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25 October 2015

Alex Hickman
Advisory Officer (Legal) Standing Committee on Legislation
Legislative Council
Parliament House
Perth, Western Australia 6000

Dear Mr Hickman,

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

On 20 October 2015, I delivered an opinion on 12 questions relating to the Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015 (**the Bill**). On 23 October, I was asked to address two additional questions.

Question 1 – pooling of property

I have been asked to identify any extrinsic materials on which a Court might rely, under s 19 *Interpretation Act*, for the proposition that the property to be transferred to the Authority under cl 22 of the Bill will form a single undifferentiated fund from which liabilities to creditors will be satisfied, regardless that an individual liability may have been incurred by one only of the WA Bell Companies.

This proposition was advanced by the Hon. Treasurer and the Hon. Attorney General in their joint submission to the Standing Committee dated and executed 5 October 2015. For examples, at page 55, under the heading "Part 3 – The Transfer, Novation and Avoidance Provisions", the submission states:

> "*The provisions are coherent, interrelated and inter-operative: that is they, collectively, operate to remove the assets and liabilities of the companies individually, pool the assets, and to permit liabilities to be paid out of the pool of assets.*
> ...
> *Rather than 11 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.*
> *Although different in execution and detail, the result to be secured is not wholly dissimilar from the mechanism now available in relation to company groups under*

Division 5.6 Division 8 of the Corporations Act, and the group scheme of arrangement provisions now found in s 411(1A) and 1B) and following of the Corporations Act."

At page 69, under the heading "(c) Essential nature of the process", the submission states:

"... The *policy* object of the Bill in aggregating the property of the WA Bell Companies, and facilitating these assets being treated as a single fund, from which singular payments would be made, is to permit the Authority to assess claims, and make discretionary judgments about them, netting off internal funds transfers, considering and making provision for circumstances that two ... companies might be answerable for the same debt, but in different ways and with different priorities, ..."

At page 73, near the top of the page, is another reference to "a single pool of funds".

Question 2 – use of final report

The second additional question relates to the final report of the Authority being tabled in Parliament under clause 43 of the Bill. The relevant parts of the question are:

"Once tabled, the final report becomes a public document. The Committee is concerned that the report might enhance the risk of litigation if, for example, its contents included more than just reporting on the procedural section 9 functions. For example, if an amendment was to be made to include details about the final determination.

If the contents of the Authority's final report were other than just reporting on section 9 procedural functions, could there be any consequences from this more comprehensive report being tabled in the Parliament? For example, could litigants use or rely on the information in the report in legal proceedings? To what extent, if any, does Parliamentary Privilege address this risk?"

Clause 43 provides that "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". Clause 9 of the Bill sets out the functions of the Authority, which include collecting etc. the property of WA Bell Companies, administering each WA Bell Company, administering, investing and managing the Fund, and performing any other functions conferred on it by the Act.

One of the "other functions" of the Authority is to make a report to the Minister which is to contain recommendations to the Minister 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 Parliament on "how the Administrator carried out" that function would include how the Administrator made the recommendations. This seems to be close to a requirement to give reasons in the cl 43 report to Parliament, which is the very thing that is expressly not required in the report to the Minister under clauses 35(3) and 36(6).

The functions of the Authority in making a cl 35/36 report do not include the report "containing" reasons for making particular recommendations. However, that does not mean

that 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. Hence, the question is whether a report to Parliament must disclose those reasons, and one can formulate plausible arguments to support either answer to that question.

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.

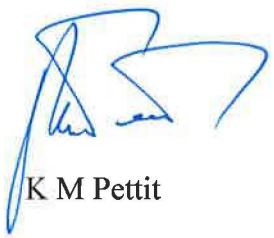
In that light, I doubt the utility of an opinion from me on whether parliamentary privilege might preclude use of the report in litigation. First, my opinion may not be shared by the Court. Second, if the cl 43 report can be relied on in Court, the consequence will be contrary to the aim of the Bill, and could be disruptive for the Bill's objectives. Third, the question may not turn on parliamentary privilege, because cl 43(1) does not provide that the report is a report to Parliament. Clause 43(2) provides that the Minister shall cause the report to be tabled, which may implies that the report is not one made directly to the Parliament and, in the hands of the Minister, the report may not be within the reach of the privilege. Fourth, without committing myself on the question, my preliminary view is that parliamentary privilege is concerned with the immunity of parliamentarians from suit or questioning in or by a court; it is not concerned with the admissibility in court of documents that are, or are intended to be, tabled in Parliament for the information of members of each House.

Rather, I suggest that the Standing Committee consider a recommendation that the Bill be clarified on this point.

Also, a question arises whether the cl 43 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 cl 36A and 37 implemented or deviated from the Authority's recommendations. I am not sure of the government's objectives in this regard. 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.

Again, it seems prudent for the Standing Committee to recommend clarification.

Yours faithfully



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