# STANDING COMMITTEE ON LEGISLATION

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

**TRANSCRIPT OF EVIDENCE**
**TAKEN AT PERTH**
**TUESDAY, 6 OCTOBER 2015**

**SESSION ONE**

**Members**

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

**Hearing commenced at 11.16 am**

**Mr HUGH McLERNON**
**Director, WA Glendinning and Associates Pty Ltd, sworn and examined:**

**The CHAIR**: On behalf of the committee, I would like to welcome you to the meeting. Before we begin, I must ask you to take either the oath or affirmation. Please state the capacity in which you appear before the committee.

**Mr McLernon**: I am a director of the company called WA Glendinning and Associates Pty Ltd, which is an unsecured creditor of the Bell companies.

[Witness took the oath.]

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

**Mr McLernon**: I have.

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

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

**Mr McLernon**: I would be happy to. I presume the members of the committee have a copy of the submission that we were invited to make.

**The CHAIR**: Yes, we do.

[11.20 am]

**Mr McLernon**: It might be helpful if I simply give the committee a quick overview of the mechanism of the act, avoiding questions of policy and so forth, and what I see as the problems that the mechanism of the act throws up, not just for the unsecured creditors in this case, but for anyone who might come under similar circumstances and be subject to the legislative power of the state if one of the opponents is the state itself, which is, with all due respect, what has happened in this instance, if I may so.

**The CHAIR**: Yes, that would be very helpful.

**Mr McLernon**: Thank you. This is literally as compressed as I could make a description of the act and, as I say, primarily the mechanism of it. The central part of it is obvious enough; it takes property from a citizen, a corporate citizen, of the state and it denudes both the companies from which the money is taken and also persons who have secondary interests in that fund—that is, unsecured creditors—of any interest in the fund thereafter and it vests that money in what is referred to as the authority in the legislation. No-one can cavil at the proposition, and we do not, that the state Constitution does not provide for just payment on expropriation, as does the

commonwealth. In a remarkable result, some might think, the plebiscite that took place in relation to that question opposed such a provision in the state Constitution. The basis for that only history can explain, but the people of the state, the people of the commonwealth effectively, voted against the proposition that if the state takes, it should pay for it. One might think that the reason they did that is because if they said no, it would mean the state would not take, not that it would not take without just payment. But in any case, that is the history of it. That taking as it happens in this case is a very large sum of money to which the state itself has a major claim; it does not have a claim to all of it obviously, but it certainly has a claim to a major part of it. People have different views amongst the unsecured creditors, but from our point of view the state has a very large moral claim and a very tenuous legal claim. Different views can be held about how those two should interplay—that is, the moral right and the legal right—and the way it has been thought to be dealt with here is to pass a law.

**The CHAIR**: Am I able to jump in there?

**Mr McLernon**: Please.

**The CHAIR**: And you tell me if I am correct here, under the deeds of assignment with the West Australian Newspapers Ltd and Albany Advertiser Ltd, WAG paid a consideration of $125 to obtain the assignment of the debts due by BGF as now forms the basis for WAG's admitted proof of debt in the amount of $183 297 347.04. Is that correct?

**Mr McLernon**: Absolutely correct.

**The CHAIR**: Okay, that is correct.

**Mr McLernon**: It is a tribute to free enterprise. No-one argues anything against that proposition. Sometimes you win and sometimes you lose, and sometimes you win more than you ever dreamed you would, but that is a question, I guess, for another day and another place and one over which I have no control whatsoever, but the facts are right. We have spent probably more than $1 million since then but that does not actually make it much better really. If we have a claim for $183 million at law, recognised by the law, protected by the law, and we paid either $125 or $1 000 125 does not really make that much difference. Can I just give you a comparison as to why it should not perhaps be that I should be chased from this place before I say another word and that is this —

**The CHAIR**: No, never.

**Mr McLernon**: Thank you. ICWA, when it took its decision to fund, was a subordinated creditor. It was behind a sea of debt and yet it was considering funding the litigation. Essentially, if it had thought properly then, litigation in favour of other people not ICWA, and so it had to become, if it could, a creditor. What it did is what we did: it purchased a debt with the assistance of the liquidator from a company called JN Taylor Holdings, a $300 million debt. They paid about two or three cents in the dollar for it. I do not complain about that for a second. I congratulate them.

**The CHAIR**: No, I just want to understand because a lot of us around here do not understand about corporate takeovers et cetera, so I just wanted to put that up-front first and probably go back later and ask you how that happened.

**Mr McLernon**: Yes, okay. To finish on that point just very quickly, I am certainly not saying that two wrongs make a right; I am simply saying that our free enterprise is full of situations where people lose a lot of money and make a lot of money. As it happens in this case there are two examples of it: one is ICWA who bought a large debt for cents in the dollar, and we who bought large cents in the dollar. Simply, if you criticise one, you criticise both.

**The CHAIR**: I am not criticising.

**Mr McLernon**: I am sorry. I do not mean you personally, Madam Chair; I meant someone else.

**The CHAIR**: I certainly was not criticising you at any stage of my questioning.

**Mr McLernon**: No, and nor did I mean to give that impression. I am talking about another person who has criticised us.

I started with the proposition that central to this is a taking of property. When you see that $1.7 billion is taken from a structure that over the centuries has been developed and honed and works pretty well and put into an artificial structure that is a clone, theoretically, of the real structure, you see a whole lot of things happen. One of them is unintended consequences. If I can give you an example of the unintended consequences quickly, it is this—or perhaps I will come back to that. What you do when you take a step or what the human reaction to even taking the step demands of you is that you protect what you are doing, and the way that this act does that is this: first of all, it takes away all rights of appeal. It denies anyone who is affected by it the advantage of the laws of natural justice. It cuts off all recourse to the courts. It cuts off all hope of going to the administrative tribunals that this legislature has set up over the years and it denies all rights in equity. Basically, it says the rights that you had yesterday, you do not have today. They then needed to protect the people who were involved in this procedure, which in itself is an indicator or a searchlight that is saying, "There's something unusual happening here. This is being done and the people who are doing it feel the need to protect themselves." This is what the act does in that regard.

[11.30 am]

Everyone from the Governor down—the Governor, the minister, the administrator, officers of ICWA, ICWA itself and the liquidator—are completely freed from any liability to any person over the whole period of the litigation and liquidation for any wrongdoing, including any criminal behaviour. I hasten to say I do not suspect, think or suggest for a moment that there has been any criminal conduct, but if there was, it is wiped clean for the whole of that period, including a provision that says by introducing this act into Parliament you are released from any liability in relation to it. I mean, it is almost an affront to suggest that you would have any liability. So, the litigation protects everyone who has had a hand in what has happened, and then on the other hand it criminalises any attempt by those otherwise interested in the events to try to go around the law by what would otherwise be lawful means. It is the everyday work of lawyers to do precisely that, but if a lawyer does it in relation to these provisions, it is criminal conduct for which you can be imprisoned for five years.

Then you have to ensure secrecy so that no person who makes a decision under this act is required to give reasons for doing so. Everything that is done is stated to be done or available to be done at the complete unfettered discretion of the person concerned. So, what effectively has happened here is the money has moved from a real construct to an artificial one and that artificial one can make ex gratia payments—not payments according to law, but payments in the complete unfettered discretion. There is a specific provision that says not one dollar of the money—that $1.7 billion—has to be distributed; the whole of the $1.7 billion can be held back and will then go to the state at the end of the 12 months. As I sit here, I do not think that will happen, but I cannot understand a law that enables it to happen; I simply cannot understand it. In order to ensure secrecy quickly, apart from not having to give reasons, the entire freedom of information system is cut away. If one has a look at schedule 2 to the FOI legislation that this Parliament has passed, there is a list of people who are completely exempt, and that list is a list into which this authority that is going to be created simply does not fit. When you have a look at the sort of bodies that Parliament has exempted, this is a foreign body, but it is necessary because if you are going to act in secret—no reasons—you cannot have the moat breached by the FOI legislation. And then the third part of the secrecy puzzle is solved by the provision that says whistleblowers will be sent to jail for two years, no matter what. There is no provision for materiality; it is simply if a person employed in the authority makes a public statement about a piece of information that has not already been made public. No matter what that information is, he commits an offence and is liable to imprisonment for two years. So, the likelihood of the ring-fencing collapsing is almost non-existent.

The other thing you have to do is make it quick. You cannot have this hang around for a period of time, for a number of reasons. The state might or might not get the money for a longer period of time, so you have put a provision in that cuts everything off at 12 months.

**Hon KEN TRAVERS**: Sorry, Mr McLernon, you are aware of the amendments that have been moved?

**Mr McLernon**: Yes, I am, and you are correct; thank you for correcting me. That was the original arrangement. There are a number of ways in which, as you say, Mr Travers, the act has been changed to, with all due respect to the draftspeople, make it survive, and that is one of them, I agree.

**Hon KEN TRAVERS**: I would have thought that one of the problems now is that there is no locked-in end date, so it actually in theory could go forever and a day waiting for a decision.

**Mr McLernon**: Yes, it is going the other way. That will not hurt the authority because it has power at the same time, by the same amendments, to make partial decisions on the way through, so it does not seem to me that there is any reason why it cannot make a decision, for instance, in relation to ICWA by itself, and it will be done very quickly.

**Hon KEN TRAVERS**: If you follow the objects of the act, one of them is to fund those who funded the court cases, so they could argue they are going to pay out that first and then work out who is owed debts and what percentage of them second, so they can take themselves to the ward of state.

**Mr McLernon**: Yes, potentially.

Just to finish the quick side of it, with the mechanism that has been put in place for giving notice, because there are five major creditors, it should not be thought that there are no other creditors. I have been contacted by a number of creditors from foreign places who hold bonds in these various companies. They will get notice of this system by an advertisement in an Australian newspaper—if they happen to read Australian newspapers in Paris, London or wherever—and they will have 30 days to make sure that they keep up to speed or, at the end of that time, their claim is lost. If I am ill or in hospital and miss the notice or miss the opportunity to do it, my claim is lost. Under the normal law that does not occur: if you do not put in your claim within the statutory period, you can continue to put it in until the money has all been paid out. So, each step is quick; it is not as quick as it used to be, as Mr Travers correctly points out, but that was the aim.

Two final things probably are these. It is not just that the fund has been taken. The rules in relation to distribution have been changed away from the normal law, so for instance a subordinated creditor under the law would not have a claim because they are not a creditor. This law has a very short phrase that says anyone can make a claim if you are a creditor "of any kind"; in other words, people who were not creditors become creditors by this act. There is a provision that enables more than 100 per cent of your debt to be paid out, which is the normal insolvency rule now changed. Even within the mechanism of the act it has been changed. The last one, and perhaps in its implementation it will not matter that much, is the retrospective nature of what was done in the act; that is, not only will people be subject to criminal sanction for being able to do something lawfully, which would otherwise be lawful, to avoid the impact of the act, but if you did it before the legislation was passed, you are still criminally responsible for it even though there was no law at the time at which you did it. I know that for virtually every one of these 15 or 16 things that is done in this act, some of them have been done in other acts before. There will be an act that is retrospective, there will be an act that takes away natural justice and there might have been an act that cuts off altogether all rights of appeal—maybe, I am not aware of it myself—but I do not think there is any legislation in the history of this state that has gone anywhere near the complete package that this is. And all theoretically, or on the record, to achieve an end that, in our respectful opinion to those who are drafting it, is not necessary. I have set out in the submission why that is so. I tried to keep the personal history out of it, and also recriminations against those who have tried to demonise us since

then, but that effectively is our overview. I suggest it would be difficult to argue that what I have said is inaccurate, but there may be some who are prepared to try.

[11.40 am]

**The CHAIR**: Can I just take you back to the beginning and ask how Glendinning became a creditor, because I think that is important.

**Mr McLernon**: Yes, ma'am. In the period around 1991–92, WA Newspapers was a creditor—a large creditor—of the Bell Group of companies. It had provided the funding for the operation of Mr Holmes à Court's empire. It had ongoing profits. In fact, those of you who remember what happened in those days —

**Hon KEN TRAVERS**: Sadly, yes.

**Mr McLernon**: What happened, as a combination between the then government, Mr Bond and Mr Holmes à Court, was that everyone rallied around—with all due respect to those who see it differently—to save Mr Holmes à Court, and that is how SGIC ended up with the their bonds and their shares in the company. They also had that debt, as I mentioned. They were about to be sold, and were sold, by Whitlam Turnbull, you may recall—that is the newspaper company. So they had profits and they had this huge debt that they thought was uncollectible—that everyone thought was uncollectible—because Bell was in the hands of Mr Bond, and had little or no chance of going anywhere quickly. It was also thought at that time that if you were going to set off against a profit, a loss represented by a debt that had not been paid back to you, then either the company that owed you the debt had to go into liquidation or you had to dispose of the debt. Under the eyes of the tax department at the time, because all of this had a spotlight all over it, the advisers to WA Newspapers advised that assigning the debt would have the effect of crystallising the tax losses. That is what was done. WA Newspapers swapped a debt of then about $160 million, which it could not collect, for a tax advantage of about $60 million or $70 million. That is how the debt, which no-one would dispute if it was in the hands of WA Newspapers, came into the hands of WA Glendinning. It is a windfall of the largest proportion.

**The CHAIR**: I just find it fascinating. I ask Nick if he has a question.

**Hon NICK GOIRAN**: Mr McLernon, can you tell the committee how long you have been the director of WA Glendinning?

**Mr McLernon**: I have a number of appointments, so I have forgotten precisely when it was, but not very long. I was not involved in WA Glendinning when these events that I have described took place. I think in about 1996 we took a 50 per cent interest in the company. The company was originally owned by the family of the late Mr Brian Coppin. I think I probably became a director when we took that 50 per cent interest, or thereabouts.

**Hon NICK GOIRAN**: Around 1996?

**Mr McLernon**: Yes, but, please, if it is important, I will check for you.

**Hon NICK GOIRAN**: Will you be able to take it on notice and come back to the committee on that?

**Mr McLernon**: I will.

**Hon NICK GOIRAN**: Is it the case that the current directors, apart from yourself, are Ben Coppin, Stephen Spiers and Wayne Bowen?

**Mr McLernon**: Yes.

**Hon NICK GOIRAN**: Can you tell us who the current shareholders of the company are?

**Mr McLernon**: Yes, I can. Expectation Pty Ltd, which is a company associated with a man called Danny Hill; the family company of Brian Coppin; and the family company of Wayne Bowen.

**Hon NICK GOIRAN**: So, you have no shares, then?

**Mr McLernon**: I do not. I have an interest. I appreciate you have not asked me that question, but if it is important I can tell you that I do have an interest in it, which is 10 per cent of Expectation's position.

**Hon NICK GOIRAN**: Now, what is the ordinary business of WA Glendinning, or is it just this matter?

**Mr McLernon**: It is just this matter. It is its only asset currently. It has been in existence since 1972; it was a very busy company, but by the time these events occurred back in '95, it had no business.

**Hon NICK GOIRAN**: You, yourself, personally, how many other liquidations have you been involved in?

**Mr McLernon**: It depends on what you mean by "involved in". Now, I am not an avoiding the question. I am not an insolvency lawyer, so I have done no insolvency law at all. As a litigation funder, which we started 25 years ago, we are constantly dealing with liquidators and liquidations.

**Hon NICK GOIRAN**: When you say "we", who is "we"?

**Mr McLernon**: "We" is originally a company called McLernon Group Limited and then a listed company called IMF Bentham Ltd.

**Hon NICK GOIRAN**: And that company, IMF, you are involved in that in what capacity?

**Mr McLernon**: As a shareholder and a director.

**Hon NICK GOIRAN**: Has that got anything to do with WA Glendinning?

**Mr McLernon**: No. That is a conclusion that has been jumped to, but it does not. I happen to be a director of both companies, but the original interest in WA Glendinning was taken in '96. IMF floated as a listed company in 2001. It had nothing to do with it.

**Hon NICK GOIRAN**: You mentioned earlier that the bill, as proposed, would give an indemnity to the Insurance Commission of Western Australia and, really, anyone in government with respect to their actions during the course of this matter, but only —

**Mr McLernon**: It is a little bit wider than I said. I did not say "anyone in government". I said "ICWA and its employees and advisers".

**Hon NICK GOIRAN**: But in terms of the other major stakeholders in this matter, it is only the Insurance Commission and its officers that would be protected from future litigation and claims?

**Mr McLernon**: Yes, exactly. And you have just reminded me—do you mind if I make one extra point?

**Hon NICK GOIRAN**: Go on.

**Mr McLernon**: I will do it at the end, if you want me to.

**Hon NICK GOIRAN**: My question then to you is: as a director of WA Glendinning and Associates, in the event this bill becomes law, you are not protected or indemnified in respect to any claims by the shareholders against you as a director?

**Mr McLernon**: That is right. That gives me the opportunity to say what I was going to say, very quickly. That means that we cannot take action against ICWA. 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. I do not think it will impact on us, because we did not have anything to do with the litigation. We tried, manfully, to do so, because we wanted to become a funded creditor.

**Hon NICK GOIRAN**: Yes, but you as a director of WA Glendinning have a responsibility, do you not, to ensure that you maximise the outcome of this current claim?

**Mr McLernon**: Absolutely.

**Hon NICK GOIRAN**: And if you do not, those shareholders that you have mentioned to us earlier—the family, I think, of Wayne Bowen, the family of Brian Coppin, and Expectation Pty Ltd—could sue in your capacity as a director?

**Mr McLernon**: They could.

**Hon NICK GOIRAN**: But the Insurance Commission of Western Australia has no such fear, if this bill becomes law?

**Mr McLernon**: That is correct.

**Hon NICK GOIRAN**: I have further questions, Chair, but you might want to go to other members.

**Hon KEN TRAVERS**: I want to clarify some points you made earlier. You were talking about ICWA's rights as a creditor. I was unclear as to whether you were saying that the bonds that ICWA held that were unsubordinated —

**Mr McLernon**: Subordinated.

**Hon KEN TRAVERS**: Subordinated, sorry. Did that make them a creditor, then, but very low down the list?

[11.50 am]

**Mr McLernon**: Yes. It made them a creditor for a particular purpose. If I may, there is a huge area of law behind that question, but in the context of what we are talking about, it made them a creditor for some purposes. 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—I have forgotten the name of it —

**Hon KEN TRAVERS**: The Law Debenture Trust or something.

**Mr McLernon**: Yes, the debenture trust corporation. ICWA advanced the money to LDTC and LDTC funded the liquidator, so it is the funding creditor in reality.

**Hon KEN TRAVERS**: So at that point, was ICWA's only potential claim or benefit that they may be rewarded for having funded the liquidation?

**Mr McLernon**: No; they had the JN Taylor possibility.

**Hon KEN TRAVERS**: When did that arise, though? Was that when they first funded it?

**Mr McLernon**: Yes, it was.

**Hon KEN TRAVERS**: So they bought that very early on in the piece?

**Mr McLernon**: They did. They have got a claim for $300 million. That claim has been completely denied, and it was always at risk of being completely denied. It has been denied by the liquidator. They were a subordinated creditor because the bonds were subordinated. Then, thirdly, 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. ICWA, with all due respect to those who were advising, from a litigation funder's point of view, about which I know something, were very badly advised. I know what they thought they could do. They thought they could get the trust deed changed, but the trust deed has a very strong provision that says you cannot change the trust deed if it would impact on other bondholders, and that is why ICWA has never been able to get the trust deed changed.

**Hon KEN TRAVERS**: I just want to make sure I understand this correctly, because this goes materially to some of the clauses within the bill that we will need to deal with.

**Mr McLernon**: It does.

**Hon KEN TRAVERS**: ICWA were funding the trust company to take the action.

**Mr McLernon**: Yes.

**Hon KEN TRAVERS**: They were then relying on an agreement they had with the trust company.

**Mr McLernon**: Yes.

**Hon KEN TRAVERS**: But the trust company could not deliver on that until they had paid out all of the other creditors' bonds.

**Mr McLernon**: Exactly, because they overlooked that the court could only make an order in favour of the creditor. In any bond situation, if you buy bonds from IMF, say, you are not the holder of the bond. A trustee is always appointed to hold the bonds.

**Hon KEN TRAVERS**: So my point in asking that question, of course, is as the bill has been presented to us, the clauses are intended that that will just simply flow the money through as the law would have intended at the time. That is my paraphrasing; I do not know that I can quote someone who says that. But the general impression that has been given is that this is about removing the long litigation process and speeding up, but in essence this bill will deliver the money in what would be a reasonable person's view about how the money should have been delivered under the law at the time. But what you are saying to us is that in the way the clauses of the bill are constructed, this money will actually effectively fix up mistakes that were made in the past —

**Mr McLernon**: Absolutely precisely.

**Hon KEN TRAVERS**: — to ensure that ICWA gets an amount that is not currently entitled to them under the law. That is the argument that you would put.

**Mr McLernon**: It may not be available to them. The best way to check that, if I may be so bold, is this: the litigation finished in 2013—finished, complete, out of the way, done—so all of this argument about it is just perpetuating the litigation is, with all due respect, seriously wrong. The money was received in June 2014 and immediately the liquidation proper began. In very quick time, all of the parties, including ICWA, had put into the court very extensive argument about the four or five major points, of which you have just spoken about one. So all parties have had their say and the court is about to work out how they will work out the answers to those questions, including the one you have just mentioned.

**Hon KEN TRAVERS**: The other thing is in your submission you make reference—you referred to it earlier—that it is probable that this $300 million purchase debt will not be admitted to proof by the liquidator and would not normally be claimable by ICWA. On what basis do you make that statement?

**Mr McLernon**: The debt was a debt, if there was a debt, of another company. When the purchase first occurred, the then liquidator made a ruling that it would be admitted. That was appealed to the Supreme Court and the Supreme Court basically said, "This has got to be adjudicated. Go away and argue properly. Bring it to the court on pleadings and we will work out whether it will or it will not be paid." It was not paid. My understanding is, and I think it is the understanding of everyone, including ICWA, that the liquidator is or is about to refuse to accept that debt.

**Hon KEN TRAVERS**: If this bill is passed, will it then be up to the authority to determine whether or not that debt is admitted?

**Mr McLernon**: Yes, in its discretion.

**Hon KEN TRAVERS**: In its discretion, but under the way the bill is currently drafted, will it be required to apply the same laws that the court would in determining whether or not that will be —

**Mr McLernon**: No.

**Hon KEN TRAVERS**: So in your opinion, what will they now rely on to determine whether that $300 million is admitted or not?

**Mr McLernon**: I think they will rely on what ICWA tells them. The way they have compartmentalised it as well is that I, for WA Glendinning, can put in what I say about WA Glendinning, but I cannot say anything about what ICWA is saying about its debt.

**Hon NICK GOIRAN**: Because you cannot see the materials.

**Mr McLernon**: No. Even if you could, you are only allowed to make submissions about your debt.

**Hon NICK GOIRAN**: And you cannot FOI the information.

**Mr McLernon**: Exactly.

**Hon KEN TRAVERS**: So in terms of the way the bill is structured, how would you see that the administrator is then able to get the facts to determine whether or not that debt should be —

**Mr McLernon**: He asks ICWA.

**Hon KEN TRAVERS**: But ICWA is only one part of the argument, surely.

**Mr McLernon**: No; ICWA is the argument on that sort of topic under this bill. That is because I have to put in details of my debt. I can make submissions on my debt. I cannot make submissions as I would normally do in insolvency against other people's debt.

**Hon KEN TRAVERS**: And whether or not that is legitimate debt.

**Mr McLernon**: Exactly.

**Hon KEN TRAVERS**: But surely to make that decision, you would need to have access to the records of the companies and all the rest of it?

**Mr McLernon**: Yes.

**Hon KEN TRAVERS**: But under your view of the bill as it is currently drafted, will they have access to all of those records?

**Mr McLernon**: Yes, they will. Yes; they can ask the liquidator for his opinion—his view. I presume he would say, "I would not admit it." But we will never know whether they admitted it or they did not because you are not allowed to know. There are no reasons; you cannot appeal. You just will not know. All you will know is X dollars will be paid to ICWA.

**Hon KEN TRAVERS**: But as you understand the bill, your reading of the bill, does it remove the capacity of the liquidator? The liquidator no longer is this effectively. I think it emasculated the liquidator, I think, is the word that was used at one point.

**Mr McLernon**: It is a terrible word, but it is true.

**Hon KEN TRAVERS**: Yes. I am quoting there; it is not my word either. In what capacity does the liquidator even exist to give that advice—as an individual?

**Mr McLernon**: He is certainly functus officio without doubt. He no longer has the powers of the liquidator, but the work that he has done, including if, for instance, by then he has formally refused the debt, can be referred to the authority.

**Hon KEN TRAVERS**: But that would be operating under the companies law.

[12 noon]

**Mr McLernon**: When it is referred?

**Hon KEN TRAVERS**: Yes.

**Mr McLernon**: No.

**Hon KEN TRAVERS**: The liquidator company is currently operating under commonwealth legislation.

**Mr McLernon**: Yes, that is right. If he refuses to admit it to proof, as they say, he would then be operating under the Corporations Act. When it is referred to the authority —

**Hon KEN TRAVERS**: Under the authority, this act?

**Mr McLernon**: — it is just operating at large.

**Hon KEN TRAVERS**: So when will the liquidator make that decision, or are those matters being put on hold because of this bill?

**Mr McLernon**: I do not know whether he has made it or not yet, or whether he will make it before the bill becomes law, if it does become law.

**Hon KEN TRAVERS**: So, that may be something we should chase up with the liquidator, as to how they are handling that there.

**Mr McLernon**: Yes.

**The CHAIR**: Has that got something to do with the mediation and why they did not go to Singapore?

**Mr McLernon**: No.

**The CHAIR**: No?

**Mr McLernon**: No. The liquidator of course did go to Singapore.

**The CHAIR**: Yes, the liquidator did, but the companies did not?

**Mr McLernon**: No, we did not. It is like, you know—I am sorry, I was going to be colourful and refer to a gun at your head but I should not do that.

**The CHAIR**: And that was because three days beforehand the bill was announced.

**Mr McLernon**: Yes, to everyone's surprise.

**The CHAIR**: And would you say that was the reason why the four companies, the five companies, did not go to Singapore to mediate, because of that reason?

**Mr McLernon**: Absolutely.

**Hon NICK GOIRAN**: I am sorry, Mr McLernon, you said, "to everyone's surprise", but of course it would have been no surprise to the Insurance Commission of Western Australia.

**Mr McLernon**: That is true. I mean it is as incestuous as you can get. The solicitors for one of the major creditors were advising the creditor. They were drawing the legislation, as I understand it, or helping to draw it. They were involved in the court proceedings and not telling the court or the other parties that everything we were doing was a complete waste of time. The millions of dollars that were being spent to get the court proceeding into a position where everyone knew what the debates were, to fly to Singapore with 30 lawyers, I think it was—there were more lawyers than you could poke a stick at—was all for nothing because they were about to pass a bill, or, sorry, to introduce a bill about which we knew nothing until someone rang me up and said, "Have you seen this press release that has been made on 5 May?"

**Hon KEN TRAVERS**: Just to finish off on all of that, my reading of the bill as it is currently drafted is that the authority can go through, consider all of the matters we have just discussed, make a determination or come to a conclusion and make a recommendation to the minister?

**Mr McLernon**: Yes.

**Hon KEN TRAVERS**: Then that goes to the minister who can submit that report to the Governor?

**Mr McLernon**: Yes.

**Hon KEN TRAVERS**: But on your reading of the bill, does the Governor then have to distribute the money in accordance with the decision of the administrator?

**Mr McLernon**: Absolutely not.

**Hon KEN TRAVERS**: The Governor could then say, "But in my opinion", and give no reasons for it, and we know effectively the Governor is advised by the cabinet so a decision of cabinet could still be to say, "But in our view that $300 million should have been admitted by these people, so we're going to fund a proportion of that back to ICWA."

**Mr McLernon**: As you can tell, I am champing at the bit to give you an answer to that question, because it is right but it is effectively worse than that. The provisions are quite clear that when it goes to the Governor, no matter what the decision of the authority is, not a penny of it needs to be distributed. There are no reasons required. A decision is just announced and that is the end of it. Now, again, I trust the Governor and the system that it will not ever come to that. But why have a law that allows it if it is never going to come to that? Those are the specific provisions: the Governor does not have to distribute a dollar. Now, I am not saying she would not give anything to ICWA or other parties. I am just saying the provisions of the law are such that they allow for that to happen.

**Hon KEN TRAVERS**: So, effectively, the administrator is only an advisory body to the government, not a determiner; whereas, again, I think the way it has been presented has been that the authority will be the determiner, will determine how the money is allocated.

**Mr McLernon**: Yes.

**Hon KEN TRAVERS**: But in effect it is just an advisory body to the government, and maybe the bill should be more accurate, would be more honest if it directly reflected that.

**Mr McLernon**: I could not possibly say that, but you could.

**Hon KEN TRAVERS**: All right, I am happy for others to ask questions and if we have time I will come back with a couple of other questions.

**Hon NICK GOIRAN**: Mr McLernon, earlier in your evidence you said—and this is according to my notes—that the state has a big moral claim but a tenuous legal claim.

**Mr McLernon**: Yes.

**Hon NICK GOIRAN**: Can you just explain the basis for saying the state has a big moral claim?

**Mr McLernon**: Yes. The state, at least arguably, was not even a creditor; it was a subordinated creditor. It made a decision to fund litigation in those circumstances, and what is more it stuck to it through thick and thin. When the GFC struck, not only did BGNV, the Belgian group, stop funding but so did the Australian Taxation Office. And ICWA through all that paid up for those people and left them in a position where they still got the same return. They spent $220 million. It is an epic funding of all time. It is a hall-of-fame litigation funding decision to do that; and thankfully they won. They won because they had limitless pockets. Had they not been the state, they would have been blown up halfway through the litigation because of the cost. They not only paid out $220 million; they risked another 200 if they lost. So, that is half a billion in a situation where it was arguable you did not have a claim. That is why I said they have got a big moral claim, but not much of a legal claim.

**Hon NICK GOIRAN**: The cost that they have expended in funding all of this litigation to the benefit of certainly everybody else and one would assume at least partly to our own benefit —

**Mr McLernon**: Yes.

**Hon NICK GOIRAN**: — is there any one of the stakeholders who would argue that the Insurance Commission of Western Australia should not at least receive dollar-for-dollar recovery for all of its costs it has expended?

**Mr McLernon**: They should get more than that—more—and no-one is suggesting that they should not. There is, as there is in every mediation where people are trying to maximise their position, a constant jostle which sooner or later will bring everyone into position and a settlement will occur. I would think they would get—in fact the last document in that pack is a letter that we wrote, WA Glendinning wrote, to all of the creditors after the Treasurer went into the Parliament and effectively told the Parliament what the position was of ICWA at the mediation. So we responded by saying, "All right, you've made it public, we will make our position public." I have forgotten now the precise figures but I think —

**Hon NICK GOIRAN**: Yes, the Insurance Commission, you said 650; ATO, 380; BGNV, 520; yourself, 100; and BGUK, 100.

**Mr McLernon**: That is three times the costs that you were mentioning—no-one else's.

**Hon NICK GOIRAN**: Yes, I understand that, but I want to be clear that you and, as far as you understand, all the other parties at least at first instance could say that there is, if you like, a first right of recovery with the Insurance Commission of WA to be refunded the costs it has expended in funding the litigation.

**Mr McLernon**: To the best of my knowledge, Mr Goiran, that is the case. The only reason I say that is because I am not privy; we are competitors to the other people.

**Hon NICK GOIRAN**: I understand that.

**Mr McLernon**: But from what I have observed at the mediation and in the various councils around that and since, it does not appear to me that there is any serious suggestion that ICWA should not get the biggest slice.

**Hon NICK GOIRAN**: Yes, I understand about the slice but I just want to be clear that we are talking about the same thing.

**Mr McLernon**: Okay.

**Hon NICK GOIRAN**: I want to put to one side any argument about what the Insurance Commission should get for its so-called investment in bonds and shares or anything like that or purchasing of debts.

**Mr McLernon**: Yes.

**Hon NICK GOIRAN**: I am just solely interested in the costs expended by the Insurance Commission to the benefit of everyone else to fund the litigation.

**Mr McLernon**: Yes.

**Hon NICK GOIRAN**: Is that, at least from your perspective as a director of your company, a first right of recovery before everything else?

**Mr McLernon**: Absolutely; automatic. Even as I say that, though, they did not bolt it down for themselves as they should have. When you are going to spend that much money, it should have been bolted down. It was not bolted down. It was one of the flapping bits of the tarpaulin that was just left up in the air throughout the whole proceeding. The reason for that is the money was being paid back to LDTC; the 220 was being paid back to LDTC. Arguably it fell under the distribution arrangements, but to answer your question, as you can see from that document, we would not only agree that they had to get their 220 but they should get a lot more.

[12.10 pm]

**Hon NICK GOIRAN**: Okay, so the dispute that remains in place then between the parties is not about the Insurance Commission's right of recovery for its costs, but about the Insurance Commission and other creditors' right of proportion for the debts that they are owed?

**Mr McLernon**: That is certainly our position and it is the position, I would think, of at least ATO, BGUK—the wildcard is probably BGNV. I can certainly talk for myself, and I think I can talk for everyone else probably, except BGNV.

**Hon KEN TRAVERS**: Is there also not as part of that settlement a reward to those that fund it, for their share?

**Mr McLernon**: Yes, without doubt, and there will be. The problem is, it will go to LDTC, not to —

**Hon KEN TRAVERS**: Yes, and then it is up to ICWA to have the arrangement with LDTC, hopefully, to bring that money back to WA —

**Mr McLernon**: No, it cannot have an agreement, because the trustee says how it has got to be distributed, and you can only have an agreement that overrides the —

**Hon KEN TRAVERS**: Where is that trustee resident then? Where is that based?

**Mr McLernon**: London.

**Hon KEN TRAVERS**: London. So this bill will not have an effect on that?

**Mr McLernon**: Yes it will. It has extraterritorial effect, under clause 4 or 5 I think it is, to the extent possible. Whether that is enough to cover that, I do not know, but it purports to have extraterritorial —

**Hon KEN TRAVERS**: Would you suggest that this bill is then going to try and circumnavigate that trust arrangement by paying directly to —

**Mr McLernon**: Without doubt.

**Hon KEN TRAVERS**: —people, outside the LDTC structure?

**Mr McLernon**: Yes. It removes that whole debate.

**Hon KEN TRAVERS**: And pays ICWA directly its reward component?

**The CHAIR**: In London, that company is not registered anymore and that money will go to the Crown?

**Mr McLernon**: Yes. That is a different company. That is a company called BGUK.

**The CHAIR**: Oh, BGUK. Sorry, there are so many acronyms in this.

**Hon KEN TRAVERS**: Just before we move off that—in your submission, you refer to the amounts that the Treasurer said is an acceptable settlement and then what you think is an acceptable settlement. They add up to different amounts.

**Mr McLernon**: Yes, they do. Not by much.

**Hon KEN TRAVERS**: By $35 million.

**Mr McLernon**: Yes.

**Hon KEN TRAVERS**: Who cares if we went with that! Is there a logic as to how you can create more money to distribute than the Treasurer?

**Mr McLernon**: It is the other way around. I did not create any more money—the Treasurer did not distribute it all. There is about $60 million left unaccounted for in the Treasurer's figures.

**Hon KEN TRAVERS**: Right. So in yours, there is still $30 million unaccounted?

**Mr McLernon**: Presume that is not to fund the administrator—the authority. One would hope not, it is not going to cost that much, but that is an unexplained amount that has not been dealt with.

**Hon NICK GOIRAN**: Mr McLernon, is there anything that would prevent, at the present time, the liquidator from refunding the Insurance Commission for the cost of the litigation to date?

**Mr McLernon**: Yes, he would be locked up. It is the reason why I would not pay it, if I was the liquidator. Remember, it is retrospective. If you make a payment out, even to ICWA, under the terminology of the bill, you are doing something which potentially defeats the —

**Hon NICK GOIRAN**: Had the bill not been in place—so rewind a few months—could the liquidator have paid the Insurance Commission its costs of the proceedings?

**Mr McLernon**: No, you would have to get an order of the court, under 564, which all of that procedure was in place. Essentially, what they were asking for was repayment of the costs and 66 per cent.

**Hon NICK GOIRAN**: Yes, but again putting this aside, the rights on the claims, which everyone is going to dispute —

**Mr McLernon**: He could not just pay it out, I do not think. Or he would not.

**Hon NICK GOIRAN**: You could not do as a provisional payment —

**Mr McLernon**: He could but he would not, because there are too many people looking over this shoulder—that is, the other unsecured creditors. He would have to do it pursuant to an order of the court.

**Hon NICK GOIRAN**: Okay, and so if the other creditors all agreed that phase 1 of the distribution will be the refund to the Insurance Commission, and we will then dispute the remainder that is left, that would be possible?

**Mr McLernon**: It would, and would have happened automatically—if they all agreed.

**Hon NICK GOIRAN**: And is the position of your company that but for this bill, that that could have happened?

**Mr McLernon**: So long as they all agreed.

**Hon NICK GOIRAN**: Yes.

**Mr McLernon**: We would agree. I doubt—people do not want to move their position, they want to use it as a lever.

**Hon NICK GOIRAN**: Your evidence to the committee is that, as far as you know, not all of the creditors would have agreed to that pragmatic approach?

**Mr McLernon**: I would be surprised if BGNV, with all due respect to them, were as pragmatic as that.

**Hon NICK GOIRAN**: Yes; okay—which perhaps then explains the fury within the Insurance Commission and then the government because of the moral claim that you referred to earlier?

**Mr McLernon**: Yes, and can I say I understand the fury. If I had just arrived at ICWA as the current MD did, and opened this Pandora's box and seen what happened, and was told by my advisers that potentially you might not get very much, I would be furious as well, but not against us. I would be furious against other people.

**Hon KEN TRAVERS**: Can I just ask? One of the things that is relied upon is this agreement with the liquidator to give—you said 66, I thought it was 60 per cent.

**Mr McLernon**: I think it is actually two-thirds.

**Hon KEN TRAVERS**: Two-thirds, all right. So of any claim would be paid for the —

**Mr McLernon**: No, not of the claim; of the total sum.

**Hon KEN TRAVERS**: The total sum would be paid as reward for funding the liquidations—funding the legal action —

**Mr McLernon**: The litigation, yes.

**Hon KEN TRAVERS**: The litigations. Was that intended to also then—would that have also removed the claim for the $300 million under the JN Taylor debt? Or would that still sit outside that? They would still be sitting there as a potential—if that was admitted as a debt—as alongside of all of the other unsubordinated creditors?

**Mr McLernon**: A very good question. I am not sure whether you know of the insolvency law sufficient to understand why that is precisely a good question, but it is because under the law, you would only get the percentage. You cannot get more than the amount of your debt. Under this legislation it says, specifically, you can get a return for funding plus the return on your debt. The artificial concept is completely different from the real.

**Hon KEN TRAVERS**: So let me just understand that, to make sure I am—in this case, to whether or not the bill can be amended to reflect the current laws. What you are saying is, you could get up to 60 per cent of the final amount—the settlement—if you had the cost of your funding the litigation, plus your actual debt, equalled more than two-thirds of the amount.

**Mr McLernon**: No, it was at least that or less. Then you get paid out the whole of your debt.

**Hon KEN TRAVERS**: Just using figures, if you had funded 200 for litigation, you would get the 200 back, and if you had a $300 million debt, you would get paid, before anybody else, the full $300 million back.

**Mr McLernon**: The whole 300, that is it.

**Hon KEN TRAVERS**: What you cannot then get is $600 million, unless you can show you had debts to the value of $600 million.

**Mr McLernon**: Exactly.

**Hon KEN TRAVERS**: So when ICWA entered into any of those agreements, that is what the law at that stage —

**Mr McLernon**: Exactly.

**Hon KEN TRAVERS**: Would an appropriate amendment to this bill be to reflect the law that was in place at the time, because one would assume that ICWA did not expect, at that time, to receive any more money, than what was in the law at the time?

**Mr McLernon**: That is one area where you would have to amend the bill to bring it into line with the law, but if you did that, you would end up with the Corporations Act. Because there are so many differences between the authority's position and the Corporations Act, but if you tried to mirror them, you might as well not do it, because you have already got the system that you are trying to mirror. But you are right, if you just want to correct some of them, that is one that you would correct; that is, you cannot get more than you are owed.

**The CHAIR**: Due to the time, and we have made very good use of your time, on behalf of the committee, I would like to thank you for coming before us today.

**Mr McLernon**: My pleasure.

**The CHAIR**: I am sure if the committee have any more questions, they will put it in writing to you and you will answer that.

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

**Mr McLernon**: We would applaud, not object.

**The CHAIR**: Thank you very much.

**Mr McLernon**: Because it is fair.

**Hon NICK GOIRAN**: Thank you.

**The CHAIR**: Thank you very much.

**Hearing concluded at 12.19 pm**