



THIRTY-NINTH PARLIAMENT

REPORT 30

STANDING COMMITTEE ON LEGISLATION

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

Presented by Hon Robyn McSweeney MLC (Chair)

November 2015

STANDING COMMITTEE ON LEGISLATION

Date first appointed:

17 August 2005

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

“4. Legislation Committee

- 4.1 A *Legislation Committee* is established.
- 4.2 The Committee consists of 5 Members.
- 4.3 The functions of the Committee are to consider and report on any Bill referred by the Council.
- 4.4 Unless otherwise ordered, any amendment recommended by the Committee must be consistent with the policy of a Bill.”

Members as at the time of this inquiry:

Hon Robyn McSweeney MLC (Chair)	Hon Ken Travers MLC (substitute for Hon Sally Talbot MLC)
Hon Lynn MacLaren MLC (Deputy Chair)	Hon Dave Grills MLC
Hon Donna Faragher MLC	Hon Nick Goiran MLC (Participating Member)

Staff as at the time of this inquiry:

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Glossary	
Administrator	Administrator of the WA Bell Companies
ATO	Australian Taxation Office
Authority	WA Bell Companies Administrator Authority
Bell litigation	Court proceedings against the banks to set aside the securities taken over assets of companies within the Bell group of companies
Bill	Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015
BGF	Bell Group Finance
BGNV	Bell Group NV
BGUK	Bell Group UK
BLS	Business Law Section of the Law Council of Australia
COR 146 of 2014	<i>Woodings v W.A. Glendinning & Associates Pty Ltd & Ors</i> (Supreme Court of Western Australia) – the application by the Liquidator pursuant to section 564 of the <i>Corporations Act 2001</i>
FLPs	Fundamental Legislative Scrutiny Principles
Funding Creditors	ICWA, the ATO (a creditor due to various taxation liabilities of a number of Bell group companies) and BGNV who funded the Court proceedings against the banks
ICWA	Insurance Commission of Western Australia
LDTC	Law Debenture Trust Corporation
Liquidator	The liquidator of WA Bell Companies
Settlement Sum	An amount of \$1.7 billion reached in a settlement between the liquidator of the Bell group of companies and the banks, prior to the banks appeal to the High Court of Australia

Supplementary Notice Paper	Supplementary Notice Paper No. 134, Issue No.1 of 14 September 2015
TBGL	The Bell Group Ltd
the Fund	WA Bell Companies Administrator Authority Fund established by the Bill
WA Bell Companies	Those companies listed in Schedule 1 to the Bill
WAG	WA Glendinning

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EXECUTIVE SUMMARY AND RECOMMENDATIONS

EXECUTIVE SUMMARY

- 1 On 15 September 2015 the Legislative Council referred to the Standing Committee on Legislation (**Committee**) an inquiry into the Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015 (**the Bill**) for report by 10 November 2015.
- 2 An extension of time to report was subsequently granted to the Committee, to report by no later than 12 November 2015.
- 3 The Bill imposes a Western Australian based liquidation regime for a number of companies, referred to in the Bill as ‘WA Bell Companies’, in place of that provided for in the *Corporations Act 2001* (Cth). This is to enable the distribution of the proceeds of a settlement of litigation between various banks and the liquidator of WA Bell Companies. This litigation was initiated by the liquidator to set aside various securities taken by the banks over various assets of WA Bell Companies.
- 4 To the best of its knowledge, the Committee is not aware of any precedent for a Bill that has been introduced for the specific purpose of imposing a liquidation regime by way of State statute in Western Australia or other jurisdictions, by utilising Part 1.1A of the *Corporations Act 2001*. The Bill proposes to impose a State based liquidation regime by:
 - overriding existing laws, including the liquidation process prescribed by the *Corporations Act 2001*
 - altering certain rights relevant to existing and pending litigation
 - a compulsory transfer of property from WA Bell Companies to an authority governed by an administrator appointed by the responsible Minister
 - the voiding of a number of private contracts, including those between the liquidator of WA Bell Companies and various creditors who provided funding for the litigation between the banks and the liquidator
 - the determination of various property and liabilities and the distribution of funds at the absolute discretion of the administrator and the Governor
 - the vesting in the State of any property of WA Bell Companies not distributed by the administrator

-
- the creation of offences covering schemes to avoid the operation of the Bill, which can include schemes entered into or made before the enactment of the Bill
 - providing for various exclusions from liability of the Minister, the authority and the Insurance Commission of Western Australia (ICWA), one of the major creditors of WA Bell Companies
 - the restriction of appeal rights.
- 5 The Second Reading Speech outlines the Government's reasons for the Bill.
- 6 A number of stakeholders from whom the Committee received evidence were critical of many features of the Bill, including its interference in a civil dispute between private litigants the subject of current and pending court proceedings, particularly where one of the litigants is a government agency (ICWA). The Bill raises a number of complex legal issues, which have been debated in the public arena and are apparent from the provisions of the Bill, including constitutional, corporations and administrative law issues.
- 7 In addition to its scrutiny of the Bill, the Committee has been assisted by an opinion from Mr Ken Pettit SC on legal issues.
- 8 The Committee has also considered the amendments in the Supplementary Notice Paper No. 134, Issue No. 1 distributed by Hon Michael Mischin MLC proposing amendments to the Bill with the intention of facilitating any objections to taxation assessments issued by the Australian Taxation Office against a number of WA Bell Companies.
- 9 Through its inquiry, the Committee:
- Was not able to identify any clauses of the Bill that are invalid on the basis of infringing the *Commonwealth Constitution*
 - Has determined the legislative intention and operational effect of a number of clauses of the Bill require clarification and, in some instances, amendment.
- 10 The Committee's conclusions are outlined in the following recommendations.

RECOMMENDATIONS

- 11 The Committee made 19 narrative recommendations and 10 statutory form recommendations. Three minority narrative recommendations are included within this Summary and are grouped as they appear in the text at the page number indicated:

Page 28

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.

Page 30

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*.

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.

Page 37

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).

Page 41

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.

Page 42

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: 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.

Page 43

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

Page 44

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

Page 45

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.

Page 46

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.

Page 48

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.

Page 48

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.

Page 57

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*.

Page 58

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.

Page 59

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.

Page 60

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.

Page 62

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

Page 63

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.

Page 65

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

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.

Page 67

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).

Page 67

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.

Page 69

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.

Page 69

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.

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.

Page 70

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.

Page 71

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:

(1) The Administrator must —

(a) 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

(b) 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.

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 —

- (a) proceedings in a court to challenge the constitutional validity of this Act; or
- (b) 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.

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.

Page 83

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,

Page 87

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.

CHAPTER 1

INTRODUCTION

REFERENCE AND PROCEDURE

- 1.1 On 15 September 2015, the Legislative Council referred to the Standing Committee on Legislation the Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015 (**Bill**) for inquiry. The Order of Reference states:

That —

(1) the Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015 be discharged and referred to the Standing Committee on Legislation for consideration and report no later than 10 November 2015; and

(2) the committee shall not inquire into the policy of the bill.¹

- 1.2 On 22 October 2015 the Legislative Council extended the Committee's time in which to report to 12 November 2015.
- 1.3 The Committee called for submissions by contacting 10 stakeholders directly and advertised the inquiry in *The West Australian* on Saturday, 19 September 2015. The Committee received 10 submissions and four supplementary submissions.
- 1.4 The Committee held a private hearing with the State Solicitor on 23 September 2015 and three public hearings on 6 and 14 October 2015.
- 1.5 Details of stakeholders invited to make a submission, submissions received and the witnesses are noted in Appendix 1. Submissions and transcripts of the hearings are posted on the Committee's website at www.parliament.wa.gov.au/leg.
- 1.6 In light of the short timeframe for this inquiry and the complex legal issues involved, Mr Ken Pettit SC was engaged by the Clerk of the Legislative Council to provide a legal opinion. Questions posed to Mr Pettit SC are set out in Appendix 2 and his opinion is attached as Appendix 3.
- 1.7 The Committee wishes to thank all submitters, those who gave answers to questions and who provided evidence to the Committee in writing or at a hearing.

¹ Legislative Council, *Parliamentary Debates (Hansard)*, 15 September 2015, p 6228.

- 1.8 The Committee particularly thanks Mr Pettit SC for his prompt, comprehensive and valuable advice.

COMMITTEE APPROACH

- 1.9 As the Committee was not referred the power to inquire into the policy of the Bill, the Committee's approach during this inquiry was to focus on the following issues to better inform the Legislative Council in its consideration of this Bill:

- Whether the provisions of the Bill are effective to implement its objects, as stated in clause 4 of the Bill (see Chapter 2 of this report).
- Whether the operational effect of any clause in the Bill is uncertain or may adversely affect the implementation of the liquidation regime provided for in the Bill (as outlined in Chapter 3 of this report).
- Legal issues, including whether any clause in the Bill is invalid for constitutional or other reasons.

- 1.10 In the Committee's consideration of the Bill, there has been some overlap between the above considerations.

- 1.11 The Committee's scrutiny of the Bill has included an assessment of its consistency with Fundamental Legislative Scrutiny Principles (FLPs), which are set out in Appendix 4.²

- 1.12 As part of this process the Committee also considered proposed amendments to the Bill in the Supplementary Notice Paper No. 134, Issue No. 1 (Supplementary Notice Paper) of 14 September 2015, distributed by Hon Michael Mischin MLC. These proposed amendments enable certain WA Bell Companies to contest taxation assessments issued by the Australian Taxation Office (ATO) and exclude from the operation of the Bill those funds subject to these assessments.³

² Western Australian legislation committees have used FLPs as a framework for scrutinising bills since 2004 when the Uniform Legislation and General Purposes Committee (which scrutinised uniform and other bills) considered these principles.

³ See Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015, *Supplementary Explanatory Memorandum*, p 1.

CHAPTER 2

OUTLINE OF THE BILL AND ITS CONTEXT

BACKGROUND TO THE BILL

2.1 The background to the subject matter of the Bill is detailed and complex, stretching back to the mid 1980s to the events which had its genesis in what is described as ‘WA Inc’. Detailed background information is set out in numerous documents, including relevant passages of the following documentation:

- The Second Reading Speech to the Bill.⁴
- The Explanatory Memorandum to the Bill.⁵
- The joint submission of the Hon Michael Mischin MLC, Attorney General and Hon Dr Mike Nahan MLA, Treasurer.⁶
- *Hansard* extracts dated 17 and 18 June 2015 and 15 September 2015.⁷
- Powerpoint slides provided to the Committee by the State Solicitor during the hearing on 23 September 2015.⁸
- Transcript of the hearing with the State Solicitor on 23 September 2015.⁹
- The judgment of Owen J in *Bell Group Ltd (in liq) and Others v Westpac Banking Corporation and Others (No 9) and (No 10)*.¹⁰
- The opinion of Mr Pettit SC.¹¹

⁴ Hon Michael Mischin MLC, Attorney General, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 11 August 2015, pp 4962-3.

⁵ Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015, *Explanatory Memorandum*, pp 1-2.

⁶ Submission 8 from Hon Michael Mischin MLC, Attorney General and Hon Dr Mike Nahan MLA, Treasurer, 5 October 2015, pp 4-43.

⁷ Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 17 June 2015, pp 4513-23; Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 18 June 2015, pp 4536-8; Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 15 September 2015, pp 6221-2.

⁸ The Bell Group litigation, Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015.

⁹ Mr Paul Evans, State Solicitor, State Solicitor’s Office, *Transcript of Evidence*, 23 September 2015.

¹⁰ [2008] 39 WAR 1 at pp 3-7.

¹¹ Ken Pettit SC, Opinion, 20 October 2015, paragraphs 3-11.

2.2 Background information specific to the positions of the various creditors of WA Bell Companies is also contained in their submissions.¹²

2.3 Set out below is a brief summary of the main events leading up to the introduction of the Bill.

- The Bell Group Ltd, the holding company of the Bell Group of companies and whose subsidiaries included Bell Group Finance (BGF); Bell Group NV (BGNV) and Bell Group UK (BGUK) was, in the mid 1980s, a publicly listed company controlled by interests associated with the late Robert Holmes à Court.
- Following the stock market crash of 1987, the Insurance Commission of Western Australia (ICWA) (then known as the State Government Insurance Commission) and the Bond Corporation each purchased 19.9% of the shares of The Bell Group Ltd, with ICWA also purchasing subordinated bonds in the company. Subsequently, the Bond Corporation made a takeover bid for The Bell Group Ltd.
- The Bell Group of companies borrowed from a number of sources, including by means of unsecured loan facilities with a number of banks. Following financial difficulties faced by the group, the banks acquired security over all of its assets and required the proceeds of asset sales to be applied to reduce debt to the banks.
- Other finance was raised through a number of bond issues, including two domestic (Australian) bond issues, issued by BGF and three in Europe, issued by BGNV. In a winding up, repayment of amounts owed to bond holders rank after the repayment of all other unsecured loans to the group. The trustee for the bond holders is the Law Debenture Trust Corporation (LDTC).
- Due to the group being unable to pay interest to bond holders in 1990, the directors of The Bell Group Ltd, in March 1991, applied for the appointment of a liquidator. The banks appointed receivers and managers, who sold the realisable assets of the group over which their securities were held.
- From 1991 onwards various Bell group companies were wound up, including:
 - a) The Bell Group Ltd on 24 July 1991 by the Supreme Court of Western Australia;

¹² See Submission 3 from Mr Neil Griffiths, Partner, Dentons UKMEA LLP on behalf of Ms JB Stephenson, liquidator of Bell Group (UK) Holdings Limited, 30 September 2015; Submission 4, private submission; Submission 5 from Mr Garry Trevor, Official Liquidator, Bell Group NV, 1 October 2015; Submission 7 from WA Glendinning & Associates Pty Ltd, 4 October 2015.

- b) BGF on 3 March 1993 by the Supreme Court of Western Australia;
 - c) BGNV (by a liquidator being appointed in the Netherlands Antilles on 3 January 1995 and by a liquidator appointed by the Supreme Court of Western Australia on 19 July 1996); and
 - d) BGUK on 13 December 1995 by the High Court of Justice in the United Kingdom.
- In 1995 the liquidators initiated proceedings against the banks to set aside the securities taken over group assets (Bell litigation). In order to secure funding for this to occur, the liquidators entered into various funding agreements with three creditors (Funding Creditors), which were ICWA, the ATO (a creditor due to various taxation liabilities of a number of Bell group companies) and BGNV.¹³
 - In consideration of the provision of funding for the Bell litigation, the liquidators agreed to provide benefits to the Funding Creditors to compensate them for the risks taken in providing this funding,¹⁴ including bringing an application under section 564 of the *Corporations Act 2001* (Cth) (*Corporations Act 2001*)¹⁵ in their favour. This application, if granted, would result in around two thirds of the proceeds from the Bell litigation, if successful, being distributed to the indemnifying creditors in shares of 7.5% (the ATO); 37.5% (ICWA and the LDTC) and 55% (BGNV).
 - Due to two of the Funding Creditors wishing to withdraw funding, the Bell litigation funding was rearranged in 1999. ICWA became the sole funder of the Bell litigation and the distribution arrangement was adjusted to shares of 9% (the ATO); 53.5% (ICWA and the LDTC) and 37.5% (BGNV).
 - The liquidator of the Bell group companies was substantially successful in the Bell litigation in the Supreme Court of Western Australia¹⁶ and the banks were ordered to pay 10 of the companies approximately \$1.6 billion.
 - In May 2009 the banks appealed the above decision. The Court of Appeal dismissed the appeal and increased the judgment debt to approximately \$2.7

¹³ The indemnifying creditors were, according to Submission 8 from Hon Michael Mischin MLC, Attorney General and Hon Dr Mike Nahan MLA, Treasurer, 5 October 2015, p 15 ICWA, LDTC, the ATO and BGNV (by virtue of providing various indemnities to facilitate the Bell litigation).

¹⁴ Submission 8 from from Hon Michael Mischin MLC, Attorney General and Hon Dr Mike Nahan MLA, Treasurer, 5 October 2015, pp 13-14.

¹⁵ The text of section 564 of the *Corporations Act 2001* is set out in section 8 below.

¹⁶ *Bell Group Ltd (in liq) and Others v Westpac Banking Corporation and Others (No 9) and (No 10)* [2008] 39 WAR 1.

billion from \$1.6 billion (partially resulting from it increasing the rate at which compound interest accrued on the money the banks had received).¹⁷

- On 14 September 2012 the banks appealed the decision of the Court of Appeal to the High Court of Australia. Before the appeal was heard, a settlement was reached, resulting in \$1.7 billion (Settlement Sum) being made available for distribution to the remaining creditors in consideration of the banks not claiming for their debts.
- In 2014 a number of proceedings were initiated in the Supreme Court of Western Australia and the Federal Court of Australia concerning the distribution of the Settlement Sum, including an application under section 564 of the *Corporations Act 2001* to determine amounts to be paid to the Funding Creditors.
- There remain a significant number of unresolved issues which require resolution before distributions by the liquidator can occur. These are underpinned by a number of disagreements over the amounts to which creditors are entitled in the distribution.
- Attempts to mediate these disagreements have, to date, been unsuccessful.

THE OBJECTS OF THE BILL

- 2.4 The Bill was introduced in the Parliament on 6 May 2015 to deliver, according to the Government, a more rapid financial return to creditors than would a litigated outcome.¹⁸
- 2.5 Proposed amendments to the Bill were published on 14 September 2015 to enable certain WA Bell Companies to contest taxation assessments issued by the ATO and to exclude from the operation of the Bill those funds subject to these taxation assessments.
- 2.6 The Bill constitutes the Government's response to avoid what it has described as '*the perpetual litigation that appears to be inevitable on any issue associated with these companies*'¹⁹ and '*a very specific and extraordinary set of circumstances*'.²⁰

¹⁷ *Westpac Banking Corporation v Bell Group Ltd (in liq) (No 3)* [2012] 44 WAR 1.

¹⁸ See Submission 8 from Hon Michael Mischin MLC, Attorney General and Hon Dr Mike Nahan MLA, Treasurer, 5 October 2015, p 44 and The Bell Group litigation, Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015 (PowerPoint presentation), pp 40-45.

¹⁹ Hon Michael Mischin MLC, Attorney General, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 11 August 2015, pp 4962-4963.

²⁰ Supplementary submission A of Hon Michael Mischin MLC, Attorney General and Hon Dr Mike Nahan MLA, Treasurer, 23 October 2015, p 4.

- 2.7 According to the Government, due to the prospect of long running litigation to determine the distribution of the Settlement Sum, legislation is ‘*the only option that will return money to creditors in a timely fashion.*’²¹
- 2.8 ICWA and the State Solicitor also referred, in their evidence to the Committee, to what they termed the ‘execution risk’ associated with the distribution of the Fund, in terms of the significant technical difficulties associated with effecting a distribution and the purpose of the Bill in mitigating this risk.²²
- 2.9 To the best of its knowledge, the Committee is not aware of any precedent for a Bill that has been introduced for the specific purpose of imposing a liquidation regime by way of State statute in Western Australia or other jurisdictions, by utilising Part 1.1A of the *Corporations Act 2001*.²³ This makes the Bill unique.²⁴
- 2.10 The Attorney General and the Treasurer stated in their joint submission:
- The Government accepts that using legislation to resolve ‘commercial’ disputes should be seldom resorted to and then only in the most extreme situations.*²⁵
- 2.11 The Committee identified the objects of the Bill from the following sources:
- The long title of the Bill, which states:

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.

²¹ See Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015, *Supplementary Explanatory Memorandum*, p 2. See also ALJ Woodings, Official Liquidator, The Bell Group Ltd, (in liquidation), letter, pp 8-9.

²² Mr Rod Whithear, Chief Executive, Insurance Commission of Western Australia, *Transcript of Evidence*, 14 October 2015, pp 9-10; Mr Paul Evans, State Solicitor, State Solicitor’s Office, *Transcript of Evidence*, 23 September 2015, p 12; R Whithear, Chief Executive, Insurance Commission of Western Australia, letter, 22 October 2015, p 3.

²³ A summary of the operation of Part 1.1A of the *Corporations Act 2001* can be found in Western Australia, Legislative Council, Standing Committee on Legislation, Report 1, *Corporations (Commonwealth Powers Bill 2001) Corporations (Ancillary Provisions) Bill 2001 Corporations (Administrative Actions) Bill 2001 Corporations (Consequential Amendments) Bill 2001*, 18 June 2001, pp 27-29 and *HIH Casualty and General Insurance Ltd v Builders Insurers’ Guarantee Corporation* [2003] NSWSC 1083, paragraphs 75-111. In Submission 8 from Hon Michael Mischin MLC, Attorney General and Hon Dr Mike Nahan MLA, Treasurer, 5 October 2015, pp 84-85 a list of Western Australian legislation is set out in which reliance is placed on section 5F of the *Corporations Act 2001* to exclude matters from the operation of that Act, including, in some cases, the whole subject matter of that legislation.

²⁴ Opinion of Ken Pettit SC, 20 October 2015, paragraph 223.

²⁵ Submission 8 from Hon Michael Mischin MLC, Attorney General and Hon Dr Mike Nahan MLA, Treasurer, 5 October 2015, p 97.

- The following extract from the Second Reading Speech:

This Bill provides a framework for the dissolution of those Bell Group companies registered in Western Australia, and the administration and distribution of the Bell litigation proceeds to avoid the perpetual litigation that appears to be inevitable on any issue associated with these companies.

This Bill uses existing provisions in Part 1.1A of the commonwealth Corporations Act 2001, which preserves the power of state Parliaments to pass laws displacing the operation of the Corporations Act in circumstances such as these, in particular for company insolvencies.

*The Bill will bring the Bell companies back within the scope of Western Australian law for the resolution and finalisation of the affairs of those companies.*²⁶

- The objects clause of the Bill, set out in clause 4, which state:

The objects of this Act are —

- (a) to provide a mechanism to resolve, without litigation, disputes which have arisen in relation to the distribution of funds (the **Bell litigation funds**) received by the liquidator of TBGL and certain of its subsidiaries (the **Bell group of companies**) as a consequence of the Bell litigation and the settlement of it in 2013;*
- (b) to provide a form of external administration of WA Bell Companies and require that it be carried out only in accordance with the provisions of this Act;*
- (c) to provide appropriate compensation to the creditors who funded the Bell litigation taking into account the funding provided and the associated risks assumed by them;*
- (d) to reflect the circumstance that without the funding mentioned in paragraph (c), the Bell litigation funds would not exist and the creditors of the Bell group of companies would have received no (or only nominal) dividends in the liquidation of those companies;*

²⁶

Hon Michael Mischin MLC, Attorney General, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 11 August 2015, p 4963.

- (e) *to make reasonable provision for the distribution of the property of the WA Bell Companies having regard to the uncertainties existing as to the nature and extent of that property;*
- (f) *to make reasonable provision for the satisfaction of liabilities owed to creditors having regard to the uncertainties existing as to the nature and extent of those liabilities;*
- (g) *to distribute the Bell litigation funds generally in accordance with the intentions of the liquidator and the creditors who funded the Bell litigation as set out in agreements made before the enactment of this Act;*
- (h) *to avoid further litigation that will waste the resources of the State and other persons and consume the Bell litigation funds.*

2.12 Object clauses are a useful aid to statutory interpretation when statutory intention in another part is unclear. They help clarify and explain complex provisions. Essentially an objects clause states the ‘why’ a law is being enacted whilst other substantive clauses state ‘what’ the law is on a particular subject. However, there is an inevitable tension between generalities in an objects clause and particularities in other parts of a bill. Of this tension, Barwick CJ in *Re Credit Tribunal; Ex parte General Motors Acceptance Corp, Australia* noted:

*the Parliament...can assert in its legislation its intention to make its law the exclusive law upon its topic.... Such an expression of intention in the Act of the Parliament will not, of course, be definitive. But the courts can resort to it in case of uncertainty or ambiguity when the operation of the Act of the Parliament, according to its other terms, has been ascertained and applied.*²⁷

2.13 In essence, the Bill imposes a Western Australian based liquidation regime for the WA Bell Companies, in place of the liquidation regime provided for in the *Corporations Act 2001*, to enable the distribution of the proceeds of the Bell litigation.

2.14 The Government asserts, in the Second Reading Speech (reflecting the object in clause 4(g) of the Bill):

This Bill ensures a fair and expeditious end to the Bell litigation, providing for an equitable distribution of funds held by the liquidator

²⁷

(1977) 14 ALR 257.

*to be generally in accordance with agreements reached and relied upon by the funding creditors throughout the Bell litigation.*²⁸

- 2.15 As noted in paragraph 2.3, the liquidators agreed to provide benefits to the Funding Creditors which included bringing an application under section 564 of the *Corporations Act 2001*.
- 2.16 The Committee notes, however, that the Bill makes a significant alteration to existing law by creating new administrative processes and a vehicle for the Governor to determine the distribution of these proceeds, acting on advice of the Cabinet. The difference between the Bill and section 564 in particular is discussed in Chapter 4.
- 2.17 Accordingly, despite the administrative processes contained in the Bill for the determination of the property and liabilities of WA Bell Companies by the WA Bell Companies Administrator Authority, it is ultimately the decision of the Governor that will determine what funds, if any, are distributed.

MAIN FEATURES OF THE BILL – STATE BASED LIQUIDATION REGIME

- 2.18 The Bill contains the following processes to impose a Western Australian based liquidation regime in place of that under the *Corporations Act 2001*:
- The establishment of a Government appointed liquidation body called the WA Bell Companies Administrator Authority (Authority) and the appointment of an Administrator of the WA Bell Companies (Administrator) (Part 2, Division 1).
 - The establishment of the WA Bell Companies Administrator Authority Fund (the Fund) (Part 2, Division 2).
 - The compulsory transfer of all property of WA Bell Companies to the Authority (Part 3, Division 1).
 - The voiding of various private contracts governing funding of the Bell litigation as well as the indemnification of Funding Creditors (Part 3, Division 3).
 - The dissolution of WA Bell Companies (Part 3, Division 4).
 - Various processes for the completion of the winding up of WA Bell Companies by the Authority (Part 4), including:

²⁸ Hon Michael Mischin MLC, Attorney General, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 11 August 2015, p 4963.

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- a) The gathering of information by the Authority from liquidators of WA Bell Companies and calling for proof of liabilities (Part 4, Division 1)
 - b) The preparation of reports and recommendations by the Authority on the property and liabilities of each WA Bell Company as well as funding or indemnities, the quantification of which is at the absolute discretion of the Authority and for which no reasons need to be given (Part 4, Division 2)
 - c) The determination of amounts to be paid to, or property to be transferred to or vested in, any person, by the Governor, in the Governor's absolute discretion,²⁹ and for which no reasons need to be given, following which every liability of every WA Bell Company to any person not the subject of a recommendation is discharged and extinguished (Part 4, Division 3)
 - d) The making of payments, or the transfer or vesting of property by the Authority, following a determination by the Governor, subject to the intended recipient executing a deed providing for the release or discharge of any person from any liability the Minister considers appropriate (Part 4, Division 4)
 - e) On the payment made to a person, or property transferred to or vested in a person in accordance with a determination of the Governor, every liability of every WA Bell Company to that person is discharged and extinguished (Part 4, Division 4)
 - f) If such a person has not given a deed to the Authority providing for a release and discharge the responsible Minister considers appropriate, on the first anniversary of the transfer day:
 - i) every liability of every WA Bell Company to that person to whom a payment has been made following a determination of the Governor is discharged and extinguished
 - ii) the determination ceases to have effect if a deed has not been executed by that person (Part 4, Division 4).³⁰
 - g) The release of the liquidator, on the dissolution of a WA Bell Company, from all liability (Part 4, Division 5).

²⁹ This is the practical effect of clauses 37(3), (4) and (8).

³⁰ The Supplementary Notice Paper contains amendments proposing to alter the timescale for these events to occur to the end of three months from the day the Governor makes a determination.

- The closure of the Fund by:
 - a) the Administrator certifying all money required to be paid out has been paid;
 - or
 - b) the first anniversary of the transfer daywhichever occurs first³¹ (Part 5, clause 40).
- The abolition of the Authority and the vesting of all property remaining vested in the Authority and vesting after the closure of the Fund, in the State (Part 5, clauses 41 and 42).

2.19 The Bill also includes the following features:

- The exclusion from the application of the *Corporations Act 2001* of each WA Bell Company, with some exceptions, and the displacement, by Parts 3, 4 and 5 of the Bill, of the Corporations legislation (Part 6) (significant differences between the liquidation regime sought to be imposed by the Bill and that under the *Corporations Act* are noted in Chapter 4).
- Provision for regulations to be made declaring a matter relating to a WA Bell Company to be subject to specified provision or provisions of the Corporations legislation (Part 6).
- The provision of various offences dealing with attempts to defeat the operation of the Bill and the misuse of confidential information, as well as injunctions to ensure compliance with the Bill (Part 7).
- Various protections given to the Minister, the Authority and ICWA in relation to a number of matters, including the preparation of the Bill and recommending its introduction into Parliament (Part 8, clauses 62 to 66).
- A stay of proceedings on and from the transfer day with respect to property of a WA Bell Company except with the leave of the Court (Part 8, clause 67).³²

³¹ The Supplementary Notice Paper contains amendments proposing to alter the timescale to replace 'the first anniversary of the transfer day' to 'the end of four months from the day the Governor makes the determination of amounts and property'.

³² The Supplementary Notice Paper proposes amendments to exclude from the operation of this clause the right to make a taxation objection to a decision of the Commissioner of Taxation.

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- No right to appeal from a decision of the Administrator, the Authority, the Minister or the Governor with the exception of an application for relief for jurisdictional error³³ (Part 8, clause 68).
 - The exemption of the Authority from the *Freedom of Information Act 1992* (Part 8, clause 71) which will preclude persons obtaining Authority records on distribution.³⁴
 - The power of the Authority to obtain an opinion from the State Solicitor on a question concerning the functions or powers of the Authority (Part 8, clause 72).
 - A power for the Governor to make regulations (Part 8, clause 77).
 - A provision for the expiry of the Act, if the Bill is enacted, on the sixth anniversary it receives Royal Assent (Part 8, clause 78).³⁵

³³ This is discussed at paragraphs 5.21 to 5.23.

³⁴ Ken Pettit SC, letter, 25 October 2015, p 3.

³⁵ The Supplementary Notice Paper proposes amendments to change this timeline to ‘at the end of 6 years beginning on the day on which the Governor makes the determination under section 37(2)’.

CHAPTER 3

DOES THE BILL IMPLEMENT ITS OBJECTS?

- 3.1 For legislation to operate effectively and with certainty, it is important that it achieves the purpose for which it was enacted. While it is not always possible to predict how the law will be applied, uncertainty in the law can give rise to a number of unintended consequences, including outcomes not contemplated by its drafters as well as those subject to its operation.
- 3.2 A central focus for the Committee's inquiry was whether and, if so, to what extent, the provisions of the Bill carry into effect the objects set out in clause 4 and reflect the stated intention in the Second Reading Speech. A failure to do so may result in significant uncertainty in the operational effect of the Bill.
- 3.3 The Committee's scrutiny of the Bill and evidence received during the inquiry raised a number of questions as to whether the provisions of the Bill, if enacted, will implement its objects.
- 3.4 In Mr Pettit SC's opinion:

*no provision of the Bill is inconsistent with the policy or objects of the Bill, taken together. Because the objects of the Bill entail some internal tension, a particular provision supporting one object may be characterised as inconsistent with another object.*³⁶

- 3.5 The Committee notes that the inconsistency of some clauses with some objects but not others may give rise to a number of uncertainties. Examples are noted below.

THE ABSOLUTE DISCRETION IN DECISION-MAKING BY THE AUTHORITY AND THE GOVERNOR AND THE POSSIBILITY OF NO COMPENSATION BEING DISTRIBUTED

- 3.6 A number of the objects of the Bill refer to:
- Providing appropriate compensation to the Funding Creditors (clause 4(c))
 - Making reasonable provision for the distribution of the property of the WA Bell Companies and for the satisfaction of liabilities owed to creditors (clauses 4(e) and (f)).

³⁶ Ken Pettit SC, Opinion, 20 October 2015, paragraph 26.

- Distributing the Bell litigation funds generally in accordance with the intentions of the liquidator (clause 4(g)).³⁷
- 3.7 However, there is uncertainty that the Bill will implement these objects because clauses provide an absolute discretion to:
- the Authority to determine:
 - a) The property and liabilities of each WA Bell Company, including the quantification of any liability (clauses 33(3) and 35(4)(a)).
 - b) The amount recommended to be paid to a person or the property transferred to or vested in a person (clause 35(4)(b)).
 - c) The priority to give to that payment, transfer or vesting.
 - the Governor to determine an amount to be paid to and property to be transferred to or vested in, a person (clause 37(2)).
- 3.8 The absolute discretion of the Authority and the Governor was raised by multiple witnesses and submissions to the Committee.³⁸
- 3.9 This uncertainty is best understood by considering the following clauses (if enacted):

Clauses 35(5) and (6)

- 3.10 Clauses 35(5) and (6) of the Bill provide:

35. Recommendations with respect to liabilities

(5) Nothing in this section requires that the aggregate value of all money recommended to be paid, and all property recommended to be transferred or vested, under this section must be equal to the value of the money or property held by the Authority or the total liabilities of all WA Bell Companies as determined under section 33.

(6) Nothing in this section creates any right in, or for the benefit of, a creditor of a WA Bell Company or any other person.

³⁷ These objects are also reflected in statements in the Second Reading Speech as well as debate on the Bill in the Parliament.

³⁸ Submission 7 from WA Glendinning, 4 October 2015, Schedule 7, pp 32 and 35; Submission 5 from Mr Garry Trevor, Official Liquidator, Bell Group NV, 1 October 2015, p 14; Submission 6 from the Law Council of Australia, 2 October 2015, p 4; Ms Victoria Butler, Deputy Chair, Insolvency and Reconstruction Law Committee of the Business Law Section, Law Council of Australia, *Transcript of Evidence*, 6 October 2015, p 3; Mr Hugh McLernon, Director, WA Glendinning and Associates, *Transcript of Evidence*, 6 October 2015, p 3.

Clauses 37(3) and (4)

3.11 Clauses 37(3) and (4) of the Bill provides:

37. Governor may determine amounts and property

(3) 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.

(4) Nothing in this Act requires that the aggregate value of all money determined by the Governor to be paid, and all property determined by the Governor to be transferred or vested, under this section must be equal to the value of the money or property held by the Authority or the total liabilities of all WA Bell Companies as determined under section 33.³⁹

Clause 42(1)

3.12 Clause 42(1) of the Bill provides:

42. Vesting of property in the State

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

3.13 When the Government was asked whether clause 35(5) of the Bill, read with clause 42(1), could have the effect of enabling all property transferred to the Authority by the operation of clause 22(1) to be vested permanently in the State despite the objects of the Bill set out in clause 4, it responded:

Theoretically, yes, and constitutionally that is permissible, though it would doubtless lead to litigation. The question is of course predicated upon the Governor making a negative determination that no creditor should receive anything.

It is not, however, the intent of the Bill nor of the provision, which is intended to ensure that no dispute arises because some element of the fund is undistributed, or some property which is accorded no value in fact has value (whether generally, or to a particular creditor) or a different value to that accorded to it in the report under clause 34.

³⁹

The Supplementary Notice Paper proposes detailed amendments to clause 37.

*The Government understands on the basis of information previously made available by the Liquidator, there is no realistic prospect that the property under the administration of the Authority will equal the value of the aggregate liabilities of the WA Bell companies.*⁴⁰

Committee comment

- 3.14 Notwithstanding the Government's stated intent, the Committee is of the view that the Bill allows for recommendations by the Authority and determinations by the Governor that no amounts are payable to any persons. This would be a scenario consistent with the wording of clauses 22(1), 35(5) and (6), 37(3) and (4) when read with 42(1).
- 3.15 In coming to this view, the Committee has taken into account the opinion of Mr Pettit SC. Mr Pettit makes a number of references to the discretion of the decision makers under the Bill, observing that '*not all possible policy objectives are clear, because to some degree outcomes from the Bill are left to the discretion of decision-makers, including the Executive*'.⁴¹
- 3.16 There is a tension between:
- the possibility of clauses 35, 37 and 42 having the effect set out in paragraph 3.14, thereby defeating the objects in clauses 4(c), (e), (f) and (g)
 - what is stated by the Government to be their intent in paragraph 3.13, which may be regarded as consistent with the intent of the object in clause 4(h) to avoid further litigation.

PROTECTION AGAINST INVALIDATION OF AUTHORITY REPORTS AND RECOMMENDATIONS

- 3.17 Clauses 34(4), 35(8) and 36(9) of the Bill provide:

34. Report to the Minister on property and liabilities

- (4) A failure by the Authority to comply with any provision of this section does not invalidate a report made by it under this section.*

⁴⁰ Submission 8 from Hon Michael Mischin MLC, Attorney General and Hon Dr Mike Nahan MLA, Treasurer, 5 October 2015, pp 73-74. A litigious response to this possible outcome is exactly what the Bill is seeking to avoid.

⁴¹ Ken Pettit SC, Opinion, 20 October 2015, paragraph 14.

35. Recommendations with respect to liabilities

(8) A failure by the Authority to comply with any provision of this section does not invalidate a recommendation made by it under this section.

36. Recommendations with respect to funding or indemnities

(9) A failure by the Authority to comply with any provision of this section does not invalidate a recommendation made by it under this section.

3.18 The effect of these clauses is that a failure by the Authority to comply with any process or ‘requirement’ in each of the clauses does not invalidate:

- a report made to the Minister on the property and liabilities of each WA Bell Company determined by the Authority (clause 34(4))
- a recommendation by the Authority to the Minister of the payment of any amount, or property transferred to or vested in, a person with respect to all liabilities of a WA Bell Company to that person as a creditor (clause 35(8))
- a recommendation by the Authority to the Minister of the payment of an amount, or property transferred to or vested in, a person as compensation for providing funding for, or an indemnity against, costs in relation to the Bell litigation (clause 36(9)).

3.19 Significantly, included within the list of matters to which the Authority ‘must’ have regard when making a recommendation to the Minister is the objects of the Bill (clauses 35(2)(a) and 36(3)(a)).

3.20 When the Government was asked about the purpose of these clauses, it responded:

*The Government does not propose to disclose its legal advice in relation to the formulation of provisions which are designed to protect the integrity of the distribution process created by the Bill, in anticipation of any challenge to the efficacy of the Bill, or any action undertaken pursuant to the Bill.*⁴²

The objective of the Bill is to reduce the risk of collateral litigation delaying a distribution to creditors. That includes collateral litigation

⁴² Submission 8 from Hon Michael Mischin MLC, Attorney General and Hon Dr Mike Nahan MLA, Treasurer, 5 October 2015, p 74.

*which might allege a defect in the report to the Minister whether of content, process or time.*⁴³

- 3.21 The Committee acknowledges the Government's policy intention to reduce the risk of further litigation arising out of actions with the Bill, which is consistent with the object in clause 4(h). However, the protection against invalidation provided by clauses 34(4), 35(8) and 36(9) is another example of inconsistencies in the Bill and how the operation of the Bill is capable of producing an outcome that will defeat one or more of its objects.
- 3.22 Also, the Committee questions the utility of imposing 'mandatory' requirements on the Authority given the effect of clauses 34(4), 35(8) and 36(9). This issue is further considered at paragraphs 7.133 to 7.134.

AVOIDING FURTHER LITIGATION

- 3.23 As stated in paragraph 2.11, one of the objects of the Bill is 'to avoid further litigation that will waste the resources of the State and other persons and consume the Bell litigation funds' (clause 4(h)).
- 3.24 The Committee notes the potential for the following future litigation.

High Court of Australia challenge

- 3.25 In its submission, BGNV stated its intention to challenge the Bill, if enacted, in the High Court of Australia on the basis that the Bill is invalid as it infringes the *Commonwealth Constitution*.⁴⁴
- 3.26 While the possibility of a successful challenge, in itself, gives rise to obvious uncertainty, it may also pose a number of practical issues, such as the means by which any funds paid out under the Bill could be recouped by the Authority if a challenge to the Bill is successful. This was highlighted in the submission of Mr Garry Trevor, the Official Liquidator of BGNV.⁴⁵

Taxation assessments issued by the ATO against certain WA Bell Companies

- 3.27 In August 2015, after the Bill was introduced in the Parliament, the ATO issued notices of taxation assessment against a number of Bell group companies for the 2014

⁴³ Submission 8 from Hon Michael Mischin MLC, Attorney General and Hon Dr Mike Nahan MLA, Treasurer, 5 October 2015, p 70.

⁴⁴ Submission 5 from Mr Garry Trevor, Official Liquidator, Bell Group NV, 1 October 2015, pp 2, 20, 22 and 24. See also Submission 7 from WA Glendinning & Associates Pty Ltd, 4 October 2015, paragraph 86; Submission 8 from Hon Michael Mischin MLC, Attorney General and Hon Dr Mike Nahan MLA, Treasurer, 5 October 2015, p 81 and ALJ Woodings, Official Liquidator, The Bell Group Ltd. (in liquidation), letter, 21 October 2015, p 2.

⁴⁵ Submission 5 from Mr Garry Trevor, Official Liquidator, Bell Group NV, 1 October 2015, p 16.

financial year for approximately \$300 million. As previously noted, the amendments in the Supplementary Notice Paper will enable certain WA Bell Companies to contest these assessments and exclude from the operation of the Bill those funds subject to these assessments.⁴⁶

- 3.28 The ATO drew the Committee's attention to the amendments proposed in the Supplementary Notice Paper by stating:

*At this stage, the Commissioner simply notes that the apparent intention of the Bell Bill, if enacted in its current form, is that it should constrain the Commissioner's capacity to administer the income tax laws according to their terms. In this context it is noted that other creditors have publicly referred to the apparent inconsistency between the Bill and the Commonwealth income tax law. Also it is noted that some of the recently introduced amendments to the Bill would appear to be inconsistent with the Bill stated purpose of reducing litigation and expediting finalisation of the outstanding issues.*⁴⁷

- 3.29 The liquidator of BGNV submitted:

*the Commonwealth only issued its tax assessments because of the introduction of the Bill. The resolution of the tax objections to those assessments will inevitably lead to review and appeal proceedings. This litigation will be the direct result of the introduction of the Bill.*⁴⁸

- 3.30 The liquidator of The Bell Group Ltd also stated, that he (through his solicitors):

*drew to the attention of The Hon Dr M Nahan MLA, Treasurer and the Hon M Mischin MLC, Attorney General certain tax implications that would arise from the transfer of all shares in WA Bell Companies to the Authority under section 22 of the Bill.*⁴⁹

- 3.31 A discussion of any inconsistency between the Bill and Commonwealth taxation law appears in paragraphs 5.8 to 5.16.

⁴⁶ See Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015, *Supplementary Explanatory Memorandum*, p 1.

⁴⁷ Andrew Mills, Second Commissioner, Australian Taxation Office, letter, 13 October 2015.

⁴⁸ Submission 5 from Mr Garry Trevor, Official Liquidator, Bell Group NV, 1 October 2015, pp 19-20.

⁴⁹ ALJ Woodings, Official Liquidator, The Bell Group Ltd (in liquidation), letter, 21 October 2015, p 1.

Possible other avenues for litigation

- 3.32 Mr Pettit SC also draws attention to a number of possible avenues for litigation in his opinion, as follows:

*First, a constitutional challenge appears likely. Second, issues arise under the Bill's provisions in cl 68 in respect of judicial review...Third, there are questions about the territorial reach of the Bill, and whether litigation might be commenced in the UK, in Netherlands Antilles or elsewhere, despite the Bill. Fourth, some parties have flagged litigation under one or more of Australia's free trade agreements. Fifth, the amounts involved, the history, the submissions and the characters, all suggest that litigation will be pursued if at all open. Sixth, litigation may be commenced and prosecuted for a period even if under a dubious cause.*⁵⁰

OPEN-ENDED OPERATION OF THE BILL

- 3.33 The Government has made a number of references to the Bill enabling an expeditious resolution to the matters the subject of the liquidation of the WA Bell Companies.⁵¹ For example, the Hon Michael Mischin MLC, Attorney General, stated in the Second Reading Speech:

*The process adopted by the authority will be similar in concept to that used in a conventional liquidation, but the mechanics of this process will be materially different. The authority will have considerably greater discretion to assess and quantify liabilities than a liquidator, and to reach an expeditious and pragmatic resolution upon questions of liability.*⁵² [Committee emphasis]

- 3.34 The timescale within which the liquidation regime in the Bill will operate and all liabilities of WA Bell Companies are to be discharged is governed by clause 38(6), which provides:

38. Authority to make payments or transfer property

(6) On the first anniversary of the transfer day —

⁵⁰ Ken Pettit SC, Opinion, 20 October 2015, paragraph 34.

⁵¹ Hon Michael Mischin MLC, Attorney General, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 11 August 2015, p 4964; Submission 8 from the Hon Michael Mischin MLC, Attorney General and Hon Dr Mike Nahan MLA, Treasurer, 5 October 2015, pp 93 and 95. See also Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015, *Explanatory Memorandum*, p 1.

⁵² Hon Michael Mischin MLC, Attorney General, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 11 August 2015, p 4964.

(a) *every liability of every WA Bell Company to the person is, by force of this Act, discharged and extinguished; and*

(b) *the determination of the Governor under section 37 in relation to the person ceases to have effect.*

3.35 Additionally, clause 40(1) provides for the closure of the Fund as follows:

40. Closure of the Fund

(1) *The Fund is closed by force of this section when whichever of the following first occurs —*

(a) *the Administrator certifies in writing that all money that the Authority is required to pay out of the Fund under section 38 has been paid;*

(b) *the first anniversary of the transfer day.*

3.36 Amendments proposed in the Supplementary Notice Paper will, if enacted, extend the 12 month period for the completion of the distribution process resulting from the uncertainty around the taxation questions. The time limits for the closure of the Fund are correspondingly extended.⁵³

3.37 The Law Council of Australia is of the view these amendments undermine the suggestion that the Bill will ‘*expeditiously resolve all disputes without the need for further legal proceedings.*’⁵⁴

3.38 The Committee asked the liquidator for The Bell Group Ltd:

- Whether he had any estimate of the time it might take to conclude all current and pending proceedings concerning the Settlement Sum?
- How does any estimate compare to the possible timeframe for the determination of the property and liabilities of WA Bell Companies under the Bill?⁵⁵

3.39 The liquidator responded as follows:

⁵³ Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015, *Supplementary Explanatory Memorandum*, p 3.

⁵⁴ Ms Victoria Butler, Deputy Chair, Insolvency and Reconstruction Law Committee of the Business Law Section, Law Council of Australia, *Transcript of Evidence*, 6 October 2015, p 2.

⁵⁵ Hon Robyn McSweeney MLC, Chair of the Standing Committee on Legislation, letter, 16 October 2015.

Given that it is very difficult to estimate the time it will take for court proceedings (and any appeals therefrom) to be resolved, and that the scope and complexity of pending or foreshadowed proceedings is currently unknown, doing the best I can:

(a) In the absence of settlement between the material creditors I estimate it may take anything between 5 to 15 years for all current, pending and foreshadowed proceedings which will affect the distribution of the settlement sum to be finally resolved.⁵⁶

(b) Given that the recent foreshadowed amendments to the Bill contemplates that the Authority will complete the administrations within 6 years, that is likely to be less than my estimate of the time it would likely take for all current, pending and foreshadowed proceedings to be finally resolved in the ordinary course.⁵⁷

3.40 Given:

- the open-ended nature of the timeframe within which the liquidation regime in the Bill will operate; and
- the uncertainty regarding when the anticipated objections to tax assessments issued against a number of WA Bell Companies by the Commissioner of Taxation will be dealt with,

the Committee cannot determine with certainty whether the Bill, when incorporated with the amendments proposed in the Supplementary Notice Paper, will provide for the distribution of the property of WA Bell Companies and compensation to creditors who funded the Bell litigation in a timelier manner than under the current law. This is despite the number of current and pending proceedings.

3.41 While clause 78 of the Bill provides for the expiry of the Bill, if enacted, at the end of six years beginning on the day the Governor makes the determination under clause 37(2), there is no precise timescale within which this determination will be made, if ever.⁵⁸

⁵⁶ ALJ Woodings, Official Liquidator, The Bell Group Ltd. (in liquidation), letter, 21 October 2015, p 8.

⁵⁷ Ibid, pp 8-9.

⁵⁸ There is no requirement on the Governor to actually make any determinations under clause 37.

CHAPTER 4

OTHER UNCERTAINTIES ARISING FROM THE BILL

DIFFERENCE BETWEEN SECTION 564 OF THE *CORPORATIONS ACT 2001* AND THE BILL

- 4.1 A number of significant differences between the liquidation regime sought to be imposed by the Bill and that under the *Corporations Act 2001* were highlighted in evidence to the Committee.⁵⁹
- 4.2 One significant difference which was the subject of detailed consideration during the inquiry was between section 564 of the *Corporations Act 2001* and the Bill.
- 4.3 Section 564 provides:

Power of Court to make orders in favour of certain creditors

Where in any winding up:

- (a) *property has been recovered under an indemnity for costs of litigation given by certain creditors, or has been protected or preserved by the payment of money or the giving of indemnity by creditors; or*
- (b) *expenses in relation to which a creditor has indemnified a liquidator have been recovered;*

the Court may make such orders, as it deems just with respect to the distribution of that property and the amount of those expenses so recovered with a view to giving those creditors an advantage over others in consideration of the risk assumed by them. [Committee emphasis]

- 4.4 As stated in paragraph 2.11 clause 4(c) provides:

4. Objects of this Act

The objects of this Act are —

⁵⁹ See ALJ Woodings, Official Liquidator, The Bell Group Ltd. (in liquidation), letter, 21 October 2015, pp 3-4; Submission 8 from Hon Michael Misichin MLC, Attorney General and Hon Dr Mike Nahan MLA, Treasurer, 5 October 2015, pp 66-68 and Ken Pettit SC, Opinion, 20 October 2015, paragraphs 37-52.

(c) to provide appropriate compensation to the creditors who funded the Bell litigation taking into account the funding provided and the associated risks assumed by them; [Committee emphasis]

4.5 Of concern to some witnesses was the difference in wording between a court making orders as it deems ‘just’ in section 564 and the provision of ‘appropriate compensation’ in clause 4(c).

4.6 In a hearing before the Committee, the Law Council of Australia stated:

*Mrs Gordon: Can I just make a point about appropriate versus just? Under section 564, the court considers all the circumstances to determine what is just. Under this legislation we are only talking about what is appropriate having regard to the guidance that is given in the legislation, to the extent that there is guidance.*⁶⁰

4.7 In its submission, WA Glendinning referred to the Bill overriding section 564 as follows:

*There has grown up in Australian jurisprudence a series of tests in relation to what is an appropriate payment to funding creditors under Section 564 of the Corporations Act. Those tests have been removed by this Bill...*⁶¹

4.8 Given the Bill, if enacted, will provide for a stay of all proceedings with respect to property of WA Bell Companies pursuant to clause 67, the outcome of the application pursuant to section 564 that is the subject of COR 146 of 2014 currently before the Supreme Court of Western Australia will likely never be known.

4.9 However, the Committee is of the view there is a potential for the Bill to deliver a different outcome than the Court, on the basis of the difference in words between clause 4(c) and section 564. Further there is potential for a different outcome due to the absolute discretion vested in both the Authority and the Governor.

4.10 The Committee also received evidence of the conflicting positions of various witnesses on a number of other issues relevant to the funding of the Bell litigation and section 564, including if and when WA Glendinning offered to fund the litigation.⁶²

⁶⁰ Mrs Barbara Gordon, Lecturer, Law School, University of Western Australia, *Transcript of Evidence*, 6 October 2015, p 8.

⁶¹ Submission 7 from WA Glendinning and Associates Pty Ltd, 4 October 2015, Schedule 7, p 38.

⁶² See Submission 7 from WA Glendinning and Associates Pty Ltd, 4 October 2015, paragraphs 25-32; Mr Hugh McLernon, Director, WA Glendinning and Associates Pty Ltd, *Transcript of Evidence*, 6 October 2015, p 6; R Whithear, Chief Executive, Insurance Commission of Western Australia, letter, 22 October 2015, pp 3-4 and Supplementary Submission A of Hon Michael Mischin MLC, Attorney General and Hon Dr Mike Nahan MLA, Treasurer, 23 October 2015, pp 5-6.

These conflicting accounts are just one example of the opposing positions of various creditors on the many issues arising out of the Bell litigation.

- 4.11 Hon Ken Travers MLC and Hon Lynn MacLaren MLC are of the view that, the question of whether WA Glendinning offered to help fund the litigation, including the circumstances and timing of any offer, may be an important consideration for the Court when reaching a decision under section 564 on what is a ‘just’ reward for the risks assumed by the Funding Creditors.

THE POTENTIAL IMPACT OF SECTION 5F(3) OF THE *CORPORATIONS ACT 2001*

- 4.12 The Committee has identified an additional source of uncertainty which may impact upon the operation of the Bill, namely, section 5F(3) of the *Corporations Act 2001*.
- 4.13 This provision provides that regulations (made by the Commonwealth Government) may provide that a declaration by a State or Territory, relying on section 5F, excluding the application of the *Corporations Act 2001* (as provided in clause 45) does not apply to the extent provided for in the regulations.⁶³
- 4.14 Accordingly, it is possible that, at any time after the Bill is enacted, the Commonwealth Government may make regulations reversing the effect of the declaration which appears in clause 45.
- 4.15 In their submission, the Attorney General and the Treasurer stated:

Consultation was undertaken with the Commonwealth Government, Department of the Treasury, and the honourable the Treasurer of the Commonwealth during the development of the Bill, on the essential concepts and mechanisms proposed to be introduced.

*The Honourable the Treasurer of the Commonwealth provided written advice to the Honourable the Treasurer that the Commonwealth did not object to the introduction and implementation of the measures proposed to be embodied in the Bill.*⁶⁴

- 4.16 Notwithstanding the evidence of the Attorney General and the Treasurer regarding the views of the Commonwealth Government, the Committee recognises this is a risk inherent in the operation of Part 1.1A of the *Corporations Act 2001*. The Committee is unable to quantify the degree of risk.

⁶³ See *HIH Casualty and General Insurance Ltd v Builders Insurers' Guarantee Corporation* [2003] NSWSC 1083 at paragraph 81.

⁶⁴ Submission 8 from Hon Michael Mischin MLC, Attorney General and Hon Dr Mike Nahan MLA, Treasurer, 5 October 2015, p 45.

- 4.17 The Committee also notes the role played by section 5G of the *Corporations Act 2001* pursuant to clause 46 of the Bill and the fact it does not contain any similar regulation making power to clause 5F(3)⁶⁵ and makes the following recommendation.

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.

COMMENCEMENT DATES OF DIFFERENT PROVISIONS OF THE BILL

- 4.18 The Committee notes the uncertainty created by the commencement dates of the following provisions and parts of the Bill.

Part 3 of the Bill

- 4.19 Clause 2(1)(d) provides:

2. Commencement

(1) This Act comes into operation as follows —

(d) the rest of the Act — on a day fixed by proclamation, and different days may be fixed for different provisions.

- 4.20 The ‘rest of the Act’ includes Part 3, which includes clause 22(1) providing for, at the beginning of the transfer day, the property described in clause 22(1) transferring to and vesting in the Authority.

- 4.21 Clause 3(1) of the Bill defines ‘transfer day’ as follows:

3. Terms used

(1) In this Act, unless the contrary intention appears—

***transfer day* means the day on which Part 3 comes into operation;**

- 4.22 The transfer day is, therefore, a critical event in and an essential condition precedent to, the liquidation process in the Bill.

- 4.23 Providing for part of an Act to come into operation on a day fixed by proclamation⁶⁶ means that there is a discretion left with the Executive regarding when laws passed by

⁶⁵ With respect to post commencement provisions as defined in clause 5G(14), which is legislation of the type introduced by the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015*.

Parliament come into operation, which includes the discretion to indefinitely suspend such laws.⁶⁷

- 4.24 The Committee notes that where unfettered control is given to the Executive to decide the commencement of legislation, this can usurp the power that lies at the heart of the role of the Western Australian Parliament. Whilst this has become common in recent years, it nevertheless raises the following FLP:

- *Does the Bill have sufficient regard to the institution of Parliament?*

*12. Does the Bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?*⁶⁸

- 4.25 The Attorney General and the Treasurer, in their submission, stated:

*The Government has not determined the day upon which proclamation of the operative provisions will take place. Nor has the Government yet formed a view as to whether the whole of the Act will be proclaimed at once, or in parts.*⁶⁹

*The Government will confer with the Administrator, once an Administrator has been provisionally appointed, to discuss the practicalities and will take into account the Administrator's view of the practicalities of the administration of the Bill, once proclaimed, in forming a concluded view upon the timing and phasing of proclamation.*⁷⁰

Clauses 48 to 50 of the Bill

- 4.26 Clause 2(2) of the Bill provides:

2. Commencement

(2) Sections 48 to 50 are deemed to have come into operation at 12 noon on the day before the day on which the Bill for this Act was introduced into the Legislative Assembly.

⁶⁶ A proclamation is a public announcement with statutory authority published in the *Government Gazette* and made by the Governor in Executive Council.

⁶⁷ See Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 45, *Working with Children (Criminal Record) Amendment Bill 2009*, 4 March 2010, p 12 and Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 84, *Medicines, Poisons and Therapeutic Good Bill 2013*, 18 February 2014, p 31.

⁶⁸ Appendix 4, Item 12.

⁶⁹ Submission 8 from Hon Michael Mischin MLC, Attorney General and Hon Dr Mike Nahan MLA, Treasurer, 5 October 2015, pp 46.

⁷⁰ Ibid, pp 46-47.

4.27 While this provides certainty about when these provisions will come into operation, the retrospective operation of clauses 48 to 50 creates significant uncertainty by virtue of them having the potential to influence behaviour before the enactment of the Bill.

4.28 In remarking on the retrospective operation of clauses 48 to 50, the Law Council of Australia submitted:

*Such an approach is inherently unsound and of serious concern. For example, it could be used by the government of the day to force certain behaviours in circumstances when a bill has not and may never be duly passed.*⁷¹

4.29 In light of this evidence, the Committee makes the following recommendation.

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*.

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.

⁷¹ Submission 6 from The Law Council of Australia, 2 October 2015, p 2.

CHAPTER 5

CONSTITUTIONALITY OF THE BILL

GENERALLY

- 5.1 The Committee posed a range of questions to Mr Pettit SC on the constitutionality of the Bill. Mr Pettit SC advised of the following on the constitutional issues raised in the questions asked.

SECTION 51(xxxi) OF THE COMMONWEALTH CONSTITUTION

- 5.2 Section 51 (xxxi) of the *Commonwealth Constitution* provides the following legislative power of the Commonwealth:

Legislative powers of the Parliament

51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: ...

(xxxi) the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws;

- 5.3 Mr Pettit SC is of the view that:

- While the creditor's capacity to prove for their debts constitutes 'property' for the purposes of section 51(xxxi) of the *Commonwealth Constitution*, the Bill, if enacted, will not be a law of the Commonwealth (despite Part 6 of the Bill applying Part 1.1A of the *Corporations Act 2001*) and therefore will not be subject to section 51(xxxi).
- If the Bill were a proposed law of the Commonwealth, it would, if enacted, be likely to offend section 51(xxxi) in not providing for the acquisition of property on 'just terms'.⁷²

Committee comment

- 5.4 The Committee draws to the attention of the House the opinion of Mr Pettit SC which highlights the significance of laws of Western Australia not being required to

⁷² Ken Pettit SC, Opinion, 20 October 2015, paragraphs 53-70. See also Submission 8 from Hon Michael Mischin MLC, Attorney General and Hon Dr Mike Nahan MLA, Treasurer, 5 October 2015, pp 57-58.

guarantee the acquisition of property on just terms. This enables the Bill to govern the means by which compensation will be provided according to its terms, which, as stated above, does not guarantee that any compensation will, in fact, be provided to any creditors who funded the Bell litigation.

- 5.5 Hon Ken Travers MLC, in noting the strong views expressed by Members and previous committees of this House on the need for property to be acquired by the State on ‘just’ terms, draws to the attention of the House Mr Pettit SC’s view that the Bill, if it were a proposed law of the Commonwealth, would likely offend section 51(xxxi) of the *Commonwealth Constitution*.

SECTION 109 OF THE COMMONWEALTH CONSTITUTION

- 5.6 Section 109 of the *Commonwealth Constitution* provides:

Inconsistency of laws

109. When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

- 5.7 Mr Pettit SC is of the view that due to the net effect of Part 1.1A of the *Corporations Act 2001*, applied by Part 6 of the Bill, the Bill is not inconsistent with the *Corporations Act 2001* and, therefore, does not infringe section 109 of the *Commonwealth Constitution*.

Inconsistency with Commonwealth taxation law

- 5.8 Mr Pettit SC stated in relation to the Bill:

*In the time available, and in the absence of any specific contention, I have not been able to identify any inconsistency with Commonwealth taxation law.*⁷³

- 5.9 The Committee also refers to what was stated by Mr Andrew Mills, Second Commissioner of Taxation, in paragraph 3.28. Unfortunately, as Mr Pettit states, Mr Mills’ statement ‘*appears to flag an inconsistency with Commonwealth tax laws, but does not assist in identifying the inconsistency.*’⁷⁴ The same lack of exegesis can be found in the submission of Mr Garry Trevor, Official Liquidator of BGNV who states that:

⁷³ Ken Pettit SC, Opinion, 20 October 2015, paragraph 82.

⁷⁴ Ibid, paragraph 74.

*there is an inconsistency for the purposes of s.109 of the Constitution between the Bill and the Income Tax Assessment Act 1936 (Cth) and other Commonwealth taxation legislation.*⁷⁵

5.10 The Supplementary Explanatory Memorandum states:

*The proposed amendments to the Bill make it consistent with the operation of the Commonwealth taxation laws while minimising the impact of those amendments on the attainment of the overall objectives of the Bill.*⁷⁶

5.11 The Supplementary Explanatory Memorandum further states that amendments on the Supplementary Notice Paper aim to:

*Proceed with minimal delay or disruption while those disputed taxation issues are resolved between the ATO and the WA Bell Companies, the amendments will allow the Bill to operate at least on those funds that are not subject to the taxation assessments.*⁷⁷

5.12 The tax liabilities in question concern TBGL as the head company of a consolidated group for income tax purposes which includes many of the WA Bell Group Companies.⁷⁸ Various notices of assessments for income tax were issued for the 2014 financial year recovered by the liquidator as a result of the settlement of the Bell proceedings to TBGL and certain other Bell Group companies. The amount of tax to be paid by TBGL is a post liquidation tax liability of approximately \$298 million to be paid: ‘on the earlier of: the day before the transfer day if the Bill is enacted and 31 December 2015.’⁷⁹

5.13 Liquidator Mr ALJ Woodings has formally objected to the tax assessments but in the meantime, the liquidator has an obligation under section 254(1)(d) of the *Income Tax Assessment Act 1936* (Cth) to retain sufficient funds to meet the assessment. Mr Woodings has to date, successfully challenged notices of assessment issued by the Deputy Commissioner of Taxation in the Federal Court.⁸⁰

5.14 Further, once the shares in WA Bell companies are transferred to the Authority, taxation crystallises. Mr Woodings said clause 22 will have the effect of causing:

⁷⁵ Submission 5 from Mr Garry Trevor, Official Liquidator, BGNV, 1 October 2015, p 22.

⁷⁶ Supplementary Explanatory Memorandum, p 1.

⁷⁷ Ibid.

⁷⁸ The group was formed for income tax purposes from 1 July 2002 according to Submission 8 from Hon Michael Mischin MLC, Attorney General and Hon Dr Mike Nahan MLA, Treasurer, 5 October 2015, p 43.

⁷⁹ ALJ. Woodings, Response to Questions, 21 October 2015, p 1.

⁸⁰ David Hargreaves, Senior Assistant State Solicitor, State Solicitor's Office, letter, 26 October 2015, p 3.

all of the WA Bell Companies that are members of the tax consolidated group of which TBGL is the head company to exit the group. This is because the WA Bell Companies will no longer be wholly-owned subsidiaries of TBGL. They will all have become wholly owned subsidiaries of the Authority. Therefore, they will not be eligible to be subsidiary members of the tax consolidated group...

*This would be likely to result in significant capital gains being made by TBGL as head company of its tax consolidated group and/or income tax liabilities arising for one or more of the Bell Group Companies (whether or not WA Bell Companies) as a result of not having access to any deductions or carry forward tax losses of the TBGL tax consolidated group.*⁸¹

- 5.15 On the question of the Commonwealth's capacity to recover tax in a liquidation, Mr Pettit is of the view that the Bill does not '*purport to affect the capacity of the ATO to recoup tax liabilities or to discriminate against the ATO.*'⁸²
- 5.16 In the time available, the Committee has been unable to identify whether there are any inconsistencies between the Bill and Commonwealth taxation law. The Committee notes that the proposed amendments to the Bill make it consistent with the operation of the Commonwealth taxation laws while minimising the impact of those amendments on the attainment of the overall objectives of the Bill.

Committee comment

- 5.17 Mr Pettit SC's opinion reflects the comprehensive way in which Part 1.1A of the *Corporations Act 2001* endeavours to overcome inconsistencies between a State or Territory law which may otherwise attract the intervention of section 109 of the *Commonwealth Constitution*. This is illustrated in the remarks of Barrett J in *HIH Casualty and General Insurance Ltd v Building Insurers' Guarantee Corporation*, where His Honour stated:

A Commonwealth law cannot cut across the Constitution by attempting to declare valid that which s.109 makes invalid⁸³...But it can so define and mould its own operation as to forestall inconsistency of the kind with which s.109 is concerned. Section 5F of

⁸¹ ALJ. Woodings, Response to Questions, 21 October 2015, p 1.

⁸² Ken Pettit SC, Opinion, 20 October 2015, paragraph 81.

⁸³ *University of Wollongong v Metwally* (1984) 158 CLR 447.

*the Corporations Act is a defining and moulding provision of this kind.*⁸⁴[Committee emphasis]

THE DOCTRINE OF SEPARATION OF POWERS AND JUDICIAL REVIEW

Separation of powers

- 5.18 The doctrine of the separation of powers provides for the division of responsibilities between the legislative, executive and judicial arms of government. It has been recognised that certain laws of a State may be invalid if they impair a State Court's judicial independence and integrity, thereby infringing this doctrine.⁸⁵
- 5.19 Mr Pettit SC expressed the view the Bill does not interfere with the State's or the Commonwealth's judiciary or judicial processes. He stated:

*In my opinion, there is little risk that cl 68 of the Bill unconstitutionally interferes with any outcome of the judicial process or with judicial independence...the Bill has affected the manner in which creditors may prove debts in the winding up of WA Bell Companies, and gives statutory guidance for the manner in which that winding up is to be conducted. That has the effect that no Court will be involved in the winding up or distributions under it. However, those aspects of the Bill effect no unconstitutional interference with judicial power.*⁸⁶

Judicial review

- 5.20 The courts have the power to judicially review administrative action to ensure compliance with the requirements contained in legislation, which will determine whether an administrator has failed to follow a statute by committing a 'jurisdictional error'.
- 5.21 A jurisdictional error occurs if a decision maker makes a decision outside the limits of the functions and powers conferred on him or her by an Act of the Parliament or does something which he or she lacks the power to do.⁸⁷
- 5.22 Jurisdictional error therefore defines the limits of legislative, executive and judicial power at federal and State levels. It describes a limitation on Commonwealth and

⁸⁴ [2003] NSWSC 1083 at paragraph 80. See also Submission 8 from Hon Michael Misichin MLC, Attorney General and Hon Dr Mike Nahan MLA, Treasurer, 5 October 2015, pp 81-83.

⁸⁵ Ken Pettit SC, Opinion, 20 October 2015, paragraph 84.

⁸⁶ Ibid, paragraph 88.

⁸⁷ *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, at paragraph 167.

State legislative power because it is not possible for any legislation to deny jurisdiction to the High Court of Australia or the State Supreme courts.

5.23 Mr Pettit SC described jurisdictional error as follows:

*The High Court and the Supreme Courts necessarily have jurisdiction to determine whether an administrator has so failed to follow a statute that he or she has made a “jurisdictional error”, i.e., an error of such important departure from statute that its consequences must be set aside.*⁸⁸

5.24 This determination is made after a judicial review of the actions of that administrator.

5.25 The Committee has covered the legal principles governing judicial review in paragraphs 7.128 to 7.129.

5.26 Mr Pettit SC also commented on the Bill’s provision for judicial review and ‘remedies’ as follows:

- While clause 68(4) of the Bill enables the full range of remedies to still be available despite the terms of clause 68(1) to (3), there is a question over the practical ability to apply for them. This is because of the restrictions in other clauses, such as those preventing reports and recommendations being invalid despite a failure to comply with a mandatory requirement and the absolute discretion in decision making provided for in clause 33(3).⁸⁹
- If the Bill is effective in formally permitting judicial review, on the one hand, but removing the usual bases for establishing such error, the result will be that judicial review is practically excluded.⁹⁰
- Clause 62 may have the effect of preventing any judicial review whatsoever due to it providing that the omission (which includes the omission of any act, matter or thing under or for the purposes of the Bill) is not to be regarded as placing any person in breach of any law of the State.⁹¹

Committee comment

5.27 The Committee agrees with the opinion of Mr Pettit SC that, despite clause 68(4) permitting judicial review for jurisdictional error, there may be practical difficulties in applying for such relief for the reasons set out in paragraph 5.26.

⁸⁸ Ken Pettit SC, Opinion, 20 October 2015, paragraph 94.

⁸⁹ Ibid, paragraph 99.

⁹⁰ Ibid, paragraph 92.

⁹¹ Ken Pettit SC, Opinion, 20 October 2015, paragraph 133.

- 5.28 There may be scope for an application for judicial review should the Authority fail to provide a draft report, pursuant to clause 32(3), to a person who has given particulars of a liability under clause 30.⁹² This is because the terms of clause 32 make it a mandatory step before the Authority can finalise its determination of property and liabilities and make recommendations to the responsible Minister and the clause does not have a provision of the type found in clauses 34(4), 35(8) and 36(9).⁹³
- 5.29 However, there is no timeframe for the provision of a draft report and no requirement for any amount to be paid by a determination of the Governor. Accordingly, it may be difficult for the person to know exactly when such a failure occurred upon which to base an application for judicial review.
- 5.30 To provide greater certainty and overcome this difficulty, the Bill should provide a timeframe within which a draft report must be provided pursuant to clause 32(3). A recommendation to this effect has been made in paragraph 7.62.
- 5.31 Furthermore, any application for review for jurisdictional error on the basis of a failure to follow a procedural step such as that contained in clause 32(3) may face another obstacle. Regardless of the mandatory requirements to be followed by the Authority, the Governor is the final decision maker whose discretion is not fettered by the Bill in any way.
- 5.32 In the Committee's view, the practical constraints in the Bill on the ability to apply for relief for jurisdictional error may operate to practically exclude that basis for relief. This may raise a question over whether the Bill could be subject to a legal challenge on this basis.

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).

CONCLUSION

- 5.33 It is not possible to predict with absolute certainty the prospects of success of any challenge to the validity of the Bill on whether it infringes the *Commonwealth Constitution*. The Courts respond to different legislative scenarios. As has been recognised, the Bill represents a response to a unique and extraordinary set of circumstances.⁹⁴

⁹² See Further Supplementary Submission B from Hon Michael Mischin MLC, Attorney General and Hon Dr Mike Nahan MLA, Treasurer, 23 October 2015, p 8.

⁹³ Ken Pettit SC, Opinion, 20 October 2015, paragraph 100.

⁹⁴ Hon Michael Mischin MLC, Attorney General, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 11 August 2015, p 4962.

CHAPTER 6

TRANSPARENCY ISSUES WITH THE BILL

LACK OF REASONS

- 6.1 Provisions in the Bill repeatedly provide that reasons need not be given for decisions. The Bill:
- contains no requirement that a draft report provided pursuant to clause 32(3) contain reasons
 - at clauses 35(3) and 36(6), provides that recommendations by the Authority with respect to liabilities of WA Bell Companies and with respect to funding and indemnities need not contain reasons
 - at clause 37A(4) provides that a determination by the Governor of an amount to be paid to, or property to be transferred to or vested in, a person need not contain reasons.
- 6.2 The Committee notes that the Western Australian Ombudsman's Guidelines on the giving of reasons for administrative decisions states the following benefits for giving reasons for decisions:
- more public confidence in the decision
 - more consistency in decision-making
 - fairness and transparency in decision-making.⁹⁵
- 6.3 These guidelines also state that '[g]iving reasons also demonstrates transparency, accountability and quality of decision-making'.⁹⁶
- 6.4 There is no general rule however, at common law, or principle of procedural fairness, that requires reasons (adequate or otherwise) to be given for administrative decisions.⁹⁷

⁹⁵ Ombudsman Western Australia, Guidelines, *Giving reasons for decisions*, July 2009, p 1. Available at: <http://www.ombudsman.wa.gov.au/Publications/Documents/guidelines/Giving-reasons-for-decisions.pdf>. Viewed 23 October 2015.

⁹⁶ Ibid.

6.5 Unless a statute, either expressly or by necessary implication, requires reasons to be given, an application for judicial review to the Supreme Court of such a decision cannot encompass a request for an order requiring the decision-maker to give reasons for the decision.

6.6 The Law Council of Australia, in its submission, stated:

*There is no requirement of transparency in the process in that neither the Authority's recommendation nor the Governor's determination need contain reasons (sections 35(3), 36(6) and 37A(4)).*⁹⁸

6.7 The Western Australian Bar Association also expressed concerns about the lack of the requirement to provide reasons.⁹⁹

6.8 The Committee notes the lack of a requirement for reasons is one of a number of measures in the Bill designed to 'protect against the possibility of challenge by litigation'.¹⁰⁰ In their submission, the Attorney General and the Treasurer stated:

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.

*An obligation to supply reasons creates the risk of extensive litigation as to the adequacy of those reasons, and the exposed process of reasoning, which is inimical to the policy of the Bill.*¹⁰¹

⁹⁷ Per Gibbs CJ in *Public Service Board of New South Wales v Osmond* [1986] 159 CLR 656 at 662. See also Groves, Matthew, *Reviewing Reasons for Administrative Decisions: Wingfoot Australia Partners Pty Ltd v Kocak*, Sydney Law Review, volume 35, p 627 and Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 66, *Supreme Court Amendment Rules 2013*, 24 October 2013, which contains an overview of the relevant law. On the recommendation of that Committee, the Legislative Council disallowed the Supreme Court Amendment Rules 2013 which would have prescribed that an applicant may apply to the Supreme Court for an order requiring an administrative decision maker to give reasons. See also Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 93, *Review of Planning and Development (Development Assessment Panels) Regulations 2011*, 8 September 2015, p 77.

⁹⁸ Submission 6 from Law Council of Australia, 2 October 2015, p 4. See also Ms Victoria Butler, Deputy Chair, Insolvency and Reconstruction Law Committee of the Business Law Section, Law Council of Australia, *Transcript of Evidence*, 6 October 2015, p 3; Submission 5 from Mr Garry Trevor, Official Liquidator, Bell Group NV, 1 October 2015, p 4; Mr Hugh McLernon, Director, WA Glendinning and Associates Pty Ltd, *Transcript of Evidence*, 14 October 2015, p 11.

⁹⁹ Western Australian Bar Association, Media Release, 3 June 2015, p 1.

¹⁰⁰ Submission 8 from Hon Michael Mischin MLC, Attorney General and Hon Dr Mike Nahan MLA, Treasurer, 5 October 2015, p 71.

¹⁰¹ *Ibid*, p 73.

*There is, however, no specific obligation to provide reasons in relation to determination of a proof under Part 5.6 Division 6 of the Corporations Act.*¹⁰²

RECOMMENDATIONS AND DETERMINATIONS NOT PUBLIC

6.9 The Bill does not require any draft reports, recommendations by the Authority or determinations by the Governor to be made public. However, this does not preclude persons provided with this information from making them public.¹⁰³

6.10 In their joint submission to the Committee, the Attorney General and the Treasurer stated:

*There is no requirement in the Bill for the Governor's determination to be made public. The amount determined to be payable and paid to a creditor is a matter which the creditor may or may not choose to make public according to its own interests.*¹⁰⁴

6.11 They also stated, in their further supplementary submission:

*It is not intended that the report of the Authority under clause 34, submitted by the Minister to the Governor under clause 37, will be a public document.*¹⁰⁵

6.12 The Committee makes the following recommendation.

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.

¹⁰² Submission 8 from Hon Michael Mischin MLC, Attorney General and Hon Dr Mike Nahan MLA, Treasurer, 5 October 2015, p 73.

¹⁰³ Ibid, pp 68 and 79. See also Further Supplementary Submission B of Hon Michael Mischin MLC, Attorney General and Hon Dr Mike Nahan MLA, Treasurer, 23 October 2015, p 8.

¹⁰⁴ Submission 8 from Hon Michael Mischin MLC, Attorney General and Hon Dr Mike Nahan MLA, Treasurer, 5 October 2015, p 79.

¹⁰⁵ Further Supplementary Submission B from Hon Michael Mischin MLC, Attorney General and Hon Dr Mike Nahan MLA, Treasurer, 23 October 2015, p 8.

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.

6.13 The Committee makes the following further recommendation.

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.

CHAPTER 7

SPECIFIC CLAUSES IN THE BILL

CLAUSE 3 OF THE BILL — DEFINITION OF LIQUIDATOR

7.1 Clause 3(1) of the Bill defines ‘liquidator’ as follows:

*liquidator includes a provisional liquidator appointed to, and holding office with respect to, a WA Bell Company immediately before the transfer day;*¹⁰⁶

7.2 In his opinion, Mr Pettit SC states that this definition is not clear as it does not address the meaning of ‘liquidator’ in parallel terms (to provisional liquidator) and recommends that it is amended to read:

*Liquidator means a liquidator of a WA Bell Company and includes a provisional liquidator of a WA Bell Company.*¹⁰⁷

7.3 The Committee agrees with Mr Pettit SC and accordingly makes the following recommendation.

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

CLAUSE 4(A) OF THE BILL

7.4 As stated in paragraph 2.11, clause 4(a) of the Bill provides:

¹⁰⁶ Amendments proposed in the Supplementary Notice Paper, if agreed to, will amend the definition to state:

liquidator includes a provisional liquidator appointed to, and holding office with respect to, a WA Bell Company immediately before —

(a) for a WA Bell Company that was registered immediately before the transfer day — the transfer day; and

(b) for a reinstated WA Bell Company — the day on which the company was deregistered;

¹⁰⁷ Ken Pettit SC, Opinion, 20 October 2015, paragraph 158.

The objects of this Act are —

*(a) to provide a mechanism to resolve, without litigation, disputes which have arisen in relation to the distribution of funds (the **Bell litigation funds**) received by the liquidator of TBGL and certain of its subsidiaries (the **Bell group of companies**) as a consequence of the Bell litigation and the settlement of it in 2013;*

- 7.5 In his opinion, Mr Pettit SC states that the Bill does not attempt to resolve disputes which have arisen in respect of distribution but by-passes them and that clause 4(a) would more accurately reflect this by stating ‘*to provide a mechanism, without litigation, for the distribution...*’¹⁰⁸
- 7.6 The Committee generally agrees with Mr Pettit SC but prefers the words ‘that avoids litigation’ as this is consistent with what is stated in clause 4(h)). Accordingly the Committee makes the following recommendation.

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

CLAUSE 4(D), (E) AND (F) OF THE BILL

- 7.7 As stated in paragraph 2.11, clauses 4(d), (e) and (f) of the Bill provide:

The objects of this Act are -

- (d) to reflect the circumstance that without the funding mentioned in paragraph (c), the Bell litigation funds would not exist and the creditors of the Bell group of companies would have received no (or only nominal) dividends in the liquidation of those companies;*
- (e) to make reasonable provision for the distribution of the property of the WA Bell Companies having regard to the uncertainties existing as to the nature and extent of that property;*

¹⁰⁸

Ken Pettit SC, Opinion, 20 October 2015, paragraph 160.

(f) to make reasonable provision for the satisfaction of liabilities owed to creditors having regard to the uncertainties existing as to the nature and extent of those liabilities;

7.8 The Committee notes that:

- The matters the subject of clauses 4(d) and (e) are, currently, yet to be determined and are the subject of legal proceedings which the enactment of the Bill will, by clause 67, stay
- The Governor will assume the ultimate decision making role in any distribution of the property of WA Bell Companies.

7.9 Also, in his opinion, Mr Pettit SC states as follows:

"Uncertainty" in property or liabilities

Clause 4(e) refers to the "uncertainties existing as to the nature and extent of" the property of the WA Bell Companies as a fact relevant to the distribution of that property. However, at the point when a distribution is to be made, the property should be the subject of the Authority's report under cl 33, and made certain.

Clause 4(f) similarly refers to uncertainties about the liabilities. However, the liabilities will be declared under cl 33.

By clause 33(3), the Authority has absolute discretion in determining the property and liability, but that provision cannot render the property or the liabilities "uncertain" for the purposes of cl 4. In any event, despite the discretion, cl 34 refers to the property and liabilities "as finally determined" by the Authority. Any earlier uncertainty is irrelevant.

It is not clear to me what the draftsman intended by these aspects of cll 4(e) and 4(f).¹⁰⁹

7.10 Due to this lack of clarity, the Committee makes the following recommendation.

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.

¹⁰⁹

Ken Pettit SC, Opinion, 20 October 2015, paragraph 163-164.

CLAUSE 4(G) OF THE BILL

7.11 As stated in paragraph 2.11, clause 4(g) of the Bill provides:

(g) to distribute the Bell litigation funds generally in accordance with the intentions of the liquidator and the creditors who funded the Bell litigation as set out in agreements made before the enactment of this Act;

7.12 In his opinion, Mr Pettit SC states:

It is not clear what policy or object is served by framing cl 4(g) in terms of the intentions of the liquidator and funding creditors as set out in the written agreements, rather than simply in terms of the relevant passages of the written agreements in question.

The actual intention of the liquidator and funding creditors was to apply under s 564, but such an application is not to be made.¹¹⁰

7.13 The Committee agrees with Mr Pettit SC and accordingly draws this potential conflict to the attention of the Legislative Council.

7.14 The Committee makes the following recommendation.

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.

CLAUSE 6 OF THE BILL — EXTRATERRITORIAL OPERATION

7.15 Clause 6 provides:

6. Extraterritorial operation

It is the intention of the Parliament that this Act should, so far as possible, operate to the full extent of the extraterritorial legislative power of the State.

7.16 Western Australia has power to legislate extraterritorially under section 2 of the *Australia Act 1986* (Cth).¹¹¹ However, there is a presumption that legislation does not operate extraterritorially unless it is expressly provided by the legislation. This presumption is rebutted by clause 6.

¹¹⁰ Ken Pettit SC, Opinion, 20 October 2015, paragraph 167-168.

¹¹¹ See Submission 8 from Hon Michael Mischin MLC, Attorney General and Hon Dr Mike Nahan MLA, Treasurer, 5 October 2015, pp 46 and 57.

7.17 For extraterritoriality to be valid, Western Australia must have some nexus with the subject of the legislation. This is provided by the WA Bell Companies having been registered in Western Australia.

7.18 The Committee notes, for the information of the Legislative Council, the questions which have been raised in evidence about the territorial reach of the Bill.¹¹²

CLAUSE 8(4) OF THE BILL — APPOINTMENT OF THE ADMINISTRATOR

7.19 Clause 8(4) provides:

8. Administrator appointed

(4) The Minister may appoint a person to the office.

7.20 The Bill does not contain any criteria to govern matters such as the qualifications and experience required by the Administrator. The Government informed the Committee no criteria will be specified. It added:

The nature of the role to be undertaken is such that it can be undertaken by a variety of qualified persons, with experience in public administration, senior management, accounting and insolvency administration or the law.

It may well be difficult to attract a person to assume the role of Administrator given the unfortunate history of personal attacks upon the Liquidator and his integrity, and actions by some creditors. The Government is concerned not to adopt prescriptive criteria which might eliminate suitable but not obvious candidates or encourage the appointment of obvious but not suitable candidates. While experience in the administration of companies in liquidation, or of the process of liquidation, in some capacity may be desirable, it is not definitive, given the nature of the functions to be performed and the powers to be exercised by the Administrator.¹¹³

7.21 Given the importance of the Administrator to the achievement of the purposes of the Bill and the complexities of the issues involved, the Committee is of the view that the Administrator must have relevant qualifications and/or experience.

7.22 The Committee therefore makes the following recommendation.

¹¹² Submission 3 from Mr Neil Griffiths, Partner, Dentons UKMEA LLP for and on behalf of Mrs B. Stephenson, liquidator of Bell Group UK, 30 September 2015; private submission.

¹¹³ Submission 8 from Hon Michael Mischin MLC, Attorney General and Hon Dr Mike Nahan MLA, Treasurer, 5 October 2015, pp 48-49.

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.

CLAUSE 12 OF THE BILL — DELEGATION OF AUTHORITY’S POWERS AND DUTIES

7.23 Clause 12 provides:

12. Delegation

- (1) The Authority may, by instrument in writing, delegate to any person any of the powers or duties of the Authority under this Act or any other written law, other than this power of delegation.*
- (2) A person exercising a power or performing a duty that has been delegated to the person under this section is taken to do so in accordance with the terms of the delegation, unless the contrary is shown.*
- (3) Nothing in this section limits the ability of the Authority to perform a function through an employee or agent.*

7.24 The Committee notes the broad nature of this power of delegation and the lack of criteria or guidance about the identity, qualification or experience of the person to whom any of the powers of the Authority may be delegated.

7.25 This raises the following FLP.

Does the Bill have sufficient regard to the institution of Parliament?

12. Does the Bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?¹¹⁴

7.26 The Committee makes the following recommendation.

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.

¹¹⁴

Appendix 4, Item 12.

CLAUSES 22 AND 25 OF THE BILL — POSITION OF BELL GROUP UK AND THE 2014 SETTLEMENT UNDER THE BILL

- 7.27 BGUK is a wholly owned subsidiary of The Bell Group Ltd. It is a company incorporated in the United Kingdom to hold various other United Kingdom and European investment assets through various subsidiary companies.¹¹⁵
- 7.28 The Committee received evidence from the BGUK liquidator that clauses 22(1)(c), 22(4) and 25(4) of the Bill¹¹⁶ interfere with its established and undisputed rights under the 2014 Settlement and the Bill's effect will be to transfer BGUK's property to the Authority, thus disturbing the 2014 Settlement.¹¹⁷
- 7.29 BGUK is of the view that the combined effect of clauses 22(1)(c), 22(4) and 25(4) deprives BGUK of '*any trust or other interest in its share of the Bell litigation funds under the 2014 Settlement.*'¹¹⁸
- 7.30 In a joint submission, the Attorney General and the Treasurer said the Government understands BGUK's concern because it '*allowed Settlement Funds attributable to it pursuant to the Settlement Deed to remain with the Liquidator of the WA Bell Companies.*'¹¹⁹
- 7.31 Mr David Hargreaves, Senior Assistant State Solicitor, State Solicitor's Office, confirmed Mr Pettit SC's view that the 2014 Settlement Deed '*stands outside the Bill*'¹²⁰ because it is not an agreement voided by clause 26(1). Instead, clauses 27(4) and (5) '*ensure that, upon dissolution of the WA Bell Companies, the Settlement Deed remains enforceable.*'¹²¹

¹¹⁵ Further Supplementary Submission B from the Hon Michael Mischin MLC, Attorney General and Hon Dr Mike Nahan MLA, Treasurer, 23 October 2015, p 3.

¹¹⁶ Collectively these state 22(1)(c) "*At the beginning of the transfer day the following are transferred to, and vested in, the Authority by force of this section — (c) 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.*" 22(4) states "*All property transferred to the Authority under this section vests absolutely in the Authority freed from any encumbrance, trust, equity or interest (of any kind and however arising) to which it was subject immediately before so vesting.*" 25(4) states "*If, by section 22, property is freed from an encumbrance, trust, equity or interest on being transferred to, and vested in, the Authority, that encumbrance, trust, equity or interest may be proved as a liability in accordance with Part 4 Division 1.*"

¹¹⁷ Submission 3 from Ms J.B. Stephenson, 30 September 2015.

¹¹⁸ Ibid, p 4.

¹¹⁹ Further Supplementary Submission B from the Hon Michael Mischin MLC, Attorney General and Hon Dr Mike Nahan MLA, Treasurer, 23 October 2015, p 3.

¹²⁰ Ken Pettit SC, Opinion, 20 October 2015, paragraph 221.

¹²¹ David Hargreaves, Senior Assistant State Solicitor, State Solicitor's Office, letter, 26 October 2015, p 5.

7.32 The Further Supplementary Submission states:

*The Settlement Deed remains enforceable, together with any rights or entitlements owed to, or by, any party not otherwise affected by the Bill, such as BGUK.*¹²²

7.33 Clause 22(1)(c) will then cause funds currently held by the liquidator on trust for BGUK, to transfer to the Authority on transfer day.¹²³ BGUK ‘therefore is not adversely affected by the operation of clauses 22 and 25 of the Bill.’¹²⁴

7.34 Mr Hargreaves said:

*We understand the UK Treasury may make a claim upon BGUK, making it possible some funds received by BGUK may pass to the UK Treasury. Any such claim relates to a debt owed by BGUK to Bell International Investments Limited, which was deregistered more than 20 years ago and its assets vested in the UK crown. Whatever the position pursuant to the Bill, it is unlikely the claim will result in action being brought by the UK Treasury.*¹²⁵

7.35 The joint submission from the Attorney General and the Treasurer states that:

*In any event, but for the potential interest of the English Crown in the winding up of BGUK, a substantial portion of the assets in the hands of the BGUK liquidator will flow back to the WA Bell Companies, by reason of debts owed by BGUK to BGF.*¹²⁶

CLAUSES 26 AND 48 TO 50 OF THE BILL — RETROSPECTIVITY

7.36 Clause 26(1) retrospectively voids 15 agreements.

7.37 Clauses 48 to 50 provide that a person must not enter into or carry out a scheme¹²⁷ for the purposes of (amongst other things) defeating the Act. This carries a significant penalty.¹²⁸ Clause 48(3) provides:

¹²² Further Supplementary Submission B from the Hon Michael Mischin MLC, Attorney General and Hon Dr Mike Nahan MLA, Treasurer, 23 October 2015, p 3.

¹²³ David Hargreaves, Senior Assistant State Solicitor, State Solicitor's Office, letter, 26 October 2015, p 5.

¹²⁴ Further Supplementary Submission B from the Hon Michael Mischin MLC, Attorney General and Hon Dr Mike Nahan MLA, Treasurer, 23 October 2015, p 3.

¹²⁵ David Hargreaves, Senior Assistant State Solicitor, State Solicitor's Office, letter, 26 October 2015, p 6.

¹²⁶ Further Supplementary Submission B from the Hon Michael Mischin MLC, Attorney General and Hon Dr Mike Nahan MLA, Treasurer, 23 October 2015, p 3.

¹²⁷ Defined as (a) any agreement, promise or undertaking, whether express or implied and whether or not enforceable or intended to be enforceable by a legal proceeding; or (b) any plan, proposal, action course of action or course of conduct.

(3) *This section applies to a scheme —*

- (a) *whether the scheme is entered into or made before or after the enactment of this Act; and*
- (b) *even if the purpose referred to in subsection (2) was not the only or dominant purpose for the scheme, so long as it was a substantial purpose.*

7.38 These clauses concern matters that will have been undertaken before the enactment of the Bill and, accordingly, raise the following FLP.

Does the Bill have sufficient regard to the rights and liberties of individuals?

*7. Does the Bill adversely affect rights and liberties, or impose obligations, retrospectively?*¹²⁹

General principles – retrospectivity

7.39 The classic statement regarding retrospective legislation was enunciated by Dixon CJ in *Maxwell v Murphy*:

*The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events.*¹³⁰

7.40 Retrospective laws offend against the general principle that legislation intended to regulate human conduct ought to deal with future acts and ought not to change the character of past transactions carried on upon the faith of the then existing law.¹³¹

7.41 There is a presumption that Parliament intends all statutes, except those which are declaratory¹³² or related to matters of procedure, to operate prospectively and not

¹²⁸ A fine of \$200 000 or imprisonment for 5 years, or both.

¹²⁹ Appendix 4, Item 7.

¹³⁰ (1957) 96 CLR 261 at 267.

¹³¹ GC Thornton, *Legislative Drafting*, London, Butterworths, 1996, p 117.

¹³² Declaratory Acts are an exception to the presumption because they are not regarded as altering the law, but are merely enacted, if there is doubt, to explain and declare the law; they are sometimes passed to set aside what Parliament deems a judicial error, whether in a statement of the common law or in the interpretation of statutes.

retrospectively unless the language used plainly manifests in express terms or by clear implication, a contrary intention.

7.42 In 2001 as stated by the Committee in its 2nd Report:

*Legally an Act of Parliament is presumed not to have retrospective application. This common law rule evolved out of a consideration that a statute changing the law ought not to be understood as applying to facts or events that have already occurred in such a way as to affect rights or liabilities which the law had defined by reference to the past events. However, this presumption can be easily displaced by some clear statement to the contrary, such as the clauses in proposed Part 2. [i.e. in an Act of Parliament]*¹³³

7.43 In its 47th Report, the Standing Committee on Uniform Legislation and Statutes Review also stated:

It is an important principle of rule of law that legislation should not have retrospective effect: a citizen is entitled to know the legislation impacting on decision, actions or inactions at the time that they occur.

*The Legislative Council has a long history of passing legislation with retrospective effect only when a cogent case has been made for that necessity, which case must address any prospect of adverse affect on persons.*¹³⁴

7.44 That committee has also reported previously on the serious nature of criminal liability operating retrospectively and recognises that Parliament must express a clear and unambiguous intention to impose such a liability, which the Parliament has the power to do, if the circumstances or policy require it.¹³⁵

7.45 As stated in paragraphs 4.19 to 4.21, Part 3, which includes clause 26, comes into effect by proclamation and clause 48 at 12 noon on the day before the day the Bill was introduced into the Legislative Assembly.

¹³³ Standing Committee on Legislation, *Co-operative Schemes (Administrative Actions) Bill 2001 and the Agriculture and Veterinary Chemicals (Western Australia) Amendment Bill 2001*, Report 2, June 2001, p 25.

¹³⁴ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 47, *Petroleum and Energy Legislation Amendment Bill 2009*, 22 April 2010, p 26.

¹³⁵ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 78, *Classification (Publication, Films and Computer Games) Enforcement Amendment Bill 2012*, 6 November 2012, p 9.

Clause 26

- 7.46 In their submission, the Attorney General and the Treasurer explained the retrospective voiding of the agreements set out in clause 26 as follows:

Under each of these indemnity agreements one or more of the Liquidators of the Bell Group companies, including of BGNV and BGUK, was exposed to a liability in connection with the undertaking of an act for the purpose of the administration of their respective companies, or for the purpose of conducting proceedings in a court.

Consequently, in undertaking that act, they might incur a liability for costs (their own or other parties) or a liability to be sued, or both. Under each of these indemnity agreements someone may be sued, and call upon an indemnity in relation to the matter upon which they are sued, exposing one or more Indemnifying Creditors to a claim; or, someone might make a claim under which one or other of the parties to the agreement might make a claim against another party to the agreement.

In relation to the agreements between the creditors, a number of them raise issues as between the creditors in relation to the distribution of funds, which are the subject of present or prospective proceedings as part of the Bell distribution proceedings.

Each of the agreements is, accordingly, a current or prospective source of litigation between the Liquidator and Indemnifying Creditors, between the Indemnifying Creditors, or between any of those parties and some other person or persons.

Each of these agreements is an instrument which in its terms is explicitly and exclusively governed by the laws of Western Australia. Consequently, it is within the competence of the Parliament to determine the validity, for the purpose of the laws of Western Australia, of those instruments.

To foreclose the possibility of further litigation in relation to those instruments, it is expedient to simply terminate them. That does not mean that they are irrelevant for the purposes of the administration of the Bill. They are relevant considerations as objects of the Bill (by clause 4(g)) and in relation to the determination of liabilities and the making of recommendations with respect to the distribution of the Fund and property (clause 35(2)(a) and 36(3)(a) and (b)(ii)).

To the extent that such litigation would represent, in form or substance, a claim against the Bell Group companies' funds being agitated by a different means those will be, in any event, claims against the Fund.

The instruments to be avoided, and in particular the BGF AFI and the TBGL AFI, record the basis upon which the Indemnifying Creditors provided funding to the Liquidator for the conduct of the Bell proceedings. In the absence of an order under s. 564 of the Corporations Act, those agreements provide those monies are repayable by the Liquidator as advances to the Liquidator.

To foreclose any argument that the avoidance of these agreements results in those advances no longer being repayable and so claimable against the Fund, clause 26(3) preserves those claims as claims to be proved in accordance with Part 4 Division 1.¹³⁶

Clauses 48 to 50

7.47 In its submission, the Law Council of Australia criticised clauses 48 to 50 as providing what they regarded as ‘*potential retrospective criminality by creating offences that can be committed before the law is in force.*’¹³⁷ It regarded these clauses as retrospective to the Bill becoming law and a coercive mechanism to force certain behaviours before the Bill has been passed and may never be passed.¹³⁸

7.48 In the Second Reading Speech, the Attorney General stated:

*The bill does not criminalise conduct committed before the bill was introduced.*¹³⁹

7.49 The Attorney General and the Treasurer also submitted:

the Bill imposes no retrospective liability in the correctly construed sense of imposing a liability upon persons as a result of their engaging in conduct when they did not know that engaging in the

¹³⁶ Submission 8 from Hon Michael Mischin MLC, Attorney General and Hon Dr Mike Nahan MLA, Treasurer, 5 October 2015, pp 62-63.

¹³⁷ Submission 6 from Law Council of Australia, 2 October 2015, p 2. See also Mrs Barbara Gordon, Lecturer, Law School, University of Western Australia, *Transcript of Evidence*, 6 October 2015, p 6; Submission 2 from The Law Society of Western Australia, 25 September 2015, attaching letter from The Law Society of Western Australia to Hon Dr Mike Nahan MLA, Treasurer, 3 June 2015, p 1.

¹³⁸ Ms Victoria Butler, Deputy Chair (WA), Insolvency and Reconstruction Law Committee of the Business Law Section, Law Council of Australia and Mrs Barbara Gordon, Lecturer, Law School, University of Western Australia, *Transcript of Evidence*, 6 October 2015, pp 3-4 and 6.

¹³⁹ Hon Michael Mischin MLC, Attorney General, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 11 August 2015, p 4966.

*conduct would, subsequently, result in such a liability. Clause 48 is only activated when persons engage in conduct after the beginning of notice of the Bill, and for the purpose of defeating, et cetera, its operation. Consequently, by the nature of the offence, a putative offender would have the opportunity to tailor their conduct so as not to offend clause 48.*¹⁴⁰

Committee comment

7.50 The Committee is of the view that clauses 26 and 48 to 50 operate retrospectively. The evidence of the Government differs in this respect. It is clear on the Government's evidence that clauses 26 and 48 to 50 are consistent with the Government's policy intent, with respect to clause 26, to prevent any legal action being taken with respect to the indemnities covered by the listed agreements and, with respect to clauses 48 to 50, to prevent any action which may defeat the purpose of the Bill.

7.51 The Committee refers the Legislative Council to its recommendation 2 regarding clause 2 of the Bill.

CLAUSE 30 OF THE BILL — PROVING LIABILITIES

7.52 Clause 30 provides:

30. Call for proof of liabilities

(1) The Authority must give to each person whom it reasonably believes to have been a creditor of a WA Bell Company immediately before the transfer day a notice requiring the person to give to the Authority, within 30 days after the date of that notice, full particulars of all liabilities of the company in relation to the person.

(2) The Authority must, as soon as practicable after the transfer day, publish in a daily newspaper circulating in Australia a notice requiring any person who believes that they were a creditor of a WA Bell Company immediately before the transfer day to give to the Authority, within 30 days after the publication of that notice, full particulars of all liabilities of the company in relation to the person.

(3) The Authority must specify in a notice under subsection (1) or (2)

—

¹⁴⁰ Submission 8 from Hon Michael Mischin MLC, Attorney General and Hon Dr Mike Nahan MLA, Treasurer, 5 October 2015, pp 86-87.

(a) the manner in which a liability may be proved; or

*(b) how that manner may be ascertained.*¹⁴¹

7.53 Concerns were expressed in evidence to the Committee about how the call for proof of liabilities will come to attention of all creditors, including those outside Australia.

7.54 WA Glendinning submitted, when commenting on clause 30(2), that:

*There is simply no way that notice will come to the attention of anyone outside Australia.*¹⁴²

7.55 When the Committee asked the Government whether it believed notice will come to the attention of all potential creditors located outside of Australia within a timeframe allowing them to provide particulars of their claim, the Attorney General and the Treasurer responded as follows:

A list of creditors of the WA Bell Companies was prepared by the liquidators soon after those companies were placed in liquidation in the early 1990s. Subject to the following paragraph, the creditors of the WA Bell Companies are therefore known to the Liquidator. The majority of those creditors are resident in Australia.

ICWA is the only holder of bonds issued by the WA Bell Companies. Consequently, the "bondholders resident in other countries" referred to in paragraph 27 on page 5 of Schedule 7 of the WAG's submission, likely refers to the holders of bearer bonds issued by BGNV and guaranteed by TBGL. LDTC, on behalf of the BGNV bondholders, has lodged a proof of debt in the winding up of TBGL in respect of TBGL's guarantee obligations under the BGNV Trust Deeds. Since the BGNV Bonds are bearer bonds, the identity of the holders cannot be ascertained from any register maintained by the issuer. As such, the Government anticipates notice under clause 30(1) will be provided by the Authority to LDTC, on behalf of the BGNV bondholders, and LDTC will then be responsible for distributing any amount paid to it in accordance with Part 4, Division 4 of the Bill with respect to TBGL's guarantee

¹⁴¹ The Supplementary Notice Paper proposes to add a new clause 30(4) providing:

(4) Subsection (1) has effect in relation to a reinstated WA Bell Company as if references in it to the transfer day were references to the day on which the company was deregistered.

¹⁴² Submission 7 from WA Glendinning and Associates Pty Ltd, 4 October 2015, Schedule 7, p 35. See also Mr Hugh McLernon, Director, WA Glendinning and Associates Pty Ltd, *Transcript of Evidence*, 14 October 2015, p 4.

obligations, to those bondholders in accordance with the BGNV Trust Deeds. This process is consistent with the law currently in force and the provisions of the BGNV Trust Deeds.

The mechanism proposed in clause 30(1) and (2) of the Bill for notifying creditors of the requirement to lodge particulars of an amount claimed by them is in the Government's view more generous than that provided for in the Corporations Act. The Government is of the view those mechanisms are more than adequate to notify potential claimants.

*As a matter of prudence, the Authority may also advertise overseas in jurisdictions in which any of the WA Bell Companies conducted business.*¹⁴³

- 7.56 It is important that all necessary steps are made to bring to the attention of those who may have a claim to the proceeds of the Bell litigation the call by the Authority for proof of liabilities of WA Bell Companies. This is particularly important given the 30 day timeframe specific in clauses 30(1) and (2). Potential creditors located overseas may be at greater risk of not receiving notice.

- 7.57 Accordingly, the Committee makes the following recommendation.

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*.

CLAUSE 32 OF THE BILL

- 7.58 Clause 32 provides:

32. Authority must seek submissions from affected creditors

(1) The Authority must comply with this section before —

(a) finalising its determination of the property and liabilities of each WA Bell Company under section 33; and

(b) finalising the recommendations that it is to make to the Minister under sections 35 and 36.

¹⁴³ Further supplementary submission B of Hon Michael Mischin MLC, Attorney General and Hon Dr Mike Nahan MLA, Treasurer, 23 October 2015, pp 6-7.

- (2) *The Authority must prepare a document (a **draft report**) that sets out —*
- (a) *its preliminary determination of the property and liabilities of each WA Bell Company under section 33; and*
- (b) *the recommendations that it is proposing to make to the Minister under sections 35 and 36.*
- (3) *The Authority must provide the draft report to any person who gave particulars of a liability under section 30.*
- (4) *A person to whom a draft report is provided under subsection (3) may make a written submission to the Authority, within 14 days after receiving the draft report, in respect of any matter relating to that person arising out of the draft report.*

Clause 32(2)

- 7.59 In their Further Supplementary Submission the Attorney General and the Treasurer state:

*Clause 32 provides for a preliminary determination of the property and liabilities of each WA Bell Company under clause 33 and a report prepared by the Authority pursuant to clauses 35 and 36, to be provided to the creditors of the WA Bell Companies.*¹⁴⁴

- 7.60 While the operation of clause 32(2) does not appear to be confined to determinations of property and liabilities of WA Bell Companies as well as recommendations, with respect to specific persons, the Committee seeks clarification on this matter. This is for the purpose of determining whether those receiving draft reports will be able to obtain information relevant to all persons with respect to whom the Authority intends to make recommendations.

- 7.61 The Committee therefore makes the following recommendation.

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.

¹⁴⁴ Further Supplementary Submission B from Hon Michael Mischin MLC, Attorney General and Hon Dr Mike Nahan MLA, Treasurer, 23 October 2015, p 8.

Clause 32(3)

- 7.62 The Committee repeats what is stated in paragraphs 5.29 to 5.30 and makes the following recommendation.

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.

Clause 32(4)

- 7.63 The Committee received evidence that, while under the *Corporations Act 2001*, when proving their claims in a liquidation of a company, creditors may make submissions regarding the claims of other creditors, clause 32 only permits a person to make submissions on their own claims.¹⁴⁵

- 7.64 In their submission, the Attorney General and the Treasurer state:

*To mitigate risks in relation to disputes as to proofs which had not been admitted, and foreshadowed challenges to proofs which have already been admitted, the Government preferred to create a robust structure for the assessment of proofs within the framework of the Bill. It is anticipated that, in so doing, and in particular under clauses 30 and 32, principal creditors will make submissions not only as to the amount claimed by them to be owing, but why, having regard to the criteria for determination under the Bill, specific amounts should be paid to them.*¹⁴⁶

- 7.65 Mr Pettit SC is of the view that the wording of clause 32(4) does not exclude a person making a submission on a competing claim of another person. This is because clause 32(4) provides that a person may make a submission ‘*in respect of any matter relating to that person*’ and that a competing claim is a matter ‘*relating to the person*’.¹⁴⁷

- 7.66 The Committee makes the following recommendation.

¹⁴⁵ Submission 7 from WA Glendinning and Associates Pty Ltd, 4 October 2015, Schedule 7, pp 35-36.

¹⁴⁶ Submission 8 from Hon Michael Mischin MLC, Attorney General and Hon Dr Mike Nahan MLA, Treasurer, 5 October 2015, p 60.

¹⁴⁷ Opinion of Ken Pettit SC, 20 October 2015, paragraph 182.

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.

CLAUSES 36(1) AND (2) OF THE BILL

7.67 Clauses 36(1) and (2) provide:

36. Recommendations with respect to funding or indemnities

(1) *Subsection (2) applies with respect to a creditor of any kind of a WA Bell Company who, before the transfer day, provided funding for, or an indemnity against costs or liability in relation to, the Bell litigation. [Committee Emphasis]*

(2) *The Authority may recommend, in writing, to the Minister an amount to be paid to, or property to be transferred to or vested in the creditor (instead of or in addition to the payment of money to that creditor), as compensation for providing that funding or indemnity.*

7.68 The Committee notes the words ‘a creditor of any kind’ does not appear in section 564 of the *Corporations Act 2001*, which instead applies to a ‘creditor’.

7.69 One of the issues that arose during the inquiry was the meaning of these words and whether they were inserted in clause 36(1) for the purpose of overcoming any issues ICWA might face, in proceedings pursuant to section 564 of the *Corporations Act 2001*, arising from an allegation it is not a ‘creditor’ for the purposes of this provision.

7.70 The Committee received conflicting evidence regarding the status of ICWA as a funding creditor of the Bell litigation.

7.71 WA Glendinning, in a hearing before the Committee, stated:

Mr McLernon: The important thing is that when ICWA decided to fund, they did not fund the liquidator. There was an interposed entity. Because the bonds were held by LDTC...

...

ICWA advanced the money to LDTC and LDTC funded the liquidator, so it is the Funding Creditor in reality.

...

*Mr McLernon: they were a Funding Creditor, except that they overlooked the problem that, under 564, the court can make an order in favour of the creditor. The creditor is LDTC, which normally you would think, "So what? LDTC gets the money and pays it to ICWA." But the provision of the trust deed under which they operated said that any moneys they got effectively under a 564 order had to be paid to all the other creditors before it was paid to ICWA.*¹⁴⁸

- 7.72 ICWA holds a contrary view, advising the Committee that ‘*it did not advance funds for the litigation to the Law Debenture Trust Corporation plc*’ and that ‘*advances made by the Insurance Commission were made directly to the liquidators or third parties as requested by the liquidators.*’¹⁴⁹
- 7.73 The Attorney General and Treasurer, in response to a question from the Committee, confirmed that the words ‘*a creditor of any kind*’ were inserted into clause 36(1) to address:
- The issue whether ICWA can be regarded as an ‘*assisting creditor*’¹⁵⁰ for the purposes of section 564
 - The fact that LDTC could be regarded as the creditor for the purposes of receiving compensation for funding the Bell litigation.¹⁵¹
- 7.74 In his opinion, Mr Pettit SC suggested that the intention of clause 36(1) in overcoming any issue faced by ICWA could be supported by adding the words ‘*whether directly or indirectly in either case*’ to the end of the clause.¹⁵²
- 7.75 Hon Ken Travers MLC notes that this alters the existing law provided for by section 564 of the *Corporations Act* and implements a new regime.
- 7.76 The Committee generally agrees with the view of Mr Pettit SC but prefers to delete the words ‘*in either case*’ as they are implicit from the context. Accordingly, the Committee makes the following recommendation.

¹⁴⁸ Mr Hugh McLernon, Director, WA Glendinning and Associates Pty Ltd, *Transcript of Evidence*, 14 October 2015, p 7. See also Submission 5 from Mr Garry Trevor, Official Liquidator, Bell Group NV, 1 October 2015, pp 16-17.

¹⁴⁹ Mr Rod Whithear, Chief Executive, Insurance Commission of Western Australia, letter, 22 October 2015, p 1.

¹⁵⁰ See Submission 8 from Hon Michael Mischin MLC, Attorney General and Hon Dr Mike Nahan MLA, Treasurer, 5 October 2015, p 75.

¹⁵¹ Further Supplementary Submission B of Hon Michael Mischin MLC, Attorney General and Hon Dr Mike Nahan MLA, Treasurer, 23 October 2015, p 7.

¹⁵² Ken Pettit SC, Opinion, 20 October 2015, paragraph 200.

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

CLAUSES 33(1), 33(3), 34(1) AND 35(1) OF THE BILL — POOLING OF ASSETS

7.77 In a joint submission the Attorney General and the Treasurer said rather than ‘*separate companies, each with separate funds and legal obligations requiring separate administration, one pool of funds will be subject to the collective liabilities of all those companies.*’¹⁵³

7.78 However, in his opinion, Mr Pettit SC states:

Pooling of assets

The Bill does not expressly pool assets so as to meet liabilities from the pool, rather than confining each liability to the assets of the debtor company. Clause 33(1) requires the Authority to determine the property of “each WA Bell Company”, cl 33(3) provides that the Authority has absolute discretion in determining the property of “each WA Bell Company”; and cl 34(1) requires a report to the Minister on the property of “each WA Bell Company”.

*However, I understand from extrinsic sources¹⁵⁴ that the intention is to pool assets. This intention seems to be focussed on the provision that the Authority must recommend payments “. . . in respect of the aggregate of all **liabilities** of all WA Bell Companies . . .”: clause 35(1). I do not think that is sufficient to clearly spell out that a payment to a particular creditor can exceed the value of the property of the relevant debtor company.*

*In my view, an amendment should be made to clarify this point.*¹⁵⁵

¹⁵³ Submission 8 from Hon Michael Mischin MLC, Attorney General and Hon Dr Mike Nahan MLA, Treasurer, 5 October 2015, p 55.

¹⁵⁴ This proposition was advanced by the Hon Treasurer and the Hon Attorney General in their joint submission to the Standing Committee dated 5 October 2015 (for example, at page 55, under the heading “Part 3 – The Transfer, Novation and Avoidance Provisions” and at page 69, under the heading “(c) Essential nature of the process”). See also Ken Pettit SC, letter, 25 October 2015, p 1.

¹⁵⁵ Ken Pettit SC, Opinion, 20 October 2015, paragraphs 169-171.

7.79 The Committee acknowledges that the policy of the Bill is for property of the WA Bell Companies to be aggregated in a single, undifferentiated fund. From this ‘pool’ of property singular payments can then be made. In the time available the Committee has not been able to consider this issue further.

7.80 The Committee makes the following recommendation.

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.

CLAUSE 38(3) AND PROPOSED NEW CLAUSES 38(5) AND 40(1) OF THE BILL

7.81 Clause 38(3) provides:

38. Authority to make payments or transfer property

(3) A person is not entitled to have a payment made to them, or property transferred to or vested in them, under this section unless the person gives to the Authority a deed that —

(a) is in the form approved by the Minister; and

(b) is executed to the satisfaction of the Authority; and

(c) provides for the release or discharge of any person from any liability that the Minister considers appropriate.

7.82 The Supplementary Notice Paper proposes new clauses 38(5) and 40(1)(b), which provide:

38. Authority to make payments or transfer property

(5) 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 Division 3 — the determination ceases to have effect.

40. Closure of the Fund

(1) *The Fund is closed by force of this section when whichever of the following first occurs —*

(a) *the Administrator certifies in writing that all money that the Authority is required to pay out of the Fund under section 38 has been paid;*

(b) *the end of the period of 4 months beginning on the day on which the Governor makes the determination under section 37(2).*

7.83 The Supplementary Explanatory Memorandum for the Bill contains the following rationale for these changes:

*The period in which payments will be finalised has been changed to 3 months from the date of the Governor's final determination (rather than 12 months from the transfer day) to reflect the uncertainty as to how long taxation issues may take to resolve.*¹⁵⁶

7.84 Mr Pettit SC drew attention to the following in his opinion:

- There is no provision in the Bill requiring a person in whose favour a determination has been made to be given a notice of this determination or the fact an approved form of discharge is available.
- There is no provision in the Bill for a person to question the form of the discharge.
- There is no safeguard in the Bill to account for any delay in distributions past 3 months by the Authority.¹⁵⁷

7.85 The Committee asked the Government whether it was confident all potential creditors will be able to be identified for the purpose of obtaining a release pursuant to clause 38(3) (for example, persons holding bearer bonds¹⁵⁸ located outside Australia). The Attorney General and the Treasurer provided the following response:

¹⁵⁶ Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015, *Supplementary Explanatory Memorandum*, p 6.

¹⁵⁷ Ken Pettit SC, Opinion, 20 October 2015, paragraphs 203-206.

¹⁵⁸ A bearer bond is a bond or debt security issued by a business entity, such as a corporation or a government. It differs from the more common types of investment securities in that it is unregistered – no records are kept of the owner, or the transactions involving ownership. Whoever physically holds the paper on which the bond is issued owns the instrument. They are uncommon today as nearly all bonds are registered electronically rather than in certificate form.

A list of creditors of each of the 2 main WA Bell Companies is attached as Schedules 5 and 6 to the submission lodged with the Committee on behalf of the Attorney-General on 5 October 2015. They total 14 for TBGL, and 15 for BGF, including ICWA, BGNV, the Commonwealth, LDTC and WAG. The Government understands total external creditors (that is, creditors other than WA Bell Companies) of the remaining WA Bell Companies number 7, all of whom are known to the Liquidator.

As stated above, it is expected LDTC will be paid any amount under Part 4, Division 4 of the Bill with respect to TBGL's obligations to the holders of bearer bonds issued by BGNV. It is likewise expected LDTC will give the release under clause 38(3) (either with the approval of the BGNV Bondholders, or court sanction).¹⁵⁹

- 7.86 To address these issues, Mr Pettit SC suggested the Bill be amended to provide for a person to be given notice of any determination by the Governor in their favour.¹⁶⁰
- 7.87 The Committee agrees with the view of Mr Pettit SC. It is also of the view the timing of the closure of the Fund should reflect the time required to give notice to those the subject of determinations by the Governor and makes the following recommendations.

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**

¹⁵⁹ Further Supplementary Submission B of Hon Michael Mischin MLC, Attorney General and Hon Dr Mike Nahan MLA, Treasurer, 23 October 2015, p 8.

¹⁶⁰ Opinion of Ken Pettit SC, 20 October 2015, paragraph 206.

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.

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).

- 7.88 The Committee has identified a further issue with the operation of clause 38(3), namely, the uncertainty surrounding the identity of bondholders in circumstances where they may be the recipients of direct payments and must provide releases before they can receive them.
- 7.89 The Committee also notes the very broad and open-ended nature of the words ‘*that the Minister considers appropriate*’ in clause 38(3)(c), which raises questions about how this clause will operate.
- 7.90 The Committee notes the complexity of this issue and makes the following recommendation.

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 43 OF THE BILL — FINAL REPORT ON AUTHORITY’S FUNCTIONS

- 7.91 Clause 43 provides:

43. Final report on Authority’s functions

- (1) *Prior to the abolition of the Authority, the Administrator must prepare a final report on how the Administrator carried out the Authority’s functions as outlined in section 9 of the Act.*
[Committee emphasis]
- (2) *The Minister is to cause to be laid before each House of Parliament the report referred to in subsection (1), prior to the abolition of the Authority.*

- 7.92 Section 9, referred to in clause 43 above, sets out the functions of the Authority. These are to:

- collect, realise and deal with the property of the WA Bell Companies
- administer each WA Bell Company (as proposed on the Supplementary Notice Paper)
- administer, invest and manage the Fund
- perform any other functions conferred on it by the Act.

7.93 Mr Pettit SC was asked to provide his opinion on clause 43, after the Committee identified uncertainty about its implications. Mr Pettit commented on three aspects of clause 43.

7.94 First, that one of the Authority's '*any other functions*' is to make a report to the Minister containing recommendations for the distribution of money from the Fund to creditors including in particular the Funding Creditors (clauses 35 and 36). On its natural meaning, and read in isolation, a report to the Parliament on '*how the Administrator carried out*' that function would include how the Administrator made the recommendations.

7.95 The Committee concurs with Mr Pettit SC that this appears to be close to a requirement to give reasons in the final report tabled in the Parliament. However, this is the very thing that is expressly not required in the report to the Minister under clauses 35(3) and 36(6).¹⁶¹

7.96 Mr Pettit SC said:

A central policy of the Bill is to prevent legal challenge to distributions, including by the Bill's provisions that no reasons need be given for recommendations. The policy extends to preventing challenge after a distribution has been made.

*From the current provisions in the Bill, I expect that the government's intention is that this policy should carry into the clause 43 report to Parliament, if there is any prospect, however slight, that a litigant could use that report to found a suit.*¹⁶²

7.97 The Committee is of the view that if it is the Government's intention that the policy of precluding a legal challenge applies to clause 43 and the contents of the final report

¹⁶¹ The functions of the Authority in making a clause 35/36 report do not include the report '*containing*' reasons for making particular recommendations. However, that does not mean the Authority need not actually have reasons for its recommendations; it means merely that the Authority need not report its reasons to the Minister in writing.

¹⁶² Ken Pettit SC, letter, 25 October 2015, p 3.

tabled in the Parliament, then this should be clarified. The Committee therefore makes the following recommendation.

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.

7.98 Second, Mr Pettit SC raised the question of whether the final report is to describe exactly what recommendations the Authority made to the Minister. Such a report will disclose to third parties whether the Governor's determinations under clauses 36A and 37 either implemented or deviated from, the Authority's recommendations. Mr Pettit said:

*On the one hand, clause 71 of the Bill exempts the Authority from the operation of the Freedom of Information Act 1992, which will preclude persons obtaining Authority records on distribution. On the other hand, the cl 43 report appears to require some information about how the Administrator carried out the function of recommending distributions.*¹⁶³

7.99 The Committee again seeks clarification as to the Government's intentions in this regard and therefore makes the following recommendation.

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.

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.

¹⁶³

Ken Pettit SC, letter, 25 October 2015, p 3.

7.100 The Committee makes the following further recommendation.

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.

7.101 Hon Ken Travers MLC and Hon Lynn MacLaren MLC dissented from this recommendation.

7.102 Third, Mr Pettit SC raised the matter of including a timeframe for Members of Parliament to digest and discuss the Authority's final report and/or act on it before the Authority is abolished. The Committee draws this to the attention of the Legislative Council.

Interim Annual Reporting of section 9 functions

7.103 The Committee considered whether clause 43 should include a requirement that interim annual reports be laid in the Parliament for the benefit of the Parliament before the Authority is abolished and the final report laid.

7.104 The Parliament has an interest in the accountability of the Executive to the people of Western Australia with respect to the implementation of this unique Bill. The Committee anticipates a great deal of public interest in the progress the Administrator makes towards distributing the Fund, especially from those motorists and taxpayers who funded \$200 million over 20 years;¹⁶⁴ as well as Members of Parliament themselves.

7.105 The imperative for a yearly reporting regime takes into consideration that although under proposed clause 78 the '*Act expires at the end of the 6 years beginning on the day on which the Governor makes the determination under section 37(2)*', that particular proposed new section does not impose a timeframe on the Governor to '*determine an amount...to be transferred or vested in a person*'. Time starts to run from then, not six years from when the Bill comes into operation.

7.106 The Committee is of the view that clause 43 should be amended to provide for yearly interim reports on clause 9 functions. Such an amendment respects the institution of Parliament.

7.107 The Committee therefore makes the following recommendation.

¹⁶⁴ Submission 8 from Hon Michael Mischin MLC, Attorney General and Hon Dr Mike Nahan MLA, Treasurer, 5 October 2015, p 94.

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.

Laying the final report in the Parliament

7.108 Pursuant to clause 43(2) the Minister receives the final report which he or she ‘*is to cause to be laid before each House of Parliament the report...*’. Being a tabled paper, the document is accessible to the general public.

7.109 The Committee notes that the final report may include information that may encourage a person to litigate or use it in evidence in proceedings, despite the fact that one of the objects of the Bill is to ‘*avoid further litigation*’.¹⁶⁵

7.110 Section 1 of the *Parliamentary Papers Act 1891* provides that a civil proceeding concerning ‘*the publication of any report, paper, vote or proceeding of the Legislative Council or Legislative Assembly*’ shall be stayed by a Court on proof of its privileged status (see also section 2 of this Act). There may be an argument that the mere tabling of a report may not invoke the protections of the *Parliamentary Papers Act 1891*.

¹⁶⁵ The Committee also notes that clause 36 (8) also provides that ‘*The Authority has absolute privilege in making a recommendation under this section and in relation to any fact or matter stated in the recommendation*’ and clauses 34(3) and 36(8) provide for absolute privilege in other circumstances.

- 7.111 In order to minimise the risk of information in the final report being used in litigation (and out of an abundance of caution), the Minister, when tabling the report in Parliament, may wish to consider moving a motion that the final report to ‘*be printed and published under the authority*’ of the Legislative Council and the Legislative Assembly.¹⁶⁶ This would clothe the final report in parliamentary privilege and clearly engage the protections of the *Parliamentary Papers Act 1891*.

CLAUSE 48 OF THE BILL

- 7.112 Clause 48(2) and (6) provides:

48. *Scheme to avoid operation of Act or achievement of its objects*

- (2) *A person must not enter into or carry out a scheme for the purpose of directly or indirectly defeating, avoiding, preventing or impeding the operation of this Act or the achievement of its objects.*

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

- (6) *This section does not apply to or in relation to proceedings in a court to challenge the constitutional validity of this Act.*

- 7.113 In his opinion, Mr Pettit SC stated the effect of clause 48(6) may criminalise all legal actions other than those challenging the constitutionality of the Bill, if enacted, including judicial review. If so, this may expose clause 48(6) to challenge.¹⁶⁷
- 7.114 The Committee is of the view any criminalisation of applications for judicial review may be disproportionate to the objects of the Bill.
- 7.115 The Committee makes the following recommendation.

¹⁶⁶ This type of motion was recently moved by the Hon Michael Mischin MLC, Attorney General in relation to the Law Reform Commission of Western Australia’s final report on *Representative Proceedings: Project 103*, June 2015: See Hon Michael Mischin MLC, Attorney General, Legislative Council, *Parliamentary Debates (Hansard)*, 21 October 2015, p 7658.

¹⁶⁷ Opinion of Mr Ken Pettit SC, 20 October 2015, paragraph 212.

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.

CLAUSES 62 TO 66 OF THE BILL — PROTECTIONS AND EXCLUSIONS FROM LIABILITY, INCLUDING THE PROTECTION OF ICWA

7.116 The Explanatory Memorandum provides the following summary of these clauses:

Clause 62: Effect of things done under Act

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

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

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

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

Clause 64: Protection of ICWA and others connected with it

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

Clause 65: Protection for compliance with the Act

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

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

This clause ensures the State or the Authority or Administrator is not liable for any action, liability or demand arising from the things listed in sub-clause (2) of this clause. This is intended to ensure the finality of the process of distribution and the conclusion of claims in relation to the Bell administrations.¹⁶⁸

¹⁶⁸ Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015, *Explanatory Memorandum*, p 23.

7.117 In their submission, the Attorney General and the Treasurer gave the following evidence on the rationale for these clauses:

These provisions ensure that the object of the Bill in securing property under clause 22, and in providing a mechanism for proving existing liabilities, or specified liabilities within the scope of clauses 22 - 25, are not undermined by property (most particularly property comprising contractual rights) being impaired by allegations that the Bill is inconsistent with those rights and give rise to new or different claims and liabilities.

Further, the Bill, somewhat presciently in the light of correspondence received from representatives of at least one Indemnifying Creditor by officers of the Government following the introduction of the Bill, provides protection for the Government (and its officers).

...

Each of those exclusions [referred to in clause 62] anticipates the potential application of an established doctrine of common law or equity, or of the provision of a statute of the State, to circumstances which will arise following the passage of the Bill.

Provisions to similar effect are included, for example, in asset privatisation legislation (e.g. Ports Management Act 2015 (NT), s.148; Port of Darwin Act 2015 (NT), s. 32) to prevent affected parties, which may not be directly involved in the transaction or relationship, from relying upon the passage of legislation to avoid, renegotiate or otherwise modify their obligations.¹⁶⁹

7.118 They state further:

Some objections have been made that the Bill contains provisions designed to benefit or protect ICWA and the State, exemplified by the statutory release and discharges contained in the Bill, in particular with respect to ICWA but also with respect to the State and the Authority.

Because the Bill is intended to provide a solution to disputes framed by creditors to maximise their recovery, presently principally conducted between themselves and the Liquidator, it would not be rational to leave open the possibility of yet further litigation, for the

¹⁶⁹ Submission 8 from Hon Michael Mischin MLC, Attorney General and Hon Dr Mike Nahan MLA, Treasurer, 5 October 2015, pp 88-89.

same purpose, but involving a different cause of action and target, namely ICWA, its officers, employees or agents.

In that regard, the Bill anticipated threats that were subsequently made against ICWA, and State officers (see letter from Lipman Karas to the State Solicitor's Office dated 29 May 2015). The necessity of this provision has accordingly already been demonstrated by the actions of some of the parties.

*The protections inserted support the achievement of the objectives of the Bill.*¹⁷⁰

- 7.119 They also gave the following evidence on the need for clause 64, in particular, and why ICWA is the sole organisation the subject of this protection:

ICWA is the only Government body which has been, relevantly, concerned with the conduct of the Bell litigation.

There is some potential overlap between clause 64 and clauses 62 and 63 to the extent that those provisions provide general protections in relation to civil matters, in formulating, and giving effect to, the Bill.

However, clause 64 deals specifically with the position of ICWA, and preserves, for the benefit of the State, claims that the State, through ICWA, may have against directors and officers under State probity legislation and ICWA's constituent legislation.

*It covers, more generally, the position of ICWA as an active participant in the Bell litigation, through funding the Bell litigation, and mitigates the risk of collateral litigation being brought against ICWA as a means of creating leverage.*¹⁷¹

- 7.120 Some witnesses who gave evidence to the Committee were critical of the protections given in these clauses. WA Glendinning stated:

*ICWA can take action against us, and even if we have a claim back against ICWA, you cannot use it as a counterclaim or a set-off. The result is remarkably unfair.*¹⁷²

¹⁷⁰ Submission 8 from Hon Michael Mischin MLC, Attorney General and Hon Dr Mike Nahan MLA, Treasurer, 5 October 2015, pp 88-90 and 98. See also *Objections to the Bill, specific objections*, tabled by Hon Michael Mischin MLC, Attorney General on 15 September 2015.

¹⁷¹ Submission 8 from Hon Michael Mischin MLC, Attorney General and Hon Dr Mike Nahan MLA, Treasurer, 5 October 2015, pp 89-90.

¹⁷² Mr Hugh McLernon, Director, WA Glendinning and Associates Pty Ltd, *Transcript of Evidence*, 6 October 2015, p 6.

7.121 The Government, in its supplementary submission to the Committee, drew attention to several clauses in the Bill, which indicated, in its opinion, that ‘*this is not necessarily the case*’.¹⁷³ They stated:

Firstly, by clauses 37 and 38 of the Bill, once payments are made to, and property has been transferred or vested in, persons in accordance with the Governor's determination, every liability of ever [sic] WA Bell Company to a person is discharged and extinguished. These provisions apply to ICWA such that any claims it may have with respect to liabilities otherwise owed to it by a WA Bell Company will cease to exist.

Second, pursuant to clause 38, if a person is to receive payment from the Fund, or have property transferred to or vested in it, that will not occur unless the person also gives the Authority a deed that provides for the release or discharge of any person from any liability the Minister considers appropriate. That may include any liability which ICWA says WAG has to it (although the Government is not presently aware of any such liability).

*Third, clause 62 provides (among other things) that the doing, or omitting to do, any act, matter or thing under, or for the purposes of, the Act are not to be regarded as placing any person in breach of any law of the State or any principles or rules of common law or equity. In addition, clause 65 provides no civil or criminal liability attaches to a person for compliance, or purported compliance, in good faith with a requirement of or under this Act.*¹⁷⁴

7.122 ICWA was asked at a hearing before the Committee:

- 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?
- 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?

7.123 ICWA responded as follows:

¹⁷³ Supplementary submission A of Hon Michael Mischin MLC, Attorney General and Hon Dr Mike Nahan MLA, 23 October 2015, p 8.

¹⁷⁴ Ibid, pp 8-9.

*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.*¹⁷⁵

7.124 In his opinion, Mr Pettit SC observed:

- While there is doubt whether clause 62(2) is necessary given ‘*statutory authority for an act is normally a good defence to any suit which impugns the act*’, ‘*the Bill does not aim to be precise or restrained; it aims to use every means available to prevent challenge, collateral and direct.*’¹⁷⁶
- Clauses 63 to 65 intend to remove liability for virtually all possible acts and omissions.¹⁷⁷

7.125 The Committee acknowledges it is a policy decision of the Government to provide for the protections in clauses 62 to 66 on the basis of mitigating ‘*the risk of collateral litigation*’.¹⁷⁸ However, in recognition of the fact other creditors of WA Bell Companies are not given the same protection as ICWA is given pursuant to clause 64, it makes the following recommendation.

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.

CLAUSE 68 OF THE BILL—NO APPEAL OR REVIEW

7.126 Clause 68 provides:

68. No appeal or review

¹⁷⁵ Mr Rod Whithear, Chief Executive, Insurance Commission of Western Australia, *Transcript of Evidence*, 14 October 2015, p 13.

¹⁷⁶ Ken Pettit SC, Opinion, 20 October 2015, paragraph 129.

¹⁷⁷ Ibid, paragraph 134.

¹⁷⁸ Submission 8 from Hon Michael Mischin MLC, Attorney General and Hon Dr Mike Nahan MLA, Treasurer, 5 October 2015, p 90.

-
- (1) *Any decision made, or other thing done, by the Governor, the Minister, the Authority or the Administrator under or for the purposes of this Act —*
- (a) *is final and conclusive; and*
- (b) *must not be challenged, appealed against, reviewed, quashed or called into question in any court; and*
- (c) *is not subject to review or remedy by way of prohibition, mandamus, injunction, declaration or certiorari in any court on any account.*
- (2) *Nothing in this Act requires the Governor, the Minister, the Authority or the Administrator to perform a function, or exercise a power, in a particular way in any particular circumstance.*
- (3) *The rules known as the rules of natural justice (including any duty of procedural fairness) do not apply to, or in relation to, the doing or omitting to do, or the purported doing of or omitting to do, any act, matter or thing under Part 3 or 4 by, or by any person on behalf of —*
- (a) *the Governor; or*
- (b) *the Minister; or*
- (c) *the Authority; or*
- (d) *the Administrator.*
- (4) *Nothing in subsections (1) to (3) affects the jurisdiction of the Court to grant relief for jurisdictional error.*

7.127 This is what is known as an ouster or ‘privative’ clause, as it seeks to restrict judicial review of decisions made by the Governor, Minister, the Authority or Administrator under or for the purposes of the Bill to that which is provided in clause 68(4), namely, action which would attract the jurisdiction of the Court to grant relief for jurisdictional error, which is discussed at paragraphs 5.21 to 5.23.

7.128 The High Court of Australia has held that:

- A basic rule that applies to privative clauses, generally, is that it is presumed that the Parliament does not intend to cut down the jurisdiction of the courts

save to the extent that the legislation in question expressly so states or necessarily implies. Accordingly, privative clauses are strictly construed.¹⁷⁹

- A clause providing that a ‘decision’ is final and may not be appealed against, reviewed, quashed or called into question by any court or tribunal cannot be applied to prevent the High Court of Australia from determining whether a Commonwealth officer's decision was affected by jurisdictional error.¹⁸⁰
- A defining characteristic of State Supreme Courts is the power to confine inferior courts and tribunals within the limits of their authority to decide by granting relief in the nature of prohibition and mandamus and certiorari, directed to inferior courts and tribunals on grounds of jurisdictional error.¹⁸¹ This cannot be removed by State Parliaments.

7.129 There is a strong presumption that a privative clause will not be effective to exclude judicial review generally, particularly of a jurisdictional error including a breach of procedural fairness.

7.130 The Committee notes the comprehensive means by which clause 68 seeks to limit any opportunity for judicial review of decisions made under the Bill, employing, subject to clause 68(4), what could be regarded as a blanket prohibition on challenging these decisions. This raises the following FLPs.

Does the legislation have sufficient regard to the rights and liberties of individuals?

1. Are rights, freedoms or obligations, dependent on administrative power only if sufficiently defined and subject to appropriate review?

*2. Is the Bill consistent with the principles of natural justice?*¹⁸²

7.131 A number of submitters and witnesses were critical of the terms of clause 68 in its exclusion of a right of judicial review and the rules of natural justice. For instance, the Law Council of Australia provided the following feedback in a hearing before the Committee.

¹⁷⁹ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

¹⁸⁰ Ibid.

¹⁸¹ *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 566. See also M Davis, *Implications of the High Court's Decision in Kirk v Industrial Relations Commission of NSW & Workcover NSW*, 2010, p 7. Available at: <http://archive.hrnicholls.com.au/archives/vol30/2010davis.pdf>. Viewed 16 October 2014. Prohibition directs a subordinate to stop doing something the law prohibits; mandamus is an order issued by higher court to compel or to direct a lower court or a government officer to perform mandatory duties correctly and certiorari is an order by a higher court directing a lower court to send the record in a given case for review.

¹⁸² Appendix 4, Items 1 and 2.

*Executive decision-making should comply with the principles of natural justice and be subject to meaningful judicial review. As I have just mentioned, in this bill there are no rights of judicial review and the rules of natural justice are expressly excluded.*¹⁸³

*The normal existing law, if you like, is that a liquidator would be able to make certain decisions, and they would be subject to judicial review, or, as I mentioned, you would make an application directly to the court. Here, it is completely overriding the judicial system.*¹⁸⁴

- 7.132 The Attorney General and the Treasurer, in their submission, provided the following information on the need for clause 68.

The combined operation of clause 68(3), with the discretions and exclusions provided, in particular, in clauses 33, 34, 35, 36 and 37A are intended to comprehensively limit arguments which are based upon procedural or formal non-compliance, and to limit, to the barest minimum, the jurisdictional constraints imposed upon the Authority, and ultimately, the Governor. That is of particular importance where a multi-staged decision making process is involved, where challenges might be raised as to the process at any stage, and the interaction between the processes at different stages.

A failure to have regard to certain matters may give rise to jurisdictional error where, for example, a Court determines that the matter was a mandatory relevant consideration or the consideration of that matter was a jurisdictional fact to the exercise of the Authority's power.

*Because of those considerations the scope for a Court to review a jurisdictional error under clause 68(4) will be, and is intended to be, limited.*¹⁸⁵

The scope of the provision

- 7.133 The Committee has outlined at paragraph 3.21 how clauses 34(4), 35(8) and 36(9) operate to provide protection against the invalidation of reports and recommendations

¹⁸³ Ms Vicky Butler, Deputy Chair, Insolvency and Reconstruction Law Committee of the Business Law Section, Law Council of Australia, *Transcript of Evidence*, 6 October 2015, p 3.

¹⁸⁴ *Ibid*, p 4.

¹⁸⁵ Submission 8 from Hon Michael Mischin MLC, Attorney General and Hon Dr Mike Nahan MLA, Treasurer, 5 October 2015, p 91.

of the Authority on the basis of them failing to follow a mandatory requirement and that this may produce an outcome that will defeat the objects of the Bill.¹⁸⁶

- 7.134 This is significant for the operation of clause 68(4) because a failure by the Authority to follow a mandatory requirement may be regarded as a precondition to the Authority being able to exercise its power to report to the Minister and make recommendations with respect to liabilities and funding or indemnities.
- 7.135 The Bill does afford an element of natural justice in providing the opportunity, in clause 32(4), for persons receiving a draft report from the Authority to make submissions.
- 7.136 However, regardless of this opportunity and the requirement of the Authority to follow mandatory requirements, the Governor is the final decision maker whose discretion is not fettered by the Bill in any way.
- 7.137 Therefore, as stated in paragraph 5.32, the practical constraints in the Bill on the ability to apply for relief for jurisdictional error may operate to effectively exclude that basis for relief. Accordingly, in addition to infringing the FLPs stated in paragraph 7.130, this may raise a question over whether the Bill could be subject to a legal challenge on this basis.

Clause 68(1)(c)

- 7.138 In his opinion, Mr Pettit SC drew the Committee's attention to a recent amendment to the *Supreme Court Rules 1971* allowing for '*a remedy having the same effect as a remedy that could be provided by a writ.*' He suggested the words '*or a remedy having the same effect as a remedy that could be provided by such writ*'¹⁸⁷ be added to clause 68(1)(c).
- 7.139 The Committee agrees this amendment would be consistent with the intent of clause 68 and makes the following recommendation.

¹⁸⁶ See Giridhar Kowtal, 'Jurisdictional error and no-invalidity clauses at State level: Does the High Court still hold all the cards?', *Australian Journal of Administrative Law*, 2015, vol. 22, p 253, where there is a discussion about the effectiveness of no-invalidity clauses of the type appearing in the Bill.

¹⁸⁷ Ken Pettit SC, Opinion, 20 October 2015, paragraphs 216-217.

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,

CLAUSE 71 OF THE BILL – EXCLUSION OF FREEDOM OF INFORMATION ACT 1992

7.140 Clause 71 provides:

71. Freedom of Information Act 1992

The Freedom of Information Act 1992 has effect as if the Authority were mentioned in Schedule 2 to that Act.

7.141 Schedule 2 to the *Freedom of Information Act 1992* sets out the persons and organisations which are exempt from the requirement to give access to documents in their possession or control.

7.142 In its submission to the Committee, the Office of Information Commissioner questioned the exemption provided to the Authority by clause 71. In its view:

the basis for making the Authority exempt from the operation of the FOI Act is not clear to me. Further, it is not apparent to me that there is a real need for the Authority to be exempt from the FOI Act or that the protections provided by the exemptions in the FOI Act are not sufficient or adequate.

In the event the Authority was subject to the access provisions of the FOI Act and the Authority was not inclined to disclose certain documents that may be sought, there appears to me to be sufficient protection from disclosure within the exemptions in Schedule 1 to the FOI Act. For example, clauses 1, 4 and 6 of Schedule 1 would provide exemptions from disclosure where:

- 1. disclosure would reveal the deliberations or decisions of Cabinet or the Governor in Executive Council;*
- 2. disclosure could reasonably be expected to have an adverse effect on the commercial or financial affairs of third parties and disclosure of that information would not, on balance, be in the public interest; or*

3. *disclosure of the deliberative processes of the Authority, the Government, a Minister or another agency would, on balance, be contrary to the public interest.*¹⁸⁸

7.143 In response, the Attorney General and the Treasurer provided the following feedback to the Committee:

The Bill provides adequate protection and safeguard for the rights and interests of creditors...Creditors are the sole stakeholders with an interest in the function of the Authority, and have shown themselves to be more than capable of acting in their own interest. There is nothing to be gained, in the Government's view, by providing third parties who have no direct interest in the functions of the Authority with an entitlement to delve into its workings, when it will have a large volume of material to work through and make recommendations upon in a compressed period.

*Furthermore, the Authority is a body with a finite life, and a limited scope of activity, and does not perform a general function of government. It is subject to a number of reporting obligations in its activities. Regrettably, one of the principal modern uses of Freedom of Information requests is as a substitute for pre-action discovery. Given the policy of the Bill is to limit litigation, it would be inconsistent with the pursuit of that policy to provide a mechanism which facilitates the exploration of potential avenues to litigate – one of the very purposes for which the Bill has been drafted to avoid.*¹⁸⁹

7.144 The Committee notes this response.

CLAUSE 72 OF THE BILL – POWER OF THE AUTHORITY TO OBTAIN AN OPINION FROM THE STATE SOLICITOR

7.145 Clause 72 provides:

72. Power to obtain opinion

- (1) *The Authority is entitled to submit to the State Solicitor a question concerning the functions or powers of the Authority.*

¹⁸⁸ Submission 9 from the Office of the Information Commissioner, 7 October 2015, pp 2-3.

¹⁸⁹ Further supplementary submission B from Hon Michael Mischin MLC, Attorney General and Hon Dr Mike Nahan MLA, Treasurer, 23 October 2015, p 9.

(2) The State Solicitor must give the Authority a written opinion on a question submitted under subsection (1).

7.146 In evidence to the Committee concerns were expressed that the operation of this clause would place the State Solicitor in a conflict of interest. This is by virtue of him having provided legal advice to one of the creditors seeking to benefit from a distribution under the Bill (namely, ICWA).

7.147 In its submission, the Law Council of Australia stated:

Section 73 of the Bill allows the Authority to submit to the State Solicitor:

- a) a question concerning the functions or powers of the Authority; or*
- b) a question relating to a determination or recommendation under Part 4.*

*The State Solicitor must then give a written opinion to the Authority. The BLS questions whether this is appropriate in circumstances where we understand that the State Solicitor may act or may have acted for one of the parties seeking to benefit from the distribution of proceeds under the Bill.*¹⁹⁰

7.148 The Law Society of Western Australia expressed a similar concern:

*The legislation provides that the Authority that it establishes may seek advice from the State Solicitor. The State Solicitor is also the advisor to the Insurance Commission of Western Australia as creditor and the State Government in seeking to implement the Bell Legislation. The Society considers this approach places the State Solicitor in a position of an actual conflict of interest. These arrangements should be re-assessed.*¹⁹¹

7.149 In a hearing before the Committee, ICWA confirmed that the State Solicitor's Office represents ICWA in litigation related to the WA Bell Companies.¹⁹²

7.150 In response to a question from the Committee about whether there is any scope for a conflict of interest to arise and, if so, how that would be managed, the Attorney General and the Treasurer stated:

¹⁹⁰ Submission 6 from the Law Council of Australia, Business Law Section, 2 October 2015, paragraph 15.

¹⁹¹ Submission 2 from The Law Society of Western Australia, 25 September 2015, attaching letter to Hon Dr Mike Nahan MLA, Treasurer, paragraph 3.

¹⁹² Mr Rod Whithear, Chief Executive, Insurance Commission of Western Australia, *Transcript of Evidence*, 14 October 2015, p 2.

*There is potential for a conflict of interest to arise, as there is in any situation where an entity seeks professional advice. Whether a conflict arises will depend upon the opinion sought. By clause 10(1) of the Bill, the Authority is empowered to do all things necessary to perform its functions. That includes the power to seek advice from a person other than the State Solicitor, should a conflict arise.*¹⁹³

- 7.151 The Committee sought the opinion of Mr Pettit SC on whether the operation of clause 72 gives rise to a conflict of interest. Mr Pettit advised as follows:

*A legal practitioner would normally have a conflict of interest in advising both a person (the ICWA) interested in the Authority's decisions and the Authority itself. This does not appear even debatable.*¹⁹⁴

*The State's interest is statutorily bound to ICWA's fortunes.*¹⁹⁵

*The State Solicitor is expressly authorised to provide advice to the Authority, which cures any otherwise existing conflict of interest.*¹⁹⁶

- 7.152 In light of the criticisms levelled at clause 72 in evidence to the Committee, including the opinion of Mr Pettit SC, that the perception of conflict of interest would exist but for the authorisation for the State Solicitor to provide advice to the Authority, the Committee is of the view the Authority should be required to seek independent legal advice on questions concerning its functions or powers. The Committee is not seeking to make an inference that any individual has acted inappropriately or would seek to do so.

- 7.153 The Committee makes the following recommendation.

¹⁹³ Further Supplementary Submission B of Hon Michael Misichin MLC, Attorney General and Hon Dr Mike Nahan MLA, Treasurer, 23 October 2015, p 2.

¹⁹⁴ Ken Pettit SC, Opinion, 20 October 2015, paragraph 137.

¹⁹⁵ Ibid, paragraph 139.

¹⁹⁶ Ibid, paragraph 142.

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.

CHAPTER 8

CONCLUSION

- 8.1 The Committee acknowledges the policy intent of the Bill. The Committee has however received evidence from some witnesses who are of the view that the means by which the Bill seeks to implement the policy are unjust and objectionable.
- 8.2 The Committee has identified a number of uncertainties as to whether the Bill will be effective in implementing its objects.
- 8.3 While the Committee, in the short timeframe of this inquiry, has not been able to identify any constitutional issues with the Bill, it is not possible to state with certainty the basis for and prospects of success of the likely future legal challenges to the Bill.
- 8.4 The Committee commends its Report to the House.



Hon Robyn McSweeney MLC
Chair

10 November 2015

APPENDIX 1

**STAKEHOLDERS INVITED TO PROVIDE A SUBMISSION,
SUBMISSIONS RECEIVED AND HEARINGS**

APPENDIX 1

STAKEHOLDERS INVITED TO PROVIDE A SUBMISSION, SUBMISSIONS RECEIVED AND HEARINGS

Stakeholders invited to provide a submission

1. The Attorney General
2. The Law Society of Western Australia
3. The Law Council of Australia
4. Western Australian Bar Association
5. Australian Bar Association
6. The Information Commissioner
7. The Public Sector Commissioner
8. Mr Tony Woodings, liquidator, The Bell Group Ltd
9. Insurance Commission of Western Australia
10. Australian Taxation Office
11. W.A. Glendinning & Associates Pty Ltd
12. Bell Group NV
13. Bell Group UK

Submissions received

1. Private citizen
2. The Law Society of Western Australia
3. Mr Neil Griffiths, Partner, Dentons UKMEA LLP on behalf of Ms J.B. Stephenson, liquidator of Bell Group (UK) Holdings Limited
 - Supplementary submission A
4. Private submission

-
- Supplementary submission A
5. Mr Garry Trevor, Official Liquidator, Bell Group NV
 6. Law Council of Australia, Business Law Section
 7. WA Glendinning & Associates Pty Ltd
 8. Hon Michael Mischin MLC, Attorney General and Hon Dr Mike Nahan MLA, Treasurer
 - Supplementary submission A
 - Further supplementary submission B
 9. Office of the Information Commissioner
 10. The Public Sector Commissioner

Public hearings

The Committee held public hearings with the witnesses noted below. Transcripts of the public hearings are available on the Committee's website at <http://www.parliament.wa.gov.au/leg>.

6 October 2015

1. WA Glendinning & Associates Pty Ltd
 - Mr Hugh McLernon, Director
2. Law Council of Australia, Business Law Section
 - Ms Victoria Butler, Deputy Chair, Insolvency and Reconstruction Law Committee
 - Mr Stephen Doyle, Legal Practitioner, Director, Warren Syminton Ralph
 - Mrs Barbara Gordon, Lecturer, Law School, University of Western Australia

14 October 2015

3. Insurance Commission of Western Australia
 - Mr Rod Whithear, Chief Executive

APPENDIX 2
QUESTIONS POSED TO KEN PETTIT SC

APPENDIX 2

QUESTIONS POSED TO KEN PETTIT SC

1. Is any clause in the Bill inconsistent with the policy of the Bill as outlined by Hon Michael Mischin MLC, Attorney General, in the Second Reading Speech to the Bill or the objects of the Bill? If so, how?
2. Is any clause in the Bill materially different from provisions in the Corporations Act 2001? For example, how do the words ‘appropriate compensation’ in clause 4(c) of the Bill compare with the power of the Court to make orders as it deems just under section 564 of the *Corporations Act 2001*?
3. To what extent, if any, will the Bill (if enacted) provide for the ‘acquisition of property’ from a person (by means of the transfer of property provided for in clause 22 of the Bill) and fall within the scope of Commonwealth legislative power in section 51(xxxi) of the *Commonwealth Constitution*? In particular:
 - (i) Do the claims of creditors amount to ‘property’ and fall within the scope of section 51(xxxi) of the *Commonwealth Constitution*? If so, on what basis is a claim characterised as property?
 - (ii) Does section 51(xxxi) of the *Commonwealth Constitution* exclude the State having the power to acquire property on other than just terms (by the operation of Part 1.1A of the *Corporations Act 2001*)?
 - (iii) If yes, will the provisions of the Bill (if enacted) infringe section 51(xxxi) of the *Commonwealth Constitution* by not providing for the acquisition of property on just terms?
4. Will any provision in the Bill (if enacted) be inconsistent with any law of the Commonwealth and therefore invalid under section 109 of the *Commonwealth Constitution*, or invalid for any other reason? In particular:
 - (i) Is Part 6 of the Bill (if enacted) effective to exclude the application of the *Corporations Act 2001* and negate a risk of the Bill infringing section 109?
5. Will the Bill (if enacted) in any way infringe Chapter III ('The Judicature') of the *Commonwealth Constitution* and the doctrine of the separation of powers? In particular:
 - (i) What is the scope of ‘the jurisdiction of the Court to grant relief for jurisdictional error’ provided by clause 68(4) of the Bill?

-
- (ii) Is the right to appeal or review constrained by other clauses of the Bill, such as clauses 34(4), 35(8) and 36(9)?
 - (iii) Is there a risk that provisions in the Bill (particularly clause 68) are invalid because they impermissibly interfere with the outcome of the judicial process and thereby the independence of the judicial branch of government, rather than alter substantive claims or rights which are at issue in pending litigation?
 - (iv) Does clause 67 providing for a stay of proceedings effectively address this legal issue?
 - 6. Is the use of the word 'must' in clause 35 of the Bill inconsistent with clause 35(8)?
 - 7. Do any legal issues arise as a result of the operation of the following clauses in the Bill (if enacted):
 - (i) The retrospective operation of provisions of the Bill, such as clauses 26 and 48(3)?
 - (ii) The operation of the offence provisions in clauses 48 to 54 and 58?
 - (iii) The operation of clause 62 ('Effect of things done under the Act')?
 - (iv) The protections afforded by clauses 63, 64 and 65?
 - (v) The operation of clause 72 (the power of the Authority to obtain an opinion from the State Solicitor)? In particular, is there a conflict of interest arising from the State Solicitor also, presumably, being the legal advisor to the Insurance Commission of Western Australia?
 - 8. Does the Bill allow the Governor to either not distribute any amount to any person or distribute amounts contrary to the recommendation of the WA Bell Companies Administrator Authority (**Authority**)?
 - 9. Does the Bill provide any guidance on how the following conflicts are to be prioritised or otherwise dealt with?
 - (i) The conflicts between the hierarchy of matters that must be taken into account by the Authority (for example, the matters set out in clause 35(2) of the Bill)?
 - (ii) The conflicts between competing objects set out in clause 4 of the Bill,

and, if not, what amendments to the Bill may be effective in providing such guidance?

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10. Are there any amendments to the Bill that, in your view, the Committee should consider recommending in its report to the Legislative Council to address any of the issues raised in your opinion?
 11. Are you aware of any precedent for a Bill that imposes an insolvency regime by way of State statute, in Western Australia or other jurisdiction? To what extent, if any, do previous examples of such schemes affect your opinion in relation to the Bill?
 12. Are there any other legal issues raised in the submissions to the Committee that you want to draw to the Committee's attention?

APPENDIX 3
LEGAL OPINION PROVIDED BY KEN PETTIT SC

APPENDIX 3

LEGAL OPINION PROVIDED BY KEN PETTIT SC

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

OPINION

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OPINION

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

Instructions

1. I have been asked by the Clerk of the Legislative Council to address 12 sets of questions relating to the Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015 (**the Bill**).
2. My instructions were received on 8 October 2015 with a request to advise in writing by 21 October 2015, which I understand reflects the time constraints imposed on the Standing Committee on Legislation (**the Committee**).

Background

3. I have not attempted to set out the history of the Bell litigation. For the purposes of this advice, it is sufficient to note the following overview.
4. Following the collapse of the Bell Group of companies, liquidators were appointed and litigation commenced in 1995 (**the Bell litigation**) by the liquidator of the Bell Group of companies (the liquidator) against several banks (**the Banks**).
5. A few creditors (**the funding creditors**) funded the litigation and indemnified the liquidator. The principal funding creditor was the Insurance Commission of Western Australia (**ICWA**). In fact, the funding and the indemnity provided by ICWA were provided indirectly, through a professional trustee company, The Law Debenture Trust Corporation plc (**LDTC**).
6. After several variations in such agreements, the funding creditors and the liquidator finally agreed in writing (**the 2000 Agreement**) that, in consideration of the funding and indemnity, an application would be made to the Court under section 564 *Corporations Act* seeking a particular distribution of the Bell litigation funds. The distribution to be sought was that 66.7% of the returns from the litigation were to be set aside for the funding creditors, of which ICWA/LDTC was to be accorded 53.5% (of the 66.7%), Commonwealth 9% and BGNV 37.5%.
7. After protracted litigation, a compromise was reached (**the 2014 Settlement**) under which the Banks withdrew as creditors in the winding up and paid \$1.7 billion to the liquidator (**the Bell litigation funds**).

8. The 2014 Settlement sum, \$1.7 billion, was the aggregate of amounts paid in respect of 11 Bell companies. The largest payments were \$1,297,541,530 to Bell Group Finance Pty Ltd (**BGF**); \$135,712,463 to Dolfinne Securities Pty Ltd; \$55,059,870 to The Bell Group Limited (**TBGL**); and \$54,708,586 to Bell Group (UK) Holdings Limited (**BGUK**).
9. Following the 2014 Settlement, disputes emerged between creditors concerning the proper distribution of the Bell litigation funds. In particular, in an application by the liquidator to the Court, some creditors opposed a distribution being made in accordance with the 2000 Agreement. They challenged not only the amount sought to be set aside for ICWA, but also the entitlement of ICWA to any advantage, alleging among other things that ICWA was not a creditor and did not provide funding or an indemnity.
10. Partly as a result of the impression that these challenges would involve complex and protracted litigation, and perhaps may result in untoward distributions, the Minister introduced the Bill to Parliament.
11. Other relevant facts associated with the Bill include these:
 - (a) The Bell litigation funds comprise almost the entirety of property (**the Fund**) available for distribution. While the Bill deals with all other property, the extent of such other property is expected to be minimal.
 - (b) The Fund will not be sufficient to satisfy all liabilities.
 - (c) There are five principal remaining creditors:
 - ICWA/LDTC.
 - Australian Tax office (ATO).
 - BGNV.
 - BGUK, a creditor under the 2014 Settlement.
 - WA Glendinning & Assoc. Pty Ltd, a substantial creditor, having purchased for \$125 a debt of \$183,297,347 owed to WA Newspapers Ltd by BGF.

Reference to Committee - "Policy"

12. The Legislative Council's reference of the Bill to the Committee expressly excluded Committee examination of the policy of the Bill. I understand the intent of this restriction is not to exclude taking account of the policy of the Bill but to preclude the Committee recommending changes to the policy.
13. In my view, adherence to that distinction is difficult because most of the Bill's provisions serve the "policy" in some degree, so that alteration of any of its clauses will effect some change in its policy.

14. The “policy” of an Act is usually discerned from the Act itself particularly, but not exclusively, by reference to stated objects. In this case, not all possible policy objectives are clear, because to some degree outcomes from the Bill are left to the discretion of decision-makers, including the Executive; because there is room to doubt that the “objects” stated in cl 4 of the Bill are comprehensive; and because the Bill is silent on some issues.
15. There is not much point in describing the policy or object or purpose of the Bill in terms of the winding up of WA Bell Companies, because that would occur without the Bill. Rather, the policy etc. of the Bill is better framed by reference to the effects of the Bill that would not otherwise occur.
16. The Bill’s aim is to serve three ends that are different from what would occur without the Bill:
 - A non-litigious (or a less litigious) winding up (in comparison to proceedings under the *Corporations Act*);
 - A distribution according to the Bill’s criteria (different from those under the *Corporations Act*); and
 - An unchallengeable (or a less challengeable) distribution process (in comparison to the position of most administrative action under State statutes).

In that context, a question whether a certain clause of the Bill is inconsistent with the policy or objects of the Bill has to focus on which policy or object is in question. For example, clause 37A(1)¹ of the Bill provides that nothing in the Bill requires that any distribution need be made to any person. That clause serves the last-mentioned aim of the Bill, but may be characterised as inconsistent with the second.

17. Also, an argument might be presented that the aims of the Bill include, more specifically than I have set out, engineering an outcome for ICWA that is, or is likely to be, more favourable or more certain, compared with a winding up under the *Corporations Act*². The Bill, its Explanatory Memorandum and the Second Reading speeches do not directly acknowledge such a purpose or object. Whether that is an aim of the Bill might be debated from a subjective perspective, but from a court’s perspective, the “purpose or object”³ of the Bill is to be determined from its provisions, including the provisions’ departure from what would otherwise be the law, aided by such extrinsic material as the Court allows under s 19 *Interpretation Act*.

¹ Proposed under an amendment proposed in the Supplementary Notice Paper No. 134, Issue No. 1 (**Supplementary Notice Paper**)

² This argument is made in submissions by Mr Trevor on behalf of BGNV, dated 1 October 2015.

³ The expression used in s 18 of the *Interpretation Act*. Section 18 requires a court to interpret the Bill in a manner that would “...promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) ...”.

18. It is too early to identify all the extrinsic material that might inform a Court on this aspect of the Bill, including because the Committee's report may itself become "extrinsic material": see s 19(2)(c) *Interpretation Act*. Nevertheless, at this stage, it is relatively clear from the Bill that one concern of the draftsman is that ICWA's earlier expectation (of a distribution in accordance with the 2000 Agreement) may not be met if the matter is left to litigation under the *Corporations Act*. That concern is addressed in the Bill by an emphasis on distributing funds in accordance with the intentions of the Bell liquidator and the funding creditors, as expressed in the 2000 Agreement. The interpretation of certain clauses may be influenced by whether it is a purpose or object of the Bill to improve the position of ICWA.

Objects of the Bill

19. The Bill deals with distribution of the property of the WA Bell Companies, principally the Bell litigation funds, in a manner that avoids litigation. The Minister's expressed reasons for preventing litigation turn on the perceptions that such litigation will occupy a long period, will cause long delays in distribution, and expend large amounts of money in litigation costs.
20. The Bill provides an alternative form of external administration, confined to the "WA Bell Companies", namely those incorporated in Western Australia, which excludes BGUK and a significant creditor, Bell Group NV (in Liq.) (BGNV).
21. The mechanism to implement that policy is to aggregate all property of the WA Bell Companies (**the Fund**), to void all previous funding agreements, and to effect a distribution of the Fund by reference to considerations set out in the Bill, but at the discretion of the decision-making entities under the Bill.
22. The Bill does not attempt a distribution in accordance with pre-existing law and, in particular, it does not attempt to achieve the result that would be obtained under the *Corporations Act* on references to a Court. Rather, the policy of the Bill is to prevent litigation on the question of distribution (i.e., prevent a judicial distribution), and instead to facilitate an administrative distribution. The Bill influences the distribution in favour of the funding creditors, ICWA in particular.
23. A complaint that the Bill alters a creditor's pre-existing legal rights is a complaint about the overall policy and intent of the Bill, not a complaint about an incident of the Bill. This is an example of the difficulty I have mentioned above of distinguishing the Bill's policy from its machinery.
24. The Bill's policy extends beyond preventing litigation within federal jurisdiction under the *Corporations Act*; it includes preventing any litigation in State jurisdiction that might delay or disrupt the processes under the Bill itself. To the latter end, the Bill has provisions which are intended to, and will, reduce the risk of legal challenge to administrative processes or outcomes under the Bill. The provisions are as follows:

- (a) No action, claim or proceeding, relating to a WA Bell Company liability, can be made or maintained, except under the Bill⁴;
- (b) An Authority, established for the purpose by the Bill, is to make a report to the Minister on the property and liabilities of the WA Bell Companies⁵. The report on property and liabilities must be compiled having regard to listed considerations⁶ but the Authority has absolute discretion⁷ in determining the property and liabilities.
- (c) The report must contain recommendations for the distribution⁸ of the Fund, but the statutory Authority does not otherwise make any decision as to the amount of distributions to creditors.
- (d) The Authority's recommendations are to be made by reference to considerations set out in the Bill⁹, but otherwise in the Authority's absolute discretion¹⁰.
- (e) Relevant factors include matters of social or personal judgment (rather than legal or factual matters) as to which reasonable minds may differ greatly – see clauses 35(2)(e)(iv), (v) and (vi) for examples¹¹.
- (f) The Authority's recommendations need not be supported by written reasons¹², which reduces the risk that an aggrieved creditor could prove that the Authority or the Governor has strayed from the Bill's provisions.
- (g) In any event, an error of law or failure by the Authority to adhere to the Bill's provisions does not invalidate the Authority's recommendation¹³. This reduces the risk of a court challenge to a recommendation, even if such failure could be proved.
- (h) The Authority's recommendations must be presented to the Minister¹⁴ but it is not the Minister who has the power to effect distributions. The intermediary involvement of the Minister reduces the risk that the Minister's actions may be challenged in court.
- (i) The Minister must submit the Authority's report to the Governor¹⁵ and the Governor may determine an amount to be distributed.¹⁶ The Governor will act only

⁴ Clause 25(5).

⁵ Clause 33.

⁶ Clause 33(2).

⁷ Clause 33(3).

⁸ Clause 34(2).

⁹ Clause 35(2).

¹⁰ Clause 36(4).

¹¹ These clauses appear to be aimed at WA Glendinning, and perhaps at others.

¹² Clause 36(6).

¹³ Clause 36(9).

¹⁴ Clause 34(1) and (2).

¹⁵ Clause 37(1).

on the advice of Executive Council. The Governor is not required to determine an amount is to be distributed;¹⁷ is not required to ensure that all the Fund is distributed¹⁸; and is not required to give reasons¹⁹. These provisions will reduce the risk that an aggrieved creditor can show any failure of process by the Governor.

- (j) In any event, a determination by the Governor does not create any right in a creditor²⁰, which may reduce the chance of a creditor having standing to challenge a determination, even if a failure of process can be shown.
 - (k) The Governor's determination also extinguishes every liability of a WA Bell company to a person who is not named in the Governor's determination as a person to receive a distribution²¹, which reduces the risk of suit by such persons as to quantum.
 - (l) The Governor's determination is not subsidiary legislation²², so it is not subject to the rules facilitating disallowance by Parliament. The Governor's determination need not be made public.
25. Complaints about lack of transparency and accountability are complaints about one aspect of the policy and objects of the Bill, not complaints about mere machinery or inadvertent incidents of the Bill's objective of making a distribution.

Question 1 - Is any clause in the Bill inconsistent with the policy of the Bill as outlined by Hon Michael Mischin MLC, Attorney General, in the Second Reading Speech to the Bill or the objects of the Bill? If so, how?

26. In light of the above, my opinion is that no provision of the Bill is inconsistent with the policy or objects of the Bill, taken together. Because the objects of the Bill entail some internal tension, a particular provision supporting one object may be characterised as inconsistent with another object.
27. Question 1 arises primarily from submissions made by the Law Council of Australia, Mr Garry Trevor, and Bell Group (UK) Holdings Ltd (BGUK).
28. The Law Council at paragraph 16 submits that the Bill does not ensure achievement of the objective, mentioned in the Explanatory Memorandum, of an equitable distribution, and no safeguards exist to ensure oversight of that objective.

¹⁶ Clause 37(2).

¹⁷ Clause 37A(1).

¹⁸ Clause 37A(2).

¹⁹ Clause 37A(4).

²⁰ Clause 37A(6).

²¹ Clause 37A(8).

²² Clause 37A(5).

29. I do not regard this as a complaint about inconsistency of the mechanisms in the Bill with the Bill's objectives. First, the Bill's objectives are discerned from the Bill, not necessarily from the Explanatory Memorandum which merely explains the Bill, and which can be relied upon only to either confirm the plain meaning of the text or to resolve some ambiguity: s 19 *Interpretation Act*. The distribution of the Fund is to be recommended having regard to the matters in cl 35(2), one only of which is the objects of the Act, and none of which mentions the words "equitable" or "just" or similar. Therefore, use of the word "equitable" in the Explanatory Memorandum would not serve to render the Bill more equitable than its text indicates.
30. Second, and in any event, even if "equitable" were an appropriate paraphrase of the objects of the Bill, it is not to be benchmarked to the *Corporations Act* since one clear objective of the Bill is to displace large parts of that Act.
31. Third, if "fairness" or "equity" in Fund distribution were one of the Bill's objectives, it has to be balanced against achievement of a non-litigious (i.e., expeditious) distribution at least as to "interim" distributions – see cl 36A²³, along with the specific objects and relevant considerations.
32. At paragraph 62, Mr Trevor for BGNV submitted that the recently proposed amendment²⁴, which removed the obligation to complete distributions within 12 months, is contrary to the original key objective of the Bill. However, the question for my opinion, and the only relevant legal question, is whether any clause in the amended Bill is inconsistent with its policy or objects, and no object mentions or now implies expedition of the final distribution.
33. At paragraphs 76-78, Mr Trevor submits that the objective of avoiding further litigation will fail, since certain litigation he mentions is inevitable. The question I am addressing is whether clauses in the Bill are inconsistent with its policy or objectives, not whether the Bill will achieve complete success in its objectives.
34. I add however, that there are possible avenues for litigation, even if the Bill is enacted. First, a constitutional challenge appears likely. Second, issues arise under the Bill's provisions in cl 68 in respect of judicial review (see below). Third, there are questions about the territorial reach of the Bill, and whether litigation might be commenced in the UK, in Netherlands Antilles or elsewhere, despite the Bill. Fourth, some parties have flagged litigation under one or more of Australia's free trade agreements. Fifth, the amounts involved, the history, the submissions and the characters, all suggest that litigation will be pursued if at all open. Sixth, litigation may be commenced and prosecuted for a period even if under a dubious cause.
35. It is not possible in this advice to be more definitive about the prospects of litigation, or its duration or success.

²³ Proposed under Supplementary Notice Paper.

²⁴ Amendment proposed in the Supplementary Notice Paper No. 134, Issue No. 1 (**Supplementary Notice Paper**).

36. *In conclusion on question 1:*

- (a) The Bill may not be consistent with a view that the Bill's object is a "just" distribution, because, first, there is no express requirement to effect a just or fair distribution; second, the outcome will turn on unreviewable exercises of discretion; and, third, the Bill sets its own criteria for fairness, not including reference to pre-existing law.
- (b) Clauses of the Bill are consistent with one or more objects of the Bill, but not inconsistent with all objects considered together.

Question 2 - Is any clause in the Bill materially different from provisions in the Corporations Act 2001? For example, how do the words 'appropriate compensation' in clause 4(c) of the Bill compare with the power of the Court to make orders as it deems just under section 564 of the Corporations Act 2001?

37. Many and important effects of the Bill are materially different from the provisions in the *Corporations Act*. In particular, all recourse to the courts is excluded under the Bill. All processes under the *Corporations Act* are transparent and reasoned and appealable, but few could be so described under the Bill. Any surplus funds, after distributions in a winding up, would normally be returned to the company members (shareholders) but under the Bill would go to the State.
38. Clause 4(c) provides that one object of the Bill is to "provide appropriate compensation" to the creditors who funded the Bell litigation. The Bill has other provisions from which "appropriate" will take some of its content:
- Clause 4(c) goes on to provide, in effect, that "appropriate" will be coloured by regard to the amount of funding provided and the risks assumed by the funders, the clear implication being that the magnitude of each counts in favour of a large distribution to ICWA in particular.
 - Similarly, clause 4(d) provides that another object is to "reflect" the circumstance that, without the litigation funding, the Bell litigation funds would not exist and creditors would have received nothing.
 - Clause 4(g) expresses the object of distributing the Bell litigation funds generally in accordance with the intentions of the liquidator and the creditors who funded the litigation, as set out in earlier agreements (primarily meaning the 2000 Agreement, but accommodating any later agreement if reached).
 - Clause 36 deals with Authority recommendations for compensation to be paid to funding creditors. Under clause 36(3), the Authority *must* have regard to the objects of the Bill, including those I have listed above.

- Clause 36(3)(d) then provides that the Authority may have regard to, among other things, the amount of funding, the terms of an agreement for the funding creditors and the extent of the risks assumed by the funding creditors.
 - By cl 35(2)(e)(vii), the Authority may have regard to those cl 36 matters in the Authority's report recommendations as to distribution in accordance with liabilities. This has the effect that the Authority may, in effect, reduce the funds available for ordinary distribution (under cl 35) by the amount set apart for funding creditors (under cl 36).
39. Section 564 of the *Corporations Act* provides that, in a winding up, the Court may make such orders as it considers "just" to give "an advantage" to indemnifying creditor over other creditors in consideration of the risk they have assumed in providing the indemnity. In very general terms, s 564 is directed at empowering a court to implement the same kind of public policy as that implemented by the Bill, namely the policy of encouragement of creditors to fund litigation to recover the assets of an insolvent company.
40. In *Atco Controls Pty Ltd (in Liquidation) v Stewart & Anor* [2013] VSCA 132 (25 June 2013)²⁵, the Chief Justice in the Court of Appeal said this at [117]:

*Section 564 gives the court a broad discretion to depart from equality of treatment among a particular class of creditors when it is deemed just to do so. In Kugel, in the matter of Charben Haulage Pty Ltd (in Liquidation)*²⁶ Emmet J held that the power was to be exercised having regard to the desirability in the public interest of encouraging creditors to indemnify liquidators who desire to pursue claims in the winding up of companies.²⁷ His Honour continued:

While the circumstances in which a funding creditor will receive the whole of the available funds might be rare (see State Bank of NSW v Brown [2001] NSWCA 223; (2001) 38 ACSR 715 at [40]–[41]), circumstances may be such as to justify such a result. It is appropriate to look at the sum recovered, the failure of other creditors to provide an indemnity, the proportions between the debts of the indemnifying creditors and the other debts, the public interest in encouraging creditors to provide indemnity so as to enable assets to be recovered and, generally, the totality of the circumstances (see Household Financial Services Pty Ltd v Chase Medical Centre Pty Ltd (1995) 18 ACSR 294 at 296–7).²⁸

41. Redlich JA at [253] made similar observations, also emphasising the broad discretion of a court under s 564.

²⁵ The High Court upheld an appeal: *Stewart & Anor v Atco Controls Pty Ltd (in Liquidation)* [2014] HCA 159, but did not question the characterisations of s 564 quoted below.

²⁶ [2011] FCA 834.

²⁷ See *Re Ken Godfrey Pty Ltd (in liq)* (1994) 14 ACSR 610, 612.

²⁸ [2011] FCA 834 at [25].

42. A summary of the considerations under s 564 was given by Brownie J in *Household Financial Services Pty. Limited v Chase Medical Centre Pty. Limited* (1995) 13 ACLC 156. In considering whether 100% of the recovered funds should be paid to the indemnifying creditor, it was pertinent that, but for the efforts of the funding creditor, no funds would be available, and that the other creditors stood by, and that the defendant had foreshadowed strenuous opposition to the claim in the litigation which increased the risk to the funding creditor.
43. The Chief Justice in *Stewart* also observed that rare cases may arise in which a funding creditor is awarded the entire available fund, which sets some context for the prima facie position under the Bill that the funding creditors obtain 66.7%. As explained in *State Bank of NSW v Brown* [2001] NSWCA 223; (2001) 38 ACSR 715 at [41]:

The cases in which 100% has been awarded have had particular features. In Cartco the amounts were very small. Creditors had advanced \$4000 and were permitted to retain the net recovery of \$7000. In Glenisia Investments the amounts were also small: \$36,000 expended for a net return of \$114,000. Furthermore, no unsecured creditor opposed the distribution of costs to the funding creditors. That was also the position in Household Financial Services but, in view of the absence of explicit disclosure in the liquidator's letter to shareholders about the proposal to seek a 100% order under s450, Brownie J gave leave to any creditor to apply to vary the order. In that case some \$65,000 had been advanced for a net return of \$215,000.

Nevertheless, *State Bank v Brown* is not authority that 100% will never be distributed to the funding creditors when the funds gathered are substantial. All the circumstances must be considered.

44. In summary, a court under s 564 *Corporations Act* will take account of:
- the risks assumed by the indemnifying creditor;
 - the sum recovered;
 - the failure of other creditors to provide an indemnity;
 - the fact that no funds would exist were it not for the funding creditor;
 - the proportions between the debts of the indemnifying creditors and the other debts;
 - the public interest in encouraging creditors to provide indemnity so as to enable assets to be recovered; and
 - generally, the totality of the circumstances.

45. The Bill expressly reflects some of those considerations. Under both the Bill and s 564 *Corporations Act*, the determination is also permitted to take account of any other relevant matter, which means that the Authority may take account of any matter regarded as relevant under s 564.
46. However, the Bill adds considerations peculiar to the Bell Group matter, and not, or not yet, reflected in case law for s 564.
47. In particular, cl 4(g) and 36(3)(a) make it mandatory to have regard to the intentions of the liquidator and funding creditors as set out in the 2000 Agreement, and that consideration is not counterbalanced by any other consideration in favour of non-funding creditors. The fact of such an agreement, and its effect in encouraging the funding/indemnification, will be relevant under s 564, but the court will not apply such an agreement to the extent its terms are disproportionate.
48. It was agreed in the 2000 Agreement that an application would be made under s 564, based on the agreed formula, so it was then envisaged that the Court would assess what a “just” distribution comprised, including by reference to the 2000 Agreement. The Bill essentially substitutes the Authority for the Court in this process, but provides that the liquidator’s / funding creditors’ intention is a mandatory consideration not conditional on those intentions being “just”.
49. Another aspect of the Bill that may be materially different from s 564 relates to parties. Section 564 operates to give advantage to a *creditor who has indemnified* the liquidator. Some parties submit that ICWA was neither a creditor nor an indemnifier. As to the latter, it seems correct that LDTC formally provided indemnities and funding. Whether ICWA, or the extent to which ICWA, is a creditor is not something I can resolve on this brief. However, as I read the Bill, the difficulty is overcome by defining “creditor” to include a person who was “a beneficiary of any trust of, or with respect to, a liability” of a WA Bell Company, which will include ICWA as a “creditor” by virtue of the trust arrangements with LDTC, even if not formally a creditor in its own right.
50. On the other question, whether ICWA “funded” the litigation, the Bill’s intention in cl 4(c) is that ICWA “funded the Bell litigation”, albeit indirectly by a back-to-back arrangement with LDTC. I have later suggested an amendment to secure this understanding.
51. In these respects, the Bill’s intention is that the internal arrangements with LDTC ought not to prejudice ICWA’s recovery in the distribution of the Fund, given ICWA’s real contribution. It is unclear how this result under the Bill would compare with an application under s 564, but it is clear that the Bill is a safer option for ICWA.
52. ***In conclusion on question 2:***
 - (a) The Bill provides several considerations as to distribution that reflect considerations the courts have adopted under s 564 *Corporations Act*.

- (b) However, the Bill also has several effects that are inconsistent with the law under the *Corporations Act*.
- (c) One possible outcome of application of the Bill will be a distribution similar to that which would have resulted under the *Corporations Act*, but no-one will be able to discern whether it has or not, because the outcome in the Courts cannot be predicted with any confidence.
- (d) On balance, the outcome for ICWA under the Bill is at least more certain than it would be under the *Corporations Act*, and is likely to be more favourable in amount. This is because “appropriate compensation”, under cl 4(c) is interpreted by reference to the Bill’s criteria, not by reference to criteria under the *Corporations Act*.

Question 3 - To what extent, if any, will the Bill (if enacted) provide for the ‘acquisition of property’ from a person (by means of the transfer of property provided for in clause 22 of the Bill) and fall within the scope of Commonwealth legislative power in section 51(xxxi) of the Commonwealth Constitution?

- (i) Do the claims of creditors amount to ‘property’ and fall within the scope of section 51(xxxi) of the *Commonwealth Constitution*? If so, on what basis is a claim characterised as property?
- (ii) Does section 51(xxxi) of the *Commonwealth Constitution* exclude the State having the power to acquire property on other than just terms (by the operation of Part 1.1A of the *Corporations Act 2001*)?
- (iii) If yes, will the provisions of the Bill (if enacted) infringe section 51(xxxi) of the *Commonwealth Constitution* by not providing for the acquisition of property on just terms?

“Property”

- 53. “Property”, for the purposes of s 51(xxxi), extends beyond land and tangible property, to include intangible and “innominate and anomalous” interests: *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 349 (the Bank Nationalisation case); *Smith Kline French v Secretary, Department of Community Services* (1990) 95 ALR 87; *Health Insurance Commission v Peverell* (1994) 179 CLR 226.
- 54. In *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, Newcrest held a mining tenement at a time when the land in the tenement was declared a national park under Commonwealth legislation, thus preventing the extraction of minerals. The High Court held this was an acquisition of ‘property’, notwithstanding that Newcrest still held its leases. Gummow J said that there had been an ‘effective sterilisation of the rights constituting the property in question’: at p 635. That is to say, while the tenement still existed and was still held by Newcrest, it could not be acted upon in the park, which was

sufficient to characterise this as an acquisition of 'property' by way of the parks declaration.

55. By analogy in the present case, the creditors' capacity to prove their debts *under the Corporations Act* in the liquidations of WA Bell Companies would amount to property for the purpose of the Constitution.

Application to State

56. The State is not bound by s 51(xxxi) Constitution or by any parallel constitutional impediment to its power to pass laws. In *Pye v Renshaw* [1951] HCA 8; (1951) 84 CLR 58, 79 - 80, five members of the High Court in a joint judgment said that if a State statute provides for the resumption of land on terms which are thought not to be just, 'that is of no consequence legally'. Section 51(xxxi) binds only the Commonwealth Parliament.
57. The provisions of Part 1.1A of the *Corporations Act*, allowing a State to carve out an area of corporations law to be covered by State law, are not laws of the Commonwealth that acquire property. Therefore, Part 1.1A is not invalid directly by reason of s 51(xxxi).
58. This leaves the question whether the High Court might interpret s 51(xxxi) as extending to Part 1.1A in the case where the relevant State intends to, or does, use Part 1.1A to pass a law to acquire property without just terms. It might be argued that the position is made worse by the facts that the Commonwealth also stands to benefit from the Bill. However, in my opinion, the Bill when enacted will be a law of the State, not in any degree a law of the Commonwealth, notwithstanding the facilitative role of Part 1.1A. The Bill is beyond s 51(xxxi).
59. Part 1.1A could not itself be characterised as a law for the acquisition of property merely by virtue of the relevant State's actions. Part 1.1A does not confer power on the State, it merely rolls back Federal legislation so that s 109 is not engaged.

Does Bill offend s 51(xxxi)?

60. This question does not arise, because the State Parliament is not bound. Nevertheless, it may be useful to examine how s 51(xxxi) may operate.
61. In a normal winding up, the liquidator acts as agent of the company, with duties similar to those of a company director, and has power to take control of and liquefy the company's assets. The assets remain the property of the company in liquidation until distributed to creditors or members. There is normally no need for any other transfer of company property.
62. The Bill transfers property out of WA Bell Companies into the Authority and does so without compensation to the WA Bell Companies. However, it does so in the context of winding up insolvent WA Bell Companies and for the purpose generally of a distribution of their property to creditors, which property is insufficient to meet those liabilities. That context makes nonsense of any general proposition that the *WA Bell Companies* should be

given just terms compensation. The real question is whether there is an acquisition of the creditors' property.

63. Section 51(xxxi) provides that the Commonwealth has power to make laws with respect to the acquisition of property on just terms from any person, which is taken to mean that the Commonwealth has no power to make laws, under other heads of legislative power, that acquire property unless on just terms as to compensation. However, this does not restrict all other heads of legislative power. The taxation power, for example, is not so confined. Similarly, the power in s 51(xviii) to make laws for copyright etc. necessarily entails curtailing the rights of those who are not protected by copyright laws, and hence the Commonwealth is not precluded by s 51(xxxi) from acquiring property under certain laws pursuant to s 51(xviii): *Nintendo v Centronic* (1994) 181 CLR 134. A law allowing confiscation of property involved in criminal conduct is not an acquisition, even though it might affect the rights of an innocent person: *Re Director of Public Prosecutions; ex p Lawler* (1994) 179 CLR 270.
64. Significantly, the High Court has observed that a Commonwealth law under s 51(xvii) allowing the sequestration of a bankrupt's property would not be an acquisition under s 51(xxxi): *Attorney General (Cth) v Schmidt* (1961) 105 CRL 361 at 372, where Dixon CJ said (other Justices agreeing):

For example, no one would doubt that, under the power to make laws with respect to bankruptcy, property of the bankrupt may be sequestered and property of others which has been left in his order and disposition may be vested in the Official Receiver and that s. 51 (xxxi) has no bearing on the matter. At the same time, if a law was made under which a piece of land was acquired for a Bankruptcy Office, s. 51 (xxxi) would govern the legislation and not s. 51 (xvii).

65. Therefore, to the extent the Bill transfers property of creditors to the Authority for distribution under external administration, it would not offend s 51(xxxi) Constitution (assuming that section applied). However, much turns on whether that distribution is to be made according to the law that gave the property value before transfer.
66. The Bill does not attempt to distribute according to pre-existing law. It vests WA Bell company property in the Authority, freed of all other interests, trusts etc., without a uniform intention or obligation to apply the funds to those pre-existing liabilities. It leaves open the possibility that ICWA will obtain more than the aggregate of its expenses and provable debts. The Bill also leaves open the possibility that some of the Fund will not be distributed but will instead pass to the State. It leaves open the possibility of WA Glendinning being paid substantially less than its provable debt would otherwise allow.
67. The test for a s 51(xxxi) acquisition of a claim in a liquidation (a "chose in action"²⁹) is not whether more might have been reaped but for the taking, but whether there is a

²⁹ *Loxton v Moir* (1914) 18 CLR 360 at 379.

difference between the value of the chose and the value of the right to apply to the Authority, both assessed on the day of the transfer. It may or may not be correct that, of the available funds, ICWA will receive a higher *proportion* under the Bill than it would under the *Corporations Act*, but I do not see how anyone could yet say that another creditor will receive less *actual return* under the Bill than it would under the *Corporations Act*. That is because proceedings under the *Corporations Act* may be lengthy, expensive and uncertain in outcome, and the result of the s 564 application could be as beneficial to ICWA as application of cl 36 of the Bill.

68. Assuming there is a reduction in value on transfer day of a creditor's property, in my opinion the Bill would not be distinguishable from the Bank Nationalisation case. In that case, assets of private banks were transferred to a Government controlled entity pursuant to a scheme, which scheme would have seen the shareholders of the private banks paid under a statutory "purchase". The Court found that an acquisition had been made without just terms. On that reasoning, the Bill would be likely to offend s 51(xxxi) of the Constitution if the Bill were a Commonwealth Bill.
69. I add that it is possible that s 564 of the *Corporations Act* might facilitate a s 51(xxxi) acquisition in certain circumstances, particularly if a Court considered it just to award an indemnifying creditor more than the sum of the creditor's debt and expenses. I am not aware of the point being argued.
70. ***In conclusion on question 3:***
- (a) The Bill is not constrained by s 51(xxxi) Constitution.
 - (b) If the Bill were constrained by s 51(xxxi) a court would be likely to hold that it effects an acquisition of property other than on just terms.

Question 4 - Will any provisions in the Bill (if enacted) be inconsistent with any law of the Commonwealth and therefore invalid under section 109 of the Commonwealth Constitution, or invalid for any other reason? In particular: is Part 6 of the Bill (if enacted) effective to exclude the application of the Corporations Act 2001 and negate a risk of the Bill infringing section 109?

71. This question arises because of submissions from Mr Trevor and from WA Glendinning and Assoc.
72. Mr Trevor submits that the Bill is inconsistent with Commonwealth law, for the purposes of s 109 Constitution in three particulars. However, he does not elaborate on these submissions. To a large extent, therefore, I am able to address these contentions only by guessing what argument is being suggested.
73. Mr Trevor's first submission is that the Bill is inconsistent with the *Income Tax Assessment Act 1936* and other taxation legislation. I am not able to guess what is intended. The Bill discloses no intention to avoid tax. The Commonwealth's taxation laws generally operate on what is done and earned, and will operate on what is done and

earned pursuant to the Bill. The recently proposed amendments³⁰ to the Bill facilitate the preservation of the Fund to the extent of current taxation notices. The ATO does not enjoy any preference under the *Corporations Act*.

74. I note that the ATO, in a recent submission to the Committee said: "At this stage, the Commissioner simply notes that the apparent intention of the Bell Bill, if enacted in its current form, is that it should constrain the Commissioner's capacity to administer the income tax laws according to their terms." That appears to flag an inconsistency with Commonwealth tax laws, but does not assist in identifying the inconsistency. While speculation is idle, it may be that Mr Trevor and the ATO have both overlooked the fact that the WA Bell Companies will be validly removed from the *Corporations Act*, and hence any assistance that Act gave to the ATO will no longer be relevant.
75. Mr Trevor's second submission is that the Bill is inconsistent with the *Corporations Act* because ss 5F and 5G *Corporations Act* do not allow the State to carve out a State-regulated area, such as is intended for the Bill. In my view, the Bill is valid in this respect: sections 5F and 5G are dealt with below.
76. WA Glendinning suggests that clause 5(1) of the Bill is inconsistent with Commonwealth law. Clause 5(1) provides that the Act binds the Crown in right of the State and, so far as the State's legislative power permits, the Crown in right of the Commonwealth and other States. As framed, cl 5(1) is not invalid because it extends to the Commonwealth only so far as the State's laws may do so.
77. The law is not perfectly clear as to the extent that State laws may affect Commonwealth rights. In *Re Residential Tenancies Tribunal of New South Wales and Henderson; ex p Defence Housing Authority* (1997) 190 CLR 410, the High Court generally affirmed the power of State parliaments to affect the Commonwealth in the exercise of the Commonwealth's capacities and function, but held that State parliaments could not affect those capacities and functions themselves. This means, generally speaking, that a State law will be effective against the Commonwealth unless (a) it is inconsistent under s 109 Constitution; or (b) it purports to affect a Commonwealth capacity, as distinct from regulating the Commonwealth's exercise of its capacities, in a non-discriminatory manner.
78. Accordingly, there is no general impediment to State law applying to the Commonwealth and its officers: criminal law, planning law, traffic law, property law all apply generally to the Commonwealth.
79. In the present case, s 5E of the *Corporations Act* expressly declares that the Act does not exclude or limit the concurrent operation of any State law (including the Bill when enacted), unless there is a direct inconsistency: ss 5E(1) and (4). Section 5F provides that, if a law of a State provides that a matter is an "excluded matter" in relation to all but specified parts of the *Corporations Act*, then none of the *Corporations Act*, other than

³⁰ Proposed under Supplementary Notice Paper.

those specified provisions, applies to that matter in that State. The Bill has done so (see below), and this eliminates any direct inconsistency of the Bill with the *Corporations Act*.

80. Section 5G of the *Corporations Act* allows a State to declare parts of a State Act to be “*Corporations Act displacement provisions*”, in which case, in particular, the provisions of the *Corporations Act* for winding up and external administration do not apply (s 5G(8)). Clause 45 of the Bill has followed sections 5F(1)(c) and 5F(2)(c). Clause 46(2) of the Bill follows s 5G. The net effect is that none of the Corporations legislation applies to a WA Bell Company, other than in the limited respects in cl 45(2) and (3), and in those limited respects (and any others) Parts 3, 4 and 5 and ss 49 and 50(3) are displacement provisions operating in the absence of corresponding *Corporations Act* provisions.
81. In that legislative framework, in my view, the Bill merely regulates the exercise by the ATO of the Commonwealth’s executive capacity to recover in a liquidation, in a non-discriminatory manner – the Bill does not purport to affect the capacity of the ATO to recoup tax liabilities or to discriminate against the ATO. As mentioned above, in the absence of any more specific argument from the ATO or Mr Trevor, I am not able to advise more specifically.
82. ***In conclusion on question 4:***
- (a) The Bill is not inconsistent with the *Corporations Act*.
 - (b) In the time available, and in the absence of any specific contention, I have not been able to identify any inconsistency with Commonwealth taxation law.

Question 5: Will the Bill (if enacted) in any way infringe Chapter III (‘The Judicature’) of the *Commonwealth Constitution* or the doctrine of the separation of powers?

83. The doctrine of the separation of powers has two related limbs. It prevents the Commonwealth vesting non-judicial powers in a Federal court³¹, and it prevents the Commonwealth vesting judicial powers in a body that is not a constitutionally appropriate court³² (often referred to as “Chapt. III Court”).
84. Chapter III of the Constitution, with its separation of powers doctrine, does not directly apply to the State: *Nicholas v Western Australia* [1972] WAR 168. However, in a series of cases beginning with *Kable*³³, the High Court held that the fact that the Constitution allows vesting, and the Commonwealth has vested, federal judicial power in some State courts has the consequence that State courts exercising federal judicial power must also enjoy certain minimum qualities as a Chapter III courts. As a result, certain laws of a State may be invalid to the extent that they vest non-judicial powers in a State Court or otherwise impair a State Court’s judicial independence and integrity.

³¹ *R v Kirby; Ex p Boilermakers Society of Australia* (1956) 94 CLR 254.

³² *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

³³ *Kable v Director of Public Prosecutions NSW* (1996) 189 CLR 51.

85. However, the *Kable* principle has no bearing on the other limb of the doctrine – it has no bearing on whether a State parliament can vest judicial powers in an administrative body that does not exercise (indeed could not exercise) federal judicial power. It might be argued that the Bill vests judicial power somewhere in the processes of the Bill but, even if so, that does not engage the *Kable* principle.
86. The State Administrative Tribunal, for example, routinely performs functions, as an administrative body, that would be regarded as judicial in the federal arena.
87. Sub-question 5(iii) asks “whether there is a risk that provisions in the Bill (particularly clause 68) are invalid because they impermissibly interfere with the outcome of the judicial process and thereby the independence of the judicial branch of government, rather than alter substantive claims or rights which are at issue in pending litigation?”
88. In my opinion, there is little risk that cl 68 of the Bill unconstitutionally interferes with any outcome of a judicial process or with judicial independence. As above, the Bill has affected the manner in which creditors may prove debts in the winding up of WA Bell Companies, and gives statutory guidance for the manner in which that winding up is to be conducted. That has the effect that no court will be involved in the winding up or distributions under it. However, those aspects of the Bill show no unconstitutional interference with judicial power.
89. A related submission³⁴ is that the Bill undermines public confidence in the judicial process by removing Bell matters from the judicial arena to the administrative arena. I think this overstates the effect on the public perception. Legislation has often made such transfers – see for examples the establishment and jurisdictions of the State Administrative Tribunal, the WorkCover Western Australia Authority (workers compensation), and the Industrial Relations Commission. See also the *Commercial Arbitration Act*. The justification for those bodies and processes included reducing complexity and improving expedition, compared with litigation.
90. The Bill does not suggest the judiciary is incapable of competently resolving the matters; merely that the judicial processes will be lengthy and complex and uncertain.
91. There is no breach of the separation of powers doctrine, and no other interference with judicial power, on account of legislation that adjusts substantive rights and thereby causes pending litigation to be abandoned: *Duncan v Independent Commission Against Corruption* [2015] HCA 32 at [26];

It is now well settled that a statute which alters substantive rights does not involve an interference with judicial power contrary to Ch III of the Constitution even if those rights are in issue in pending litigation. This Court's decision in Bachrach³⁵ affords an example of a case involving a

³⁴ The Law Council of Australia letter to State Solicitor dated 16 June 2015, and repeated in the Law Council's submission dated 2 October 2015.

³⁵ *H A Bachrach Pty Ltd v Queensland* [1998] HCA 54; (1998) 195 CLR 547 at 560 [8]- [9], 563-564 [18]-[22].

piece of State legislation which was said to contravene the Kable principle. That case was concerned with a section of the Local Government (Morayfield Shopping Centre Zoning) Act 1996 (Q) that provided that the purposes for which certain land could be used without the consent of the local council were "taken to include" a particular proposed shopping centre development. This Court held that the impugned legislation did not constitute an impermissible interference with judicial power, notwithstanding that it was directed at the specific parcel of land which was the subject of pending proceedings in court.

92. ***In conclusion on question 5:***

- (a) The State is not relevantly bound by Chapter III Constitution.
- (b) The Bill does not offend Chapter III Constitution.

Questions 5(i) and (ii) - What is the scope of 'the jurisdiction of the Court to grant relief for jurisdictional error, provided for by clause 68(4) of the Bill? Is the right to appeal or review constrained by other clauses of the Bill, such as clauses 34(4), 35(8) and 36(9)?

- 93. It is not difficult to explain the gist of the courts' use of the concept of "jurisdictional error". The difficulties arise in its detailed application.
- 94. In general, the courts have power to judicially review administrative action, essentially to ensure that statutes are followed. Judicial review, again speaking generally, is designed to ensure proper process, not to ensure particular or 'correct' outcomes. The High Court and the Supreme Courts necessarily have jurisdiction to determine whether an administrator has so failed to follow a statute that he or she has made a "jurisdictional error", i.e., an error of such important departure from statute that its consequences must be set aside.
- 95. The High Court in *Craig v South Australia* (1995) 184 CLR 163 at 179³⁶ said:
If ... an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.

See also *Re Minister for Immigration and Multicultural Affairs; Ex p applicant S20/2002* (2003) 198 ALR 59; *Australian Broadcasting Tribunal v Bond* [1990] 170CLR 321 at 353 per Mason J.

³⁶ *Craig* may not provide a rigid taxonomy of jurisdictional error by administrative tribunals: *Kirk v Industrial Relations Court (NSW)* (2010) 239 CLR 531 at [73] (dealing with inferior courts).

96. For the purposes of judicial review, the error must be an error of law or legal process; it is not sufficient for judicial review that an error is shown in fact-findings or in the weight accorded relevant factual considerations (unless the factual error is so grave as to be irrational). Also, there must have been a legal consequence of the error, which consequence is the matter to be remedied – courts will not entertain suits merely to prove a point.
97. In short, if an applicant proves that an administrator acting under an Act has (for example) failed to take account of a consideration made mandatory by the legislation, and that the applicant has sufficient interest in the matter, then the court will set aside the administrator's decision as invalid, and may order the administrator to reconsider in accordance with the law, or grant some other relief.
98. Prohibition, mandamus, injunction, declaration and certiorari are in large part remedies, rather than causes of action. The cause of action that calls for any such remedy is usually a failure to follow a statute. Clause 68(1)(c) provides that these remedies are not available, but subject to cl 68(4).
99. Clause 68(4), provides that cl 68(1) does not affect the Court's jurisdiction to grant relief for jurisdictional error, meaning that the full array of those remedies is still available for jurisdictional error, regardless of cl 68(1)(c).
100. Some aspects of the Bill are not clear. If an applicant proves such a failure by the Authority under cll 34, 35 or 36, the court may be persuaded not to quash the relevant recommendation or report, since the Bill provides, in cll 34(4), 35(8) and 36(9), that the Authority's failure does not effect invalidity of the resulting recommendation/report. That is to say, the court might be persuaded that certiorari cannot lie against an act that is statutorily made valid, despite the administrative failing. On the other hand, the administrative failure still has a consequence, namely a valid *but flawed* report, which report adversely affects the applicant, and a court might be persuaded to entertain a case under a remedy that does not necessarily challenge the validity of the report.
101. The Bill provides for an "absolute discretion" in decision making: see cl 33(3). This type of clause is directed at ensuring that there can be no jurisdictional error, because the decision maker is not bound to follow relevant considerations.
102. By these means, the Bill's intent is to formally permit judicial review under cl 68(4) for jurisdictional error, but to remove the usual bases for establishing such error. If the Bill is effective in these respects, the result will be that judicial review is practically excluded. However, as above, it is not clear that judicial review for jurisdictional error has been excluded to the extent the Bill intends.
103. Some clauses of the Bill provide for mandatory administrative steps, and do not have a provision to the effect found in cll 34(4), 35(8) and 36(9) or 33(3). For example, cl 32(3) requires the Authority to provide a draft report to each proving creditor and any failure of the Authority to do so may invalidate the Authority's recommendations, and cl 68(4) can be engaged.

104. ***In conclusion on question 5(i) and (ii):***

- (a) Many aspects of the Bill are directed at preventing judicial review of administrative action under the Bill.
- (b) The Bill's formal allowance of judicial review for jurisdictional error will not allow substantial litigation, because the Bill removes the usual bases for relief.
- (c) Judicial review for jurisdictional error will lie for a failure to follow mandatory steps under the Bill, where those steps are not protected by provision of the kind found in cl 34(4), 35(8) and 36(9) or 33(3).
- (d) It is not certain that all avenues of judicial review have been closed, even where provision has been made to the effect that a failure will not invalidate actions, as in cl 34(4), 35(8) and 36(9).

Question 5(iv) - Does clause 67, providing for a stay of proceedings, effectively address this legal issue?

- 105. Clause 67 effectively terminates any existing court proceedings, and prevents the commencement of any new proceedings, unless leave of the Court is obtained. It applies only to proceedings with respect to property of a WA Bell Company, and it applies only after the day that such property is transferred to the Authority and out of the WA Bell Companies.
- 106. In other words, the moment the property is out of WA Bell Company ownership and liquidator control, and in the ownership and control of the Authority, no proceedings can be brought or continued without leave.
- 107. In the case of existing proceedings in State courts, leave might be given on terms restricted to costs of the proceedings to date, or in respect of other incidental issues such as whether certain property falls under clause 22. It is difficult to see how leave might be granted to continue substantively.
- 108. In the case of proceedings in the Federal Court, it is difficult to see how the Federal Court could have effective jurisdiction once the property is within the Authority under the Bill's provisions and Part 1.1A *Corporations Act* is engaged. I do not see how a case could proceed in the Federal Court, with or without cl 67.
- 109. ***In conclusion on question 5(iv):***
Clause 67 will be effective in terminating proceedings to which it relates.

Question 5(iii) - Is there a risk that provisions in the Bill (particularly clause 68) are invalid because they impermissibly interfere with the outcome of the judicial process and thereby the independence of the judicial branch of government, rather than alter substantive claims or rights which are at issue in pending litigation?

110. The submissions on this point appear to argue that legislation cannot be passed that would have the effect of terminating litigation currently on foot, or precluding new proceedings, or new judicial review proceedings, by reason that such legislation interferes with judicial independence.
111. In my opinion, such arguments are not correct. Apart from the *Kable* principle, which arises from the Commonwealth Constitution, the State's constitutional system of government does not turn in any significant degree on Parliament refraining from passing certain laws on account of judicial independence. Parliament may pass laws that stop certain kinds of litigation, and has done so. Examples have been given earlier.
112. Judicial independence turns on the Executive having no influence in judicial resolution, and it probably extends by convention to the behaviour of Parliamentarians, including in Parliament, but not to the passage of laws (subject to the *Kable* principle).
113. *In conclusion on question 5(iii):*
- The Bill does not interfere in an unconstitutional manner with the State's or the Commonwealth's judiciary or judicial processes.

Other Constitutional Issues

114. I take questions 3-5 to be canvassing possible causes for constitutional challenge to the Bill.
115. However, it should not be assumed that those questions cover the field of possible challenges. Nor should it be assumed that the existing case law on constitutional matters addresses the issues in this particular matter in any predictable manner.
116. Many constitutional observers were surprised by the outcome in *Kable*, which imposed for the first time constraints on State courts as a consequence of the Commonwealth Constitution. While *Kable* has subsequently been refined in a manner less confining for the States, it nevertheless invalidated the NSW legislation in question.

Question 6 - Is the use of the word 'must' in clause 35 of the Bill inconsistent with clause 35(8)?

117. Clauses 34, 35 and 36 each contains mandatory provisions, expressed by use of "must", in respect of the making of a report or recommendations, and nevertheless provides that the report or recommendation is not invalid by reason of failure to comply with the mandatory provision. In other words, the clauses command that certain things be done, but provide that nothing will alter if they are not.

118. Clause 35 is probably the clearest example. It provides that the Authority must have regard to the objects of the Act in making a recommendation, but that the recommendation is not invalid even if the objects of the Act are disregarded.
119. In my view, there is no inconsistency such as to vitiate the clauses.³⁷ The draftsman has taken the view that the Authority can be relied upon to obey the mandatory provisions without sanction by way of court invalidation of decision-making. Mandatory provisions without sanction are not uncommon.
120. ***In conclusion on question 6:***
- (a) Subclause 35(1) is not inconsistent with subclause 35(8).
 - (b) Subclause 35(1) takes effect as a mandatory provision, but one for which the Bill intends no judicial oversight, and which continues to be effective even though invalid or otherwise liable to be declared invalid.

Question 7 (i)-(ii) – Do any legal issues arise as a result of the operation of the following clauses in the Bill (if enacted):

(i) The retrospective operation of provisions of the Bill, such as clauses 26 and 48(3)?

(ii) The operation of the offence provisions in clauses 48 to 54 and 58?

121. Each of those clauses has retrospective operation, or relies upon another clause that has such operation.
122. There is no legal impediment upon the State Parliament enacting retrospective laws. It does so frequently.
123. Nor is there any general impediment to the Federal Parliament doing so, and it has, including in criminal matters: see *Polyukovich v Commonwealth* (191) 172 CLR 501.
124. The point was clearly articulated in *R v Kidman* (1915) 20 CLR 425 at 451. In *Kidman*, the retrospectively was effected by deeming an amendment to legislation to have commenced operation earlier than it was made, and a defendant could be convicted for an act done after the nominated commencement but before the law was in fact made.
125. Most of the debate in cases about retrospectivity concerns the principle of statutory interpretation under which courts will presume that legislation does not operate retrospectively. Those debates say nothing about the Parliament's ability to pass such laws, only about the clarity of expression needed in order to make retrospective laws effective.

³⁷ Bearing in mind that judicial review for jurisdictional error is preserved.

126. *In conclusion on question 7(i)-(ii):*

The State Parliament is not prevented from enacting laws that have a retrospective or retroactive operation, including in respect of criminal provisions.

Question 7 (iii) and (iv): Do any legal issues arise as a result of the operation of the following clauses in the Bill (if enacted):

(iii) The operation of clause 62 ('Effect of things done under the Act')?

(iv) The protections afforded by clauses 63, 64 and 65?

127. According to the Explanatory Memorandum, clause 62 is intended to limit any collateral legal challenge to any aspect of the achievement of the Bill's objectives. Clause 62(2) does so by negating any effects that, apart from the Act's protections, might have given rise to a cause of action. The relevant effects include breach of contract, civil wrongs, terminating contracts and so on.
128. Clause 62(1) limits clause 62(2) to acts of those persons who are concerned in making the Bill and Act and regulations, doing anything under the Bill, or in the effects of the Bill in transferring property, vesting property and affecting liabilities.
129. It may be doubted whether this is necessary, since statutory authority for an act is normally a good defence to any suit which impugns the act. However, the Bill does not aim to be precise or restrained; it aims to use every means available to prevent challenge, collateral and direct.
130. Time does not permit an exhaustive examination of all possible side effects of clause 62.
131. One line of inquiry I may have pursued with extra time is whether the removal of liability for persons performing acts under the Bill also affects rights as between outsiders. For example, following the Bill's alteration of liabilities, clause 62 will prevent A from suing the Administrator, the liquidator and ICWA, in any capacity. But if A had made a promise to B, the performance of which is affected by the Bill, B appears still able to sue A, but A will have no right to sue ICWA as a third party, which may cause B loss.
132. I do not know enough about the facts to advise whether this is a real problem, or is entirely moot.
133. On a different point, I also note that cl 62 may have an additional effect of preventing any judicial review whatsoever. Clause 62(1)(d) applies the section to a person "omitting to do" any other act, matter or thing under the Act. Clause 62(2)(b) then provides that the omission is not to be regarded as placing any person in breach of, or as constituting a default under, any law of the State.

134. Clauses 63, 64 and 65 extend the blanket of immunity still further. They protect the Minister, the Authority, public servants, and ICWA. I do not see any legal issues other than the obvious, and obviously intended, removal of liability for virtually all possible acts and omissions.
135. *In conclusion for question 7(iii) and (iv):*
- Clauses 62 to 65 take an extraordinarily wide approach to protecting persons and entities from legal proceedings, and may terminate suits otherwise available, but does not otherwise raise any obvious legal problems. My opinion in the latter regard is heavily conditioned by my lack of understanding of the facts by which to judge likely eventualities.

Question 7 (v): The operation of clause 72 (the power of the Authority to obtain an opinion from the State Solicitor)? In particular, is there a conflict of interest arising from the State Solicitor also, presumably, being the legal advisor to the Insurance Commission of Western Australia?

136. There may be several different issues involved in this question. The office of the State Solicitor is not a statutory office, but is recognised in many statutes. The office serves as legal adviser to the State, and to many but not all emanations of the State.
137. First, a legal practitioner would normally have a conflict of interest in advising both a person (the ICWA) interested in the Authority's decisions and the Authority itself. This does not appear even debatable.
138. Second, State Solicitors have in the past sometimes expressed the view that no conflict arises where there are contests between departments of State, because the client is nevertheless the State itself, and advice is directed to the State's interest. However, that view may not extend to contests between statutory corporations. In my opinion, it would not apply to the present case because it could not be said that the unitary, common, client is the State. On the contrary, that view would undermine the authority of the Authority as an entity with responsibility to third parties.
139. Third, the question presupposes that the State Solicitor has acted, or will act, for the ICWA. I do not know if the State Solicitor has acted or will act for ICWA but, even if not, I do not think the conflict would be resolved. That is because the State's interest is statutorily bound to ICWA's fortunes. Under the *Insurance Commission of Western Australia Act 1986*, ICWA is an agent of the Crown, with directors appointed by the government, subject to ministerial directions and, most importantly, obliged to declare an annual dividend in favour of the State. The Bill in cl 4(h) expressly refers to the "resources of the State". The impression is that any advice to the Authority might be influenced by the effects on the State's revenue.

140. Fourth, a statute may override common law and professional obligations, including statutory obligations, and authorise a person to act in what would otherwise be a conflict between interest and duty or between two duties. In my opinion, despite the office of State Solicitor not being a statutory office, it is necessarily true that the State Solicitor is adviser to the State and its officers. It is not open to the State Solicitor, in advising the Authority, to thereafter decline, on grounds of conflict, to advise the State on matters under the Bill. Clause 72 of the Bill plainly requires the State Solicitor to give advice if so requested, and plainly entitles the Authority to make a request³⁸, which cures any conflict.
141. The explanatory materials do not disclose a policy objective for clause 72. It is a matter for the Committee whether to recommend a change.
142. *In conclusion on question 7(v):*
- The State Solicitor is expressly authorised to provide advice to the Authority, which cures any otherwise existing conflict of interest.

Question 8 - Does the Bill allow the Governor to either not distribute any amount to any person or distribute amounts contrary to the recommendation of the WA Bell Companies Administrator Authority?

143. Clause 37A(1)³⁹ provides that nothing in the Act requires the Governor to determine that any amount is to be paid to any person on any account whatsoever. This provision applies regardless of the content of the Authority's report, so it is possible that the Authority's report recommends a certain set of payments, which the Governor may disregard.
144. However, it appears that the motive behind cl 37A(1) is not to actually permit such an anomaly, but to preclude judicial review.

Question 9 - Does the Bill provide any guidance on how the following conflicts are to be prioritised or otherwise dealt with:

- (i) **The conflicts between the hierarchy of matters that must be taken into account by the Authority (for example, the matters set out in clause 35(2) of the Bill),**
- (ii) **The conflicts between competing objects set out in clause 4 of the Bill,**
- and, if not, what amendments to the Bill may be effective in providing such guidance?**

Inconsistency

145. I do not think that clause 35(2) contains a "hierarchy" of considerations that must be taken into account. It does however contain mandatory considerations that might incline the

³⁸ It does not, however, prevent the Authority obtaining advice elsewhere.

³⁹ Proposed under Supplementary Notice Paper.

Authority in opposite directions. For example, having regard to the 2000 Agreement will incline the Authority to the above-mentioned 53.3% of 67% of the litigation fund being allocated to ICWA, whereas having regard to the submissions of the other creditors may disincline the Authority to do so.

146. I doubt that the objects of the Bill in clause 4 contain similar tensions. The first, second and last objects, to provide a non-litigious resolution by way of a form of external administration to avoid litigation, do not conflict with other objects or each other. The objects in cl 4(c), (d) and (g) relate to appropriate return to the funding creditors by reference to the risks they took, the absence of any funds had they not done so, and the agreements which gave some security against those risks. I do not see anything in these three objects which is inconsistent with each other or with the first mentioned objects.
147. The other two objects, in cl 4(e) and (f), relate to “reasonable” provision for distribution and for satisfaction of liabilities, including in respect of non-funding creditors. Those two objectives relate to the “property of the WA Bell Companies”, not confined to the Bell litigation fund. Each use of “reasonable” in those objects is to be interpreted in light of the other objects. The word “reasonable” is also conditioned in cl 4(e) and (f) by reference to the “uncertainties existing as to the nature and extent” of the property and liabilities, which is apparently intended to depress returns to non-funding creditors.
148. In any event, even if, contrary to my view, some tension exists among the objects, the tension is to be resolved by balancing competing objectives.
149. I do not see anything inconsistent in this. Having regard to a consideration does not mean that the consideration must be applied in full. This is particularly evident in cl 35(2) because the Authority’s duty to have regard to the submissions received from creditors could not mean that those submissions must be accepted and applied. It is an everyday event in administration that an administrator must have regard to factors militating for and against a proposed course. Such tensions are resolved by judgment and discretion to reach an appropriate balance of competing considerations.

Guidance

150. The Bill does not dictate a distribution outcome with precision, but it does provide guidance. The Bill distinguishes between the “Bell litigation fund” (the money obtained by compromise of the litigation against the Banks) and the “Fund” (the total property vested in the Authority under cl 16, which may include some property in addition to the Bell litigation fund).
151. First, as to the Bell litigation funds, the Bill contains a pronounced preference for rewarding the funding creditors to a greater degree than would apply were they to be ranked equally with non-funding creditors: objects 4(c)-(g); cl 35(a); cl 36(3)(a).
152. Second, the amount of the Bell litigation fund that is to be devoted to the funding creditors has one directly relevant consideration, in object 4(g), namely the 2000 Agreement. The Bill’s objects and relevant considerations then condition the

reasonableness of returns from Bell litigation funds to non-funding creditors by reference to that 2000 Agreement, among other things.

153. Third, as to distribution of that 66.7% between the funding creditors, the Bill again has one only directly relevant consideration, namely regard to the same 2000 Agreement, which allocated 53.5% to ICWA/LDTC; 9% to the Commonwealth and 37.5% to BGNV. As above, the Bill's guidance for returns to non-funding creditors is then conditioned by reference to the 2000 Agreement among other things.
154. As to the property of the WA Bell Companies generally, the Bill's guidance is in objects 4(e) and (f), and also more particularly in cl 35(2)(d) which refers to the priorities set out in Part 5.6 Division 6 of the *Corporations Act*.
155. In other words, the way is open and preferred under the Bill for the Authority to recommend, and for the Governor to determine, an outcome that would result from application of the 2000 Agreement and otherwise as if Part 5.6 Division 6 of the *Corporations Act* applied.
156. ***In conclusion on question 8:***

The Bill does not determine a particular distribution, but does provide strong guidance for the Authority's recommendations for distribution.

Questions 10 and 12 - Are there any amendments to the Bill that, in your view, the Committee should consider recommending in its report to the Legislative Council to address any of the issues raised in your opinion? Are there any other legal issues raised in the submissions to the Committee that you want to draw to the Committee's attention?

157. The following aspects of the Bill could be addressed.

Definition of "liquidator"

158. "Liquidator" is defined to *include* a provisional liquidator of WA Bell Company, but does not address the *meaning* of "liquidator" in parallel terms. I suggest it read: "'Liquidator' means a liquidator of a WA Bell Company and includes a provisional liquidator of a WA Bell Company."

Resolving disputes

159. Clause 4(a) refers to the Bill providing a mechanism to "resolve disputes which have arisen" in respect of distribution. However, the Bill does not attempt to "resolve" any such dispute. Rather, it by-passes those disputes.
160. It would be more accurate to insert: "to provide a mechanism, without litigation, for the distribution".

“Reflecting” that no funds would exist but for ICWA’s funding

161. Clause 4(d) refers only to the object of reflecting the fact that no Fund would exist but for the litigation and the funding of it. I think the intended object is to make a *distribution* which reflects that fact.
162. Although this will be probably be understood even without amendment, it will be clearer if cl 4(d) became part of cl 4(c), rather than stand alone.

“Uncertainty” in property or liabilities

163. Clause 4(e) refers to the “uncertainties existing as to the nature and extent of” the property of the WA Bell Companies as a fact relevant to the distribution of that property. However, at the point when a distribution is to be made, the property should be the subject of the Authority’s report under cl 33, and made certain.
164. Clause 4(f) similarly refers to uncertainties about the liabilities. However, the liabilities will be declared under cl 33.
165. By clause 33(3), the Authority has absolute discretion in determining the property and liability, but that provision cannot render the property or the liabilities “uncertain” for the purposes of cl 4. In any event, despite the discretion, cl 34 refers to the property and liabilities “as finally determined” by the Authority. Any earlier uncertainty is irrelevant.
166. It is not clear to me what the draftsman intended by these aspects of cll 4(e) and 4(f).

Intentions of liquidator

167. It is not clear what policy or object is served by framing cl 4(g) in terms of the intentions of the liquidator and funding creditors as set out in the written agreements, rather than simply in terms of the relevant passages of the written agreements in question.
168. The actual intention of the liquidator and funding creditors was to apply under s 564, but such an application is not to be made.

Pooling of assets

169. The Bill does not expressly pool assets so as to meet liabilities from the pool, rather than confining each liability to the assets of the debtor company. However, clause 33(1) requires the Authority to determine the property of “*each* WA Bell Company”, cl 33(3) provides that the Authority has absolute discretion in determining the property of “*each* WA Bell Company”; and cl 34(1) requires a report to the Minister on the property of “*each* WA Bell Company”.
170. However, I understand from extrinsic sources that the intention is to pool assets. This intention seems to be focussed on the provision that the Authority must recommend

payments "... in respect of the aggregate of all *liabilities* of all WA Bell Companies ...": clause 35(1). I do not think that is sufficient to clearly spell out that a payment to a particular creditor can exceed the value of the property of the relevant debtor company.

171. In my view, an amendment should be made to clarify this point.

"Administration"

172. Division 3A, proposed to be inserted by the Supplementary Notice Paper, deals with what the Bill refers to as "administration". Clause 26A(1) provides that the Authority is the "administrator" of each WA Bell Company and cl 9(1)(aa) now provides that the Authority's functions include "administering" each company. The words "administer" and "administrator" are not defined⁴⁰. Their ordinary meaning is difficult to state other than by reference to the *Corporations Act*, under which only a registered liquidator may be an administrator and only a natural person may be a liquidator: s 1279.
173. Also, the statutory concept of "administration" may not be appropriate for the Authority.
174. Further, confusion may arise by use of the term "Administrator" for the person appointed under cl 8, but vesting of "administration" not in that person but in the Authority.
175. I think the Bill's intention is simply to constitute the Authority as a body able to perform the functions under the Bill, and to prevent any company officer exercising powers. I suggest the "administrator" be defined by reference only to functions under the Bill.⁴¹

Power over Liquidator

176. Part 4 Division 1, particularly cl 29, imposes requirements on the liquidator of a WA Bell Company to do certain things. The person who is the liquidator was appointed under the *Corporations Act*, and is not removed from that office by the Bill (see cl 26C(3)).
177. The liquidator is an officer whose powers, duties and liabilities stem from Commonwealth statute. Once Part 1.1A *Corporations Act* is engaged, the liquidator may be an ordinary citizen without authority under the *Corporations Act*, although, if so, it is unclear what is intended by cl 26C(3).
178. If he is still authorised under the *Corporations Act*, it is not clear how a State statute may impose obligations on him in that capacity, under criminal sanction⁴².
179. I suggest that the point be clarified.

⁴⁰ There is a definition of "Administrator", but only in reference to the person appointed under cl 8.

⁴¹ The Bill, by cl 10(2)(d) also confers power on the Authority to exercise any power that can be exercised by a "liquidator" under the *Corporations Act*. No similar problem arises here, because the Authority is not thereby constituted as a liquidator. The Authority will not be bound by s 1279 *Corporations Act*, because the WA Bell Companies are removed from the operation of the *Corporations Act*.

⁴² Clause 52 of the Bill.

Right of a creditor to address rights of other creditors

180. Some submissions complain that a creditor, in making a submission under cl 32 of the Bill, will be confined to the creditor's own claim, whereas the creditor should be able to point out defects in other claims, in order to reduce or eliminate competing claims on the Fund. The submission on behalf of the Hon Treasurer and Hon. Attorney General also indicates that creditors will make submissions as to the amount claimed by them and the amounts they should be paid, but not including submissions on the amounts claimed by other creditors.
181. Clause 32 requires the Authority to prepare a "draft report", which report will set out the liabilities of *each* WA Bell Company, and address all liabilities and all recommendations for distribution. Each person claiming to be a creditor will obtain a full copy of each draft report. Clause 32(4) provides that each such person may make a submission "in respect of any matter relating to that person arising out of the draft report".
182. In my opinion, a competing claim, particularly a very substantial claim, is a matter "relating to the person", and each person may make a submission on competing claims. Courts will determine whether an Act intends procedural fairness is to be accorded and its extent, and, generally speaking, will find an implied right of ample procedural fairness unless the Act clearly excludes it. In the Bill, procedural fairness is embedded to an extent in cl 32(4), and that clause does not clearly confine the right in the manner suggested.
183. Nevertheless, since the point appears to be of concern, I suggest that it be made explicit.
184. I cannot see any object or policy of the Bill likely to be compromised by a change in favour of extending submissions, save only for the additional time the Authority might spend in assessing submissions.

Absolute discretion in determination

185. Clauses 33(3) and 35(4)(a) of the Bill provide that the Authority has "absolute discretion" in determining the property and liabilities of each WA Bell Company.
186. This provision appears to allow the Authority, in its discretion, to declare a liability to, say, BGNV or WA Glendinning which is less than the evidence or law indicates. Conversely, it appears to provide that the Authority may declare a liability to ICWA which is more than the evidence and law indicate. As to property, the position appears to be that the Authority has absolute discretion to determine the extent of the Bell litigation fund to be other than it is.
187. In my view, despite its text, this provision has little to do with any intention that the Authority is to be actually freed of the constraints of evidence, law, logic and reasonableness. It has more to do with insulating the Authority from legal challenge. The Committee might take the view that the provision is disproportionate to its objective.

188. I do not see why determination of the property should be subject to a discretion. The property is largely the Bell litigation fund, which is liquidated. The remainder of the Fund could be liquidated or valued. In any event, this determination involves questions of fact, not law, and judicial review, including for jurisdictional error, will not be available.
189. Liabilities, on the other hand, may in fact be intractably uncertain unless judicially determined, and do involve questions of law. Hence, on those accounts, it might be preferable to limit cl 33(3) to liabilities.
190. Clause 68 provides that the Authority's determination under cl 33 is final and conclusive, and must not be challenged, which will insulate the process from judicial review.

"Compensation"

191. In each of clauses 4, 36 and 37(3)(b), the amount that may be paid to a funding creditor is referred to as "compensation". Section 564 *Corporations Act* does not use that word, but speaks instead of an "advantage" to the funding creditor, generally taken to mean an elevation in ranking and/or a preference over others ranked equally, but not meaning any payment greater than the sum of the liability and litigation costs.
192. In my view, "compensation" is likely to be interpreted to cap the recommended payments to ICWA under cl 36 at the amount actually advanced to fund the litigation (plus interest).⁴³
193. The intention of the Bill is not expressly clear in three relevant respects:
- (a) Is ICWA to be compensated for its litigation funding to the extent of that funding, plus interest, and not more? This is a question under cl 36.
 - (b) Whatever is the determined liabilities on which ICWA claims, is ICWA to be given an advantage over others in satisfying that liability? This is a question under cl 33 and 35(4). Some submissions suggest that ICWA is not a creditor at all or, if it is a creditor, is a minor creditor. If so, any "advantage" will be of little utility, which leads to the third possible intention.
 - (c) Could ICWA have some indulgence in determining the validity, or extent, of liabilities to it, under the absolute discretion of the Authority, and/or under a discretion the Governor-in-Council enjoys?
194. If it is correct that ICWA is not a substantial creditor, then, subject to what follows, there is a conceptual problem in expecting that the Bill will deliver for ICWA more than its litigation funding. That is because litigation funding is usually encouraged only for the

⁴³ The extended definition of "creditor" and the emphasis given to it in cl 36(1) only relate to the *eligibility* of ICWA (and other funders) to claim compensation, not to the extent of any distribution.

purpose of returning funds due to creditors, not for rewarding persons in the manner that dealers in distressed debt or professional litigation funders are rewarded.

195. As mentioned earlier, I think the Bill's object is to implement the 2000 Agreement, namely to see that ICWA is paid 53.5% of 2/3rd of the Bell litigation fund, and that object is not expressed to be subject to ICWA's proof of debt in like or greater amount. If ICWA has no substantial debts owed to it, then it must follow that cl 36 is intended to reward, not merely to compensate, ICWA.
196. Therefore, the answer to (a) above must be negative, and the word "compensation" should be replaced by "reward" or similar.

"Creditor of any kind"

197. Clause 36(1) relates to a recommendation by the Authority that funding creditors be paid amounts on account of having provided funding. I have mentioned above the difficulty that, as some allege, ICWA was not a creditor and did not fund the litigation, and that this difficulty is overcome by an extended definition of "creditor".
198. Nevertheless, the Bill emphasises the point by framing cl 36(1): "in respect to a creditor of any kind of a WA Bell Company".
199. I suggest that it be made clearer that "any kind" relates to the creditor and not to the WA Bell Company.
200. I also suggest that the intention be supported by adding these words at the end of the subclause: ", whether directly or indirectly in either case".

Deeds of Release re LTDC

201. Clause 38(3) of the Bill provides that a person is not entitled to a payment unless the person first executes a deed of release in respect of additional claims. This may be difficult to achieve where LDTC is the intended payee in its role as trustee for bondholders. Presumably, LDTC is unable to execute such a release without each bondholder's sanction. Those bonds are bearer bonds, and LDTC may not be able to identify them until they present. Further, some of those bond holders may be dealers in distressed debt, i.e., persons the Minister would particularly wish to be bound by deed not to sue.
202. However, I am not able in the time available to suggest a suitable amendment, other than a facilitative amendment, such as "*Unless otherwise permitted by the Minister, ...*", under which payment may be made if LDTC can provide alternative assurances.

Limitation period – cl 38(5)

203. After the Governor has made a determination in favour of a person, the person is still not entitled to the payment unless the person executes an approved discharge. There is no provision requiring notice to the person that a determination has been made, or to the

effect that the approved form of discharge will be available for inspection at any particular time. There is no provision for the person to question the form of discharge.

204. By cl 38(5)(b)⁴⁴, if the person has not given the executed discharge within 3 months of the Governor's determination, the determination ceases to have effect.
205. While it is not made explicit what consequence flows from the determination ceasing to have effect, in light of cll 38(5)(a), 40(1)(b) and 40(2) it is implied that the person's entitlement is extinguished, and the money is to pass to Consolidated Revenue under cl 40(2).
206. The Bill has no safeguard for the event that a delay, past 3 months, might be the fault of the authorities. I suggest that there be an obligation to give notice of the Governor's determination to the person, accompanied by the form of discharge, and that the limitation period start from that notice. Clauses 38(5)(b) and 40(1)(b) should be adjusted accordingly.

Report to Parliament

207. Clause 43 requires a final report from the Authority, which report must be laid before each House "prior to the abolition of the Authority".
208. The report is that of the Authority, not necessarily a report on the whole process involving as it does decisions by the Minister, the Executive Council and the Governor. Nevertheless, the Authority's report will presumably include its distribution in accordance with the Governor's determination, in which case Parliament will be informed of the final determination.
209. I assume there is some purpose in laying the report before Parliament prior to the Authority being abolished, although it is not clear what that purpose might be. I suggest that a time frame be provided, to ensure that each House has sufficient time to digest the report and, if necessary, act on it, before abolition of the Authority.

Offences

210. Clause 48 provides that criminal sanctions apply to any scheme for the purpose of directly or indirectly defeating, impeding etc. the operation of the Act or the achievement of its objects. Clause 48(6) provides that this does not apply to a person taking action in a court to challenge the "constitutional validity" of the Act.
211. The presence of clause 48(6) implies that other legal challenges might be criminal. In particular, a Supreme Court application for judicial review may be criminal, although it is unclear exactly how this might play out, for reasons that follow.

⁴⁴ Proposed to be inserted by the Supplementary Notice Paper.

212. First, however, the Committee might question the need to both prevent judicial review, by the various means explained elsewhere in this opinion, and also (possibly) to criminalise applications for judicial review. The Committee may consider whether cl 48(6) should extend to all legal proceedings. One reason to do so is that the criminalisation of applications to the Supreme Court, especially on judicial review, is likely to offend an implied Constitutional constraint on the State Parliament under the *Kable* principle, if not under a more broadly based principle not yet articulated by the High Court.
213. At first glance, it is difficult to see how an application for judicial review could itself defeat etc. the operation of the Act. That is because the nature of judicial review is to ensure that impugned executive action is *in accordance* with the legislation – judicial review, in a sense, sides with the Parliament, against the executive, to ensure the executive abides Parliament’s intentions.
214. However, the Bill goes further. It may make criminal any conduct (e.g., application to the Supreme Court for judicial review) which has a purpose of upsetting the intended objects of the Bill, even if that purpose is not the main purpose, provided it is a substantial purpose.
215. Quite apart from *Kable*, the Committee might question whether the possible criminalisation of applications for judicial review is disproportionate to the objects of the Bill.

Certiorari etc.

216. Clause 68(1)(c) of the Bill provides that the traditional remedies for judicial review are not available, subject to cl 68(4). Recent amendments to the Supreme Court Rules allow an application for certiorari etc. or “a remedy having the same effect as a remedy that could be provided by a writ.”⁴⁵ Clause 68(1)(c), being specific to the writs, may not preclude such other remedies.
217. The Committee may wish to recommend that the following words be added to cl 68(1)(c): “or a remedy having the same effect as a remedy that could be provided by a such writ.

BGUK


218. BGUK participated in the Bell Group litigation, the appeal and the unsuccessful mediation in 2013, but contributed no funds or indemnity to the plaintiff/liquidators. According to the Treasurer’s submission, BGUK is a creditor for about \$58m under the 2014 Settlement. BGUK submitted that the Bill would deprive BGUK of any trust or other interest in the Bell litigation fund, which trust or interest it holds pursuant to the 2014 Settlement, having compromised its rights in exchange for an interest in the Bell litigation Fund.

⁴⁵ Order 56 rule 2(2)(c).

219. In short, BGUK submits that, while the Bill's objective should be to not disturb the Settlement, the Bill's effect will be to transfer BGUK's property to the Authority and thus disturb the 2014 Settlement.
220. On my reading, BGUK is not a WA Bell Company, is not listed in Schedule 1, and will not have its property transferred by cl 22.
221. Clause 4(g) refers to the liquidator's intentions set out in earlier agreements. The earlier agreements may include the 2014 Settlement with the Banks, if relevant. If the 2014 Settlement stands outside the Bill, as appears from cll 22⁴⁶ and 26⁴⁷, then it would follow that BGUK is to be paid ~\$58m from that Settlement, and will not be affected by the Bill at all.
222. If this is correct, and is intended, I suggest it be made clearer that the 2014 Settlement is not within the Bill, and that BGUK be informed (BGUK has made submissions that assume BGUK is affected).

Question 11 - Are you aware of any precedent for a Bill that imposes an insolvency regime by way of State statute, in Western Australia or other jurisdiction? To what extent, if any, do previous examples of such schemes affect your opinion in relation to the Bill?

223. No.



K M Pettit SC
20 October 2015

⁴⁶ BGUK is not a WA Bell company, and hence its property is not transferred to the Authority).

⁴⁷ The 2014 Settlement Agreement is not voided by cl 26.

APPENDIX 4
FUNDAMENTAL LEGISLATIVE SCRUTINY PRINCIPLES

APPENDIX 4

FUNDAMENTAL LEGISLATIVE SCRUTINY PRINCIPLES

Does the Bill have sufficient regard to the rights and liberties of individuals?

1. Are rights, freedoms or obligations, dependent on administrative power only if sufficiently defined and subject to appropriate review?
2. Is the Bill consistent with principles of natural justice?
3. Does the Bill allow the delegation of administrative power only in appropriate cases and to appropriate persons?
4. Does the Bill reverse the onus of proof in criminal proceedings without adequate justification?
5. Does the Bill confer power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer?
6. Does the Bill provide appropriate protection against self-incrimination?
7. Does the Bill adversely affect rights and liberties, or impose obligations, retrospectively?
8. Does the Bill confer immunity from proceeding or prosecution without adequate justification?
9. Does the Bill provide for the compulsory acquisition of property only with fair compensation?
10. Does the Bill have sufficient regard to Aboriginal tradition and Island custom?
11. Is the Bill unambiguous and drafted in a sufficiently clear and precise way?

Does the Bill have sufficient regard to the institution of Parliament?

12. Does the Bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?
13. Does the Bill sufficiently subject the exercise of a proposed delegated legislative power (instrument) to the scrutiny of the Legislative Council?
14. Does the Bill allow or authorise the amendment of an Act only by another Act?
15. Does the Bill affect parliamentary privilege in any manner?
16. In relation to uniform legislation where the interaction between state and federal powers is concerned: Does the scheme provide for the conduct of Commonwealth and State reviews and, if so, are they tabled in State Parliament?