that I am not suggesting that for a moment. I am just suggesting that the scheme be limited to the Insurance Commission and any other funding creditor getting their funds back immediately, in your case I understand that to be $200 million, and every other dispute be left in the ordinary course.

Mr Whithear: That is okay but we will spend potentially tens of millions more on legal fees. The $200 million, if and when we get into court and argue all our other different claims, should be straightforward. I am not saying it will be because others will fight because you can, and you can gain a financial advantage by fighting. It should be straightforward. I agree that if the bill dealt with that that would be a good thing. The problem is that the residual is huge in terms of money and then cost to resolve it, and the execution risk involved in taking any settlement through to fruition.

The CHAIR: It is an unusual bill for an unusual time period that Western Australia went through called WA Inc.

Hon KEN TRAVERS: I think some of the issues go well after WA Inc.

The CHAIR: Well, probably, but that is where it had its genesis, really.

Hon KEN TRAVERS: No, that is one of the key issues. There are a range of decisions that have been taken by ICWA over that time.

The CHAIR: Yes, to get back the money that was put up, the $150 million worth of bonds and the 19 per cent of the other.

Hon KEN TRAVERS: Which may or may not give them the right to credit, and in fact that is one of the questions. The act changes to become any creditor, whereas arguably your bonds would not be listed as a debt under the Companies (Administration) Act as it stands.

Mr Whithear: They are a debt; there will be debate about priority.

The CHAIR: The committee received evidence that clause 64 —

Hon KEN TRAVERS: But you may not be a creditor.

Mr Whithear: I think the liquidator said we are.

The CHAIR: Okay, question 11. The committee has received evidence that clause 64 of the bill was drafted in response to certain threats of legal action that have recently been made against ICWA following the introduction of the bill. The committee also notes the clause is potentially a very wide operation, including covering the conduct of the entire bill for litigation. Why is it necessary to provide statutory protection for ICWA for conduct over such a long period for the objects of the bill to be fulfilled, and does ICWA regard it as fair that it would receive this type of protection not afforded to other creditors? Upon what basis would there be a course of action lying against anyone for preparing and/or recommending the introduction of the bill into Parliament?

Mr Whithear: To try to tackle that last one, I am not a lawyer and nor am I creative enough to come up with the courses of action that some players in this game are able to come up with. Some people have taken great umbrage that the Insurance Commission or the State Solicitor did not breach the confidentiality regime that applies almost to the development of any legislation and the decision-making processes of an Australian state government. People accuse us of doing this in secret. Most times, unless governments have made a decision to, say, issue an exposure draft, that is how legislation is developed. It is developed, it is considered by cabinet, it is approved and it is announced. That is what happens.

Hon KEN TRAVERS: Very seldom, though, do they have the conflict that the legislation is to benefit themselves.

Mr Whithear: No comment on that, but that is an example of where somebody created the grounds, which is normal practice of a government, to develop legislation with its bureaucrats providing advice and, for some reason, we should have told everyone we were doing that. That is rubbish, but people are upset because we did not tell them. That is an example of people pursuing grounds that I think are completely spurious, but it does not stop them.

[12.40 pm]

The CHAIR: We have some questions that we will send you, if you are happy to answer those. Are there any last questions? Ken?

Hon KEN TRAVERS: I think it will be covered in the written questions.

Hon NICK GOIRAN: In relation to the amendments, there are a whole stack of amendments before the Legislative Council at the moment. Are you able to advise the committee of when you first became aware that these amendments would be necessary, and were you consulted on them?

Mr Whithear: We were aware that the Australian Taxation Office was contemplating issuing tax assessments. I wrote to the Australian Taxation Office asking them not to, or to give us notice were they to do so. They issued the tax assessments. I was aware that if the tax assessments were issued, the companies would need to stay alive. That was unfortunate, because the major driver for the structure of things was to have the bill expire in a year's time, so this matter was dealt with. I had discussions with the tax office but, understandably, they wanted to use their statutory powers to issue tax assessments. They did, and that required changes to the bill to remove that 12-month self-destruct provision to keep the companies alive to contest the tax affairs, and it is not what we would prefer, but it is the consequence of the not unreasonable action by the commonwealth government to seek to recover moneys under its law.

Hon NICK GOIRAN: Sorry, I misheard: did you say unreasonable action?

Mr Whithear: No, I said a reasonable action. It is not the one I would have preferred, but it is a reasonable action for them to issue tax assessments, of course. It just changes how the bill would operate.

Hon NICK GOIRAN: So it is your evidence to the committee that it is necessary for the Council to pass the amendments in order for the scheme to be effective, but it does not actually improve the likely financial outcome to the Insurance Commission of WA?

Mr Whithear: Not at all. I guess you would have to form a view on the tax liabilities of the companies, and the liquidator has plenty of views on that. I do not; we have a view and we have written to other creditors supporting a return for the tax office at a certain level, but other than that, keeping the companies alive so they can contest those tax assessments and the liquidator has just done that and won a court case in the last few weeks against the tax office on that front. How that plays out is between those two parties, unless we can bring this all to an end.

The CHAIR: Ken just want to clarify something.

Hon KEN TRAVERS: When you said you were a creditor, is that a creditor that would have standing under 564 to receive an award in its favour? Again, the act changes the terminology from a creditor to a creditor of any kind, just trying to understand why the "of any kind" has been added in there.

Mr Whithear: There are classes of creditors, and this is one of the issues that would make the schemes of arrangement very difficult to deliver. Each of these five main creditors has different rights in different companies. For example, there is one company I am aware of where the tax office is really the only creditor, and there are other cases where other parties are in that camp. Any one of those entities could then effectively hold the other creditors to ransom because that individual class of creditor has to sign off on that. You actually want "a creditor of any kind", meaning any of those creditors of any of those companies on the same footing.

Hon KEN TRAVERS: But that is not what my question was, which was in terms of being is there an issue around whether or not you are a creditor who would have standing under 564 to receive an award in its favour?

Mr Whithear: It is one of 100 issues that people are contesting us on, but we are comfortable we are a creditor. I think the submission made to this committee by the liquidator talks about ICWA and BGNV being principal creditors of BGF, but we have differences of views of lots of things.

Hon KEN TRAVERS: But that is through LDTC, is it not?

Mr Whithear: LDTC has a role, but it is a trustee company.

Hon KEN TRAVERS: Yes, but your bonds are held through them. They are the creditor and then they would have to pay out in accordance with their bond agreement.

Mr Whithear: Each bond issue, of which there are several, has a trustee, and the LDTC is the trustee in all of them.

Hon KEN TRAVERS: So they are the creditor; you have a claim against —

Mr Whithear: No, in our view. Others will argue—that is what we are dealing with. People are paid to argue, quite reasonably; they will argue.

Hon KEN TRAVERS: It would have been good to have secured that at the time of the funding litigation.

The CHAIR: Does anyone else have any more questions?

Hon NICK GOIRAN: One last question, Madam Chair. It is a quick one. If the Parliament was to pass this bill and this scheme once, it could do it again in the future, having set some form of precedent to do so. Do you have a manifest objection to this bill being restricted to the funds provided to the liquidator, in your case the $200 million, and at a later stage, when the ordinary course of litigation, if it should prove to be fruitless, then the Parliament reconsidering for the balance?

Mr Whithear: I would support anything that brings any part of this to resolution, but I would manifestly support something that brings the whole thing to resolution because I am responsible for prudently spending the Insurance Commission's funds, and some of this money is not being spent — We are being forced to spend it, but I do not see it as prudent expenditure of our funds. I would far prefer this matter to be dealt with. The circumstances of Bell are narrow and unique; I would not see them being applied again, but we have to kill this somehow.

The CHAIR: On behalf of the —

Hon KEN TRAVERS: But it also buries any problems that have occurred inside ICWA over the last 10 years as well.

Mr Whithear: I think last time we met you asked whether I would write a book about this later; maybe we will.

The CHAIR: On behalf of the committee, I would like to thank you very much for appearing today.

Hearing concluded at 12.47 pm

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