

**BY EMAIL (lclc@parliament.wa.gov.au)**

The Hon Robyn McSweeney MLC  
Chair of the Standing Committee on Legislation  
Parliament House  
Perth  
Western Australia  
6000  
Australia

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30 September 2015

Dear Madam

**Written submissions to the Standing Committee on Legislation (the Committee) in respect of the inquiry into the Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015 (the Bill)**

1. These submissions are presented to the Committee for and on behalf of Ms J.B. Stephenson (the **BGUK Liquidator**) in her capacity as liquidator of Bell Group (UK) Holdings Limited (**BGUK**), an English incorporated company.
2. BGUK entered liquidation by Order of the English High Court on 14 December 1995, on the petition of Bell Group Finance Pty Limited (in liquidation) (**BGF**), a WA Bell Company. The Liquidator of BGF had concluded that it would be beneficial to the Australian Bell Group companies' liquidations if BGUK could be placed in liquidation and be joined as a plaintiff in the anticipated proceedings against the banks. BGUK and the BGUK Liquidator duly joined in the proceedings and in the Court of Appeal proceedings BGUK was awarded in excess of A\$134m as a Bell Judgment Creditor. BGUK and the BGUK Liquidator have therefore been involved in the complex Bell Group related litigation since the outset and were supportive of and active participants in the 2013 mediation which concluded in the settlement of such litigation in June 2014. This involved the compromise of BGUK's rights as a Bell Judgment Creditor in return for the right to share in the Bell litigation funds.
3. BGUK and the BGUK Liquidator have their own rights and obligations as parties to the 2014 Settlement (including BGUK's right to share in the settlement sums). BGUK also claims to be a creditor of certain WA Bell Companies. BGUK and the BGUK Liquidator therefore have three separate and distinct interests in the subject matter of the Bill:
  - a. As parties to the 2014 Settlement with their own rights and obligations under that Settlement;
  - b. In the case of BGUK, as a creditor of one or more WA Bell Companies; and
  - c. In the case of the BGUK Liquidator, as a party to certain indemnity agreements which are affected by the Bill.

4. These submissions will focus in particular on the interests referred to in paragraph 3(a) above. In short, we submit that the Bill in its current form pays insufficient regard to, and adversely affects, those legitimate interests when the policy objectives of the Bill can and should be achieved without having those effects.
5. The Preamble to the Bill states its purpose as follows:

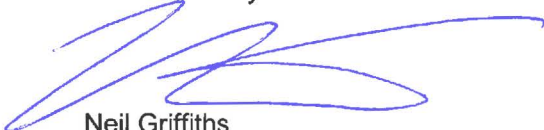
*"An Act to provide a legislative framework for the dissolution, and administration of the property, of The Bell Group Ltd ACN 008 666 993 (In Liquidation) and certain of its subsidiaries and for related purposes"*.
6. It is important that the Committee appreciates that the Bill does not, nor could it or should it, provide for the dissolution and/or the administration of the property of BGUK. BGUK is an English company, which is in liquidation subject to the supervision of the English Court and its officer, the BGUK Liquidator.
7. The BGUK Liquidator's role is to collect in the assets of BGUK for distribution to BGUK's creditors in accordance with English liquidation law.
8. We would also stress that BGUK and the BGUK Liquidator have at all times sought to avoid disputes with other creditors and to resolve differences consensually. When presenting the Bill to Parliament, the Attorney-General referred to two recent mediation attempts after the introduction of the Bill. The first failed because only one creditor other than ICWA turned up. That creditor was BGUK. Moreover, whatever litigation may have started between creditors since the 2014 Settlement, BGUK and the BGUK Liquidator have not been involved. The BGUK Liquidator seeks only to recover BGUK's agreed share of the Bell litigation funds, and for BGUK's claims as a creditor of any of the WA Bell Companies to be processed properly in accordance with Australian liquidation law or the regime established by the Bill, should that come into force. The Attorney-General's characterisation of ICWA's co-creditors as "avaricious" is unfortunate and unfair if it refers to BGUK.
9. We note that the Attorney General stated in the second reading of the Bill to the Legislative Council as follows: *"as the bill refers to and operates upon legal relationships governed only by the laws of Western Australia and companies registered in Western Australia, this legislation has little or no effect on other states..."*. BGUK is not, of course, registered in Western Australia.
10. The objects of the Bill are set out in s4 of the Bill. These are, in summary (emphasis added):
  - a. To provide a mechanism to resolve without litigation *disputes which have arisen in relation to the distribution of the Bell litigation funds*;
  - b. To provide a form of external administration of *WA Bell Companies*;
  - c. To provide compensation to *creditors who funded the Bell litigation*;
  - d. To reflect the circumstances that without that funding no recoveries would have been possible;
  - 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 the *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 [*note: we read this as a reference to the TBGL Liquidator*] and the creditors who funded the Bell litigation as set out in agreements entered into before the enactment of the Act;
  - h. To avoid further litigation.



11. We submit that it is clear from the objects of the Bill, as set out in the Preamble and s4, as well as the terms of the Bill generally, that the Bill is not intended to affect the interests of BGUK and the BGUK Liquidator as *parties to the 2014 Settlement with their own rights and obligations under that Settlement*. This is separate from and must not be confused with whatever effect the Bill has on BGUK's position as a creditor of any WA Bell Company. It is accepted that BGUK will, like other creditors, be required to present its creditor's claim to the Authority if the Bill is enacted.
12. Dealing with each of the stated objects of the Bill above in turn:
  - a. No disputes have arisen in relation to the distribution of BGUK's share of the Bell litigation funds to which it is entitled as a party to the 2014 Settlement; there is therefore nothing for the Bill to resolve in this respect;
  - b. BGUK is not a WA Bell Company so s4(b) is not relevant to BGUK;
  - c. BGUK did not fund the Bell litigation so the issue of compensation to BGUK for funding the Bell litigation does not arise;
  - d. For the same reason s4(d) is not relevant to BGUK;
  - e. BGUK's share of the Bell litigation funds is not the property of any WA Bell Group Company, and therefore it is not the object of the Bill to provide for its distribution;
  - f. The release to BGUK of its share of the Bell litigation funds has nothing to do with the satisfaction of liabilities owed to creditors by any WA Bell Company;
  - g. The release to BGUK of its share of the Bell litigation funds accords with the intentions of the TBGL Liquidator and the funding creditors as enshrined in the 2014 Settlement;
  - h. There is no reason to think that further litigation will occur in respect of BGUK's share of the Bell litigation funds.
13. The Committee is also invited to note that the Bill, whilst expressly making void a number of indemnity and other agreements entered into before the coming into force of the Act (particularly those listed at s26(1)), does not purport to have any effect at all on the 2014 Settlement. This is for very obvious and good reasons: it is essential that the 2014 Settlement, which generated the A\$1.7bn Bell litigation funds currently held on trust by the TBGL Liquidator, should not be undermined or disturbed in any way. It would be a catastrophe if that happened.
14. For the same reason, it is equally essential that the parties to the 2014 Settlement should continue to have the same rights and obligations for which they contracted in that Settlement. Parliament will, by means of the Bill, supplant the TBGL Liquidator and the WA Bell Companies with the Authority established by the Bill, so that the Authority can exercise the rights and honour the obligations of the TBGL Liquidator and the WA Bell Companies under the 2014 Settlement. The Authority has every reason to do so in order to ensure that the Bell litigation funds are available in accordance with the terms of the 2014 Settlement, but Parliament does not, nor can it, supplant BGUK with the Authority. BGUK must therefore be allowed to exercise its rights under the 2014 Settlement.
15. Unfortunately, in our submission, in this respect the Bill is therefore defective and unfairly prejudicial to the legitimate interests and expectations of BGUK. This is because the Bill goes beyond its stated purpose and objects, in that the Bill interferes with BGUK's rights as a party to the 2014 Settlement, as follows:
  - a. S22(1)(c) of the Bill transfers certain property to the Authority. This includes "*all property held by a person in the capacity of liquidator of a WA Bell Company on trust for any person other than the WA Bell Company*";

- b. S22 of the Bill vests such property in the Authority *"freed from any encumbrance, trust, equity or interest"*;
  - c. S25(4) of the Bill provides that a person with such an interest must prove for it as a liability, meaning that the Authority has absolute discretion as to how to treat such a claim under the Bill.
16. On the face of it, the combined effect of these provisions is to deprive BGUK of any trust or other interest in its share of the Bell litigation funds under the 2014 Settlement. We submit that this goes beyond the purpose and objects of the Bill. It is neither necessary, nor appropriate to fulfil the policy of the Bill, which is not to interfere with established and undisputed rights under the 2014 Settlement.
17. We submit that there is a ready and sensible solution to this problem. Under s27 of the Bill, following the dissolution of the WA Bell Companies and the discharge of their respective liquidators, any agreement or instrument (with certain exceptions which are not relevant here) to which the WA Bell Companies are a party continues to have effect in accordance with its terms on and after dissolution as if reference in it to the companies or the liquidator were references to the Authority. In other words, the Authority steps into the shoes of the WA Bell Companies and the TBGL Liquidator (by which we mean the liquidator(s) of all of the WA Bell Companies which are in liquidation).
18. Taken on its own, s27 suggests that the rights of BGUK and the BGUK Liquidator under the 2014 Settlement can be asserted against the Authority so that the terms of the 2014 Settlement can be given their intended force and effect. Unfortunately, the other provisions of the Bill, including ss22 and 25 referred to above, confuse the position for no good reason required by the purpose and objects of the Bill by interfering with the rights of BGUK and the BGUK Liquidator. This confusion can be removed, we submit, by making it clear that ss22 and 25 of the Bill are subject to and without prejudice to the terms of s27 of the Bill. Otherwise the Bill creates a conflict between ss22 and 25 on the one hand, which take rights away, and s27 on the other hand, which preserves rights. We submit that the drafting of the Bill must be amended to resolve this conflict, and that this should be done in such a way as to make it clear that the Authority must honour the obligations of the TBGL Liquidator and the WA Bell Companies under the 2014 Settlement fully and timeously.
19. In summary, the Bill contains confused and conflicting provisions which fail to deal adequately with the position of BGUK and the BGUK Liquidator under the 2014 Settlement. These issues should be resolved by making it clear that the Bill does not affect their position under that Settlement. This need not affect BGUK's separate position as a creditor of the WA Bell Companies, which will fall to be dealt with under the arrangements provided for by the Bill along with other creditor claims.

Yours faithfully



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