2015

SUPPLEMENTARY

SUBMISSION OF

THE TREASURER OF WESTERN AUSTRALIA

AND THE ATTORNEY GENERAL

to the

LEGISLATIVE COUNCIL SELECT COMMITTEE ON LEGISLATION

STATE SOLICITOR'S OFFICE

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

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TABLE OF CONTENTS

1. BACKGROUND

This Submission is made by the Honourable Attorney General, on behalf of the Honourable Treasurer of Western Australia and the Government of Western Australia, to the Legislative Council Standing Committee on Legislation, with respect to its inquiry into the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015* (**Bill**).

By written Submission dated 5 October 2015 the Government of Western Australia made submissions to this Committee in relation to the Bill.

Having read submissions subsequently lodged with this Committee by WA Glendinning & Associates Pty Ltd (**WAG**); the Law Council of Australia (**Law Council**), and Bell Group N.V. (In Liquidation) (**BGNV**) posted on the Committee's webpage, the Government of Western Australia wishes to briefly address some points made in those submissions. This Submission should be read in conjunction with Submission of the Treasurer of Western Australia and the Attorney General dated 5 October 2015.

Capitalised terms in this Submission have the meaning given to them in Schedule 1 of the Submission dated 5 October 2015.

2. INTRODUCTION

1. The tone of some parties' submissions is in the Government's view, unnecessary, and stems from a flawed or incomplete understanding of the object and operation of the Bill.

2. This Bill has been prepared by the Government to address a very specific, and extraordinary set of circumstances: to finalise one of the longest and largest liquidations of a corporate group of companies in Australia, which has for many years dominated and imposed a particularly heavy burden upon the judicial, public, legal, and accounting sectors of this State, in circumstances where parties are now unable to find common ground upon which to agree almost anything.

3. The events which gave rise to the subject matter of this Bill occurred in the 1980s. Many of the companies involved in those matters have been in liquidation since 1991. The liquidations of those companies have now been running so long many of the directors of those companies are deceased, or infirm. The Bell litigation - a simple preference claim, - commenced by the Liquidator in 1995 ran for 18 years, concluding in 2013 even before exhausting all legal avenues available to the protagonists. The Liquidator alone expended over $265 million on legal and other expenses. Other parties incurred similar costs and expenses.

4. There is now a pool of funds of approximately $1.75 billion available to a relatively small number of creditors.

5. Creditors however are in dispute over a myriad of issues which have arisen over the last 25 years since the collapse of the Bell group in 1989.

6. The number and complexity of the issues in dispute between creditors, dwarf the number and complexity of those raised in the Bell litigation.

7. The Bill is intended to, and does, operate to bring these matters to a pragmatic, fair and reasonable conclusion, for the benefit of all stakeholders.

8. Those stakeholders are:

   (a) a very small number of remaining creditors of the Bell Group; and

   (b) the people of this State who will be bystanders to the extraordinary time, cost, and expense that will be incurred by a comparatively small number of creditors, and the use of the judicial, and other public resources of this State.

9. The Bill is not intended to, and does not, operate to the detriment of any creditor. It offers a pragmatic, fair and reasonable solution to an intractable problem which, if not resolved, will descend into a morass of litigation, recrimination, and incur such time and cost that will make the Bell litigation, look simple, and cost-effective.

10. Creditors have claims in the liquidation of the Bell Group companies, many of which are at variance with claims of others. No-one has a determined or vested right to any particular property or amount of money of the Bell Group companies.

11. If parties are not able to agree the manner in which the Bell litigation proceeds are to be distributed among them, the Authority is required to take into account all relevant matters including pre-Bill arrangements between creditors, to determine the liability of each WA Bell Company to its creditors.

12. It is not correct to say the Bill confers a commercial advantage upon any particular creditor, including ICWA. If parties agree among themselves how funds held by the Liquidator should be distributed, sub-clause 36(3)(b) of the Bill requires the Administrator to take that agreement into account when making his or her recommendation. If agreement among creditors cannot be reached, the Bill sets out a pragmatic, fair and reasonable manner in which a qualified Administrator and his or her staff, with the assistance of the Liquidator and his staff and their collective experience in the liquidations of the Bell Group companies, can determine who receives how much of the property of the Bell Group companies, in a manner that does not require many (more) years of litigation, and the associated administrative and judicial cost, and burden. To facilitate this, the Bill attempts to minimise "execution risk" – that is, the risk associated with parties agreeing the terms of any settlement, and 1 or more of those parties subsequently attempting to re-negotiate, or obstruct implementation of, that agreement.

13. The Government is concerned at the time and cost it will take to resolve the many issues which require resolution, in circumstances where parties are unable to agree on almost anything. That is not to blame any 1 party, although there are clearly some parties more prone to disagree, and raise issues of questionable merit, than others. Certain parties have also put in

dispute issues which have been accepted as settled for many years, and which they have benefitted from, in an endeavour to advantage their current legal and commercial positions. Some of those issues were referred to in course of the Bell litigation, but may now need to be re-litigated.

14. Consequently, the Government at no time thought passage of the Bill was a "*fait accompli*". Because of various parties' long-adopted stances and tactics, nothing to date has been simple or easy, and the Government has at no stage assumed debate concerning the Bill would be any different.

15. At the conclusion of his 2565 page judgment in a section he titles "*At last: an end to the lucubration*", his Honour Justice Owen wrote, "*I went into this trial believing that, at some point, the parties would settle. I still think it should have settled because, basically, it is only about money*", commenting how he "*felt, and still feel, about the desirability of a negotiated end to the litigation*" and, in the 9759th and fourth last paragraph of his judgment that, "*It is still not too late for the parties to put an end to this saga by a negotiated settlement, ...*".

16. The parties have thus far not been able to put an end to this saga. It is this Government's wish that this saga be brought to an end nevertheless.

3. SUBMISSION TO THE COMMITTEE BY WAG DATED 4 OCTOBER 2015

17. The history of the debt now owed by BGF to WAG, is that in February 1992 WAG purchased a debt owed by BGF to West Australian Newspapers Ltd and Albany Advertiser Pty Ltd, for $125. With interest, that debt is now approximately $183,297,347.04.

3.1. Funding – paragraphs 25 - 32

18. In November 1994, the Liquidator invited all creditors of BGF including WAG to provide him with funding to enable him to investigate the affairs of BGF.

19. ICWA, BGNV, and the Commonwealth (on behalf of the ATO) agreed to provide such funding, and executed an indemnity agreement with the liquidator.

20. WAG said it did not wish to fund the Liquidator, but did agree that two-thirds of any recovery should be apportioned to the Indemnifying Creditors.

21. By October 1996, when WAG indicated it may be interested in indemnifying the Liquidator, an enormous amount of work had already been undertaken investigating potential claims against the Banks; assessing the merits of claims against the Banks; proceedings had been commenced in the Federal Court, and in excess of $7.2 million in costs had been expended by the liquidator.

22. The liquidator consequently indicated to WAG he was adequately indemnified. The liquidator invited WAG to put a formal proposal to him, setting out certain issues that had to be appropriately addressed in any such

proposal. WAG declined to do so and said it was instead discussing the matter with the Indemnifying Creditors. WAG did not ultimately become an indemnifying creditor.

23. The outcome is that, although WAG may be a creditor of BGF, it has not assumed any risk associated with funding the claim against the Banks, nor was it involved in the Bell litigation. It is only now there are funds available WAG has become involved because of its status as creditor of BGF.

3.2. Issues for resolution – paragraph 45

24. In August 2014, the liquidators commenced COR 146 of 2014 in the Supreme Court of Western Australia, seeking various orders in relation to distribution of funds held by the Liquidator.

25. In October 2014, ICWA commenced COR 202 and 208 of 2014 (now consolidated into COR 208 of 2014) in the Supreme Court of Western Australia seeking 31 separate heads of relief, principally relating to issues ancillary to the relief sought by the Liquidator in COR 146 of 2014, which require resolution before any distribution may be made pursuant to any orders made in COR 146 of 2014. Necessarily, these heads of relief relate to matters in respect of which ICWA is party, or has an interest in. There are many other issues which require resolution in which ICWA is not the proper party, in relation to which proceedings have not yet been commenced, which also require resolution before any distribution may be made pursuant to any orders made in COR 146 of 2014.

3.3. Factual matters – paragraph 46 - 47

26. ***46 a***: It is not correct to say ICWA is not a creditor of BGF. Until recently, it has not been questioned that ICWA is a creditor BGF. ICWA's status as creditor of BGF was questioned for the first time in the period immediately prior to the commencement of COR 146 of 2014 and COR 208 of 2014: ICWA holds approximately $75 million of bonds issued by BGF for which LDTC is trustee; it has advanced approximately $198 million to the Liquidator pursuant to the indemnity agreements entered into between the Liquidators and the Indemnifying Creditors in 1995, and is – at least – a contingent creditor of BGF, and therefore a creditor as the law uses that term.

27. ***46 b***: The bonds issued by BGF are subordinated. ICWA's interest in those bonds is not.

28. ***46 c – d***: There was no attempt by ICWA – or anyone – to de-subordinate the BGF Bonds. In 1995 and 1996 ICWA, LDTC and the Liquidators, in conjunction with BGNV and the Commonwealth, considered amending the BGF Trust Deed and TBGL Trust Deed for the BGF Bonds and TBGL Bonds to clarify that repayment of amounts advanced to the Liquidator, pursuant to the indemnity agreements, by ICWA – which since 1999 has been the sole, remaining indemnifying creditor – and any amount awarded to ICWA pursuant to s. 564, were not captured by the subordination and turnover provisions of the Trust Deeds. Those provisions subordinated

payments by TBGL and BGF of principal and interest with respect to the TBGL Bonds and BGF Bonds to the interests of Senior Creditors, such as BGNV. Ultimately this proposed amendment was not proceeded with. It may need to be progressed in the future. ICWA has never attempted to change the subordination status of the principal and interest of the TBGL Bond and BGF Bond debts.

29. ***46 e. – f***: The "trustee" – LDTC – has never written a cheque to fund the Liquidator. For the entire 17 years during which ICWA provided funding to the Liquidators, ICWA wrote each cheque.

30. ***46 g***: When the TBGL Trust Deed and BGF Trust Deed were negotiated, there was no consideration given to the possibility of amounts being advanced to the Liquidators by ICWA, or any s. 564 award, and so the terms of the Trust Deeds were not drafted to accommodate these concepts. Accordingly, the Trust Deeds were not drafted with the intention of capturing these categories of payments. In any event, the terms of the Trust Deeds do not, in the Government's view, capture these amounts. Others are disputing that, seeking advantage.

31. ***46 h – i***: The *"$300M debt"* referred to, is an amount owed by TBGL to JNTH, in which ICWA has a beneficial interest. That debt is currently an admitted debt in the liquidation of TBGL, although the liquidator and ICWA are undertaking some further investigation in relation to that debt.

32. ***46 j***: Allegations of fraud in relation to Western Interstate have only very recently been made by BGNV, who will benefit commercially from the Western Interstate transaction being set aside. BGNV previously acquiesced in, and benefited from the (until recently) generally accepted proposition that Western Interstate was a creditor of BGF.

33. ***46 k***: No creditor has "*an unarguable claim*" in this matter, as evidenced by the lengthy Statements of Issues Facts and Contentions filed recently by parties in Supreme Court of Western Australia COR 146 of 2014 and COR 208 of 2014, which raises, responds to, and puts in contention, a multitude of issues.

34. ***46 l***: BGNV and the ATO ceased to fund the liquidators in 1999. The GFC is generally accepted to have occurred in 2007-8. The dot-com crash in 1999-2000 was different in nature and scope (see also page 11 of the transcript of Mr McLernon's evidence to this Committee on 6 October 2015).

35. ***47***: All parties have, and have expressed, various arguments in relation to their, and other parties', respective positions. It is precisely because no one party has an "*unarguable claim*" that the parties are locked in such a difficult and intractable position.

3.4. BGF Committee of Inspection – paragraph 50

36. ***50***: At a meeting of the creditors of BGF in August 2014, ICWA sought to be appointed to the Committee of Inspection of BGF. BGNV and WAG voted

to prevent that. ICWA commenced proceedings seeking orders that it be appointed a member of that Committee. That matter has progressed, and the parties are awaiting an interlocutory decision of the Court in relation to documents sought by BGNV which, ICWA contends, are not relevant in the context of that application.

3.5. Proceedings issued at the time of mediation – paragraph 52

37. *52*: At the time of mediation in May and June 2015 there were 2 significant pieces of litigation on foot, and numerous minor pieces of litigation. The major litigation was COR 146 of 2014 commenced by the liquidator, and COR 208 of 2014 commenced by ICWA, and approximately 8 other pieces of smaller litigation including an application commenced by WAG, being Supreme Court of Western Australia COR 162 of 2014. BGNV has prepared draft papers for, but not commenced, a challenge to the significant Western Interstate transaction referred to above, based on allegations of fraud.

3.6. Mediation

38. As far as the Government is aware, no-one at any stage, including for the purpose of mediation, "*had undertaken ... to act reasonably*".

39. The Government certainly hoped parties would act reasonably, and was disposed to be reasonable if they did.

4. EVIDENCE OF HUGH MCLERNON, DIRECTOR OF WAG ON 6 OCTOBER 2015

4.1. Protection from liability of persons other than ICWA – page 6-7

40. Evidence was given by Mr McLernon that under the Bill only ICWA and its officers are protected from future litigation and claims, ICWA can take action against WAG, and he is not protected or indemnified with respect to claims by shareholders against him as a director of WAG.

41. There are several provisions in the Bill which indicate this is not necessarily the case.

42. *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 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.

43. *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).

44. *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..

4.2. ICWA's claims in the winding up of the Bell Group companies – page 7

45. At page 7 of the transcript of evidence given by Mr McLernon, he suggests ICWA's only potential claim or benefit in the liquidation of the Bell Group companies is a reward for having provided funding, as a subordinated creditor, and in relation to a debt it bought from JNTH.

46. ICWA's claims in the winding up of the Bell Group companies are:

(a) as an ordinary unsecured (and unsubordinated) creditor of TBGL for $3,239,884.75 (of which $3,085,370.95 has been admitted) arising from TBGL's lease of premises at the Forrest Centre, 221 St Georges Terrace, Perth;

(b) as the holder of a beneficial interest in a proof of debt lodged by JNTH in the winding up of TBGL for $301,230,267 (of which $291,147,583 has been admitted);

(c) as a subordinated creditor of TBGL for $172,531,250 (of which $168,287,500.33 has been admitted) with respect to the TBGL Bonds and TBGL's guarantee of the BGF Bonds;

(d) as a subordinated creditor of BGF for $96,145,833.33 (all of which has been admitted) with respect to the BGF Bonds; and

(e) as a creditor of TBGL and BGF which has provided an indemnity and made payments to fund the Bell litigation, which it contends entitles it to:

(i) repayment of the amounts advanced to the Liquidators;

(ii) an award of its share of two-thirds of the amount recovered, protected or preserved by the Bell litigation pursuant to an order under s. 564.

4.3. Status of the JNTH proof of debt – page 7-8

47. Mr McLernon has claimed JNTH's proof of debt "*has been completely denied*" and "*the liquidator is or is about to refuse to accept that debt*".

48. The Government is not aware of any information available to Mr McLernon for the purpose of giving evidence which could reasonably form the basis of these assertions.

49. As stated in paragraph 31 above, the debt has been admitted in the winding up of TBGL since March 1996. While, the liquidator is reviewing JNTH's proof of debt, that review is ongoing. The liquidator has not reached a decision as to whether the JNTH proof of debt was correctly admitted.

4.4. Operation of s. 564 and the Trust Deeds – pages 7-8

50. Mr McLernon has asserted ICWA advanced money to LDTC, and LDTC funded the Liquidators. As stated in paragraph 29 above, LDTC has never written a cheque to fund the Liquidators and it was ICWA that wrote every cheque providing such funding.

51. He states the TBGL Trust Deed and BGF Trust Deed "*say that any moneys* [ICWA] *got effectively under a 564 order had to be paid to all the other creditors before it was paid to ICWA*". While WAG contends in COR 146 of 2014 and COR 208 of 2014 that the Trust Deeds should be construed as operating in this way, the Trust Deeds on their face say no such thing. As stated in paragraph 30 above, the Trust Deeds do not contemplate any order being made under s. 564 at all. Rather, in ICWA's view, as stated in paragraph 28 above, the subordination and turnover provisions of the Trust Deeds provide for principal and interest with respect to the Bonds (but not repayment of amounts advanced to the Liquidator or payments pursuant to an order under s. 564) to be applied in priority in satisfaction of debts owed by TBGL and BGF to Senior Creditors.

52. While these are issues contended in COR 146 of 2014 and COR 208 of 2014, it does not follow that, in providing for payments to be made directly to ICWA, the Bill will "*effectively fix up mistakes made in the past*", or provide for ICWA to be paid an amount which it is not otherwise entitled to.

4.5. Submissions made and advice given to the Authority – page 9

53. Submissions to the Authority with respect to the JNTH proof of debt will be made by JNTH, not ICWA. Although ICWA is likely to have input into any submission made by the JNTH liquidator, it is not correct for Mr McLernon to assert that in determining the liability of WA Bell Companies to JNTH the Authority "*will rely on what ICWA tells them*".

54. The Authority will also have the benefit of the account and statement, books of the WA Bell Company, and any report, provided by the Liquidator in accordance with clause 29 of the Bill.

4.6. Mediation – page 10

55. Mr McLernon asserted the reason certain companies did not attend a mediation scheduled in May 2015 was because of the announcement of the Bill. However, the Bill does not prevent, and at no time has prevented, the parties from reaching a mediated agreement.

56. As stated in paragraph 12 above, if parties agree how funds should be distributed, sub-clause 36(3)(b) of the Bill requires the Administrator to take that agreement into account. The Bill then effectively operates to remove any execution risk with respect to that agreement.

4.7. Amount to be paid to ICWA – page 12-13

57. During Mr McLernon's evidence, this Committee referred to WAG's distribution position (that is: ICWA, $650 million; ATO $380 million;

BGNV, $520 million; WAG, $100 million; and BGUK, $100 million). In response, Mr McLernon stated ICWA should be refunded the costs it had expended funding the Bell litigation and "*a lot more*".

58. The Government understands WAG's position (including as disclosed in Mr McLernon's evidence) is any amount paid to ICWA other than as a refund of the costs it had expended funding the Bell litigation, will be caught by the terms of the subordination and turnover provisions in the TBGL Trust Deed and BGF Trust Deed, and be paid to the Senior Creditors, including WAG, such that ICWA will in fact receive no more than a refund of the costs it had expended funding the Bell litigation.

5. SUBMISSION TO THE COMMITTEE BY THE LAW COUNCIL OF AUSTRALIA DATED 2 OCTOBER 2015

59. Much of the submission by the Law Council is objection to technical elements of the Bill. Its submission deals little with the practicalities faced by this State, or the practical effect (if any), of objections raised by them.

60. The Government in its submission at Part 9 (page 94) deals with many of the concerns raised by the Law Council.

61. The Government does however wish to respond to 3 comments in particular made in the Law Council's submission.

62. Paragraph 5 of the Law Council's submission says that as Settlement occurred in 2013, issues sought to be dealt with in the Bill have become relevant only in the last 2 years. That is, with respect, misconstrued, and demonstrates the narrow understanding and approach adopted by the Law Council. With the exception of 1 or 2 issues raised recently by parties attempting to advance their own position, all issues now before the Court, and those anticipated issues not yet before the Court, have been understood by the parties for many years, and in many instances, debated. The last 18 years of litigation, and the last 2 years of correspondence between the parties have confirmed, and demonstrated, the complexity, and intractability of the parties' positions in relation to those issues.

63. In paragraph 7 of its submission, the Law Council says "*...the issue for the Legislative Council to decide when considering whether to pass the legislation is not complex. Should the Government pass legislation that interferes in a civil dispute between private litigants when one of the litigants is essentially the State in circumstances where the State owned entity may be advantaged by such legislation to the detriment of the other litigants?*". Again, with respect, the issues involved, are complex. Nowhere does the Law Council address any of them. It raises legal issues without appearing to have any real understanding of the issues themselves; the context and environment in which the parties are operating, and the practical effect those comments may have.

64. Paragraph 9 of the Law Council's submission says "*...there is existing law and a judicial process that can adequately deal with the matters the subject of the Bill.*" Again, with respect, existing law and judicial processes are not

well-equipped to deal with matters of this nature. The liquidation of this group of companies is now 24 years old, and it took 18 years of litigation to deal with what was in substance 1, albeit large, preference claim. The issues now in dispute are substantially more complex and interwoven, and the parties no less motivated to challenge and dispute their claims to a share of in excess of the $1.75 billion at stake.

6. BGNV SUBMISSION

65. The objects of the Bill are set out in clause 4. The Government would prefer if possible to avoid another 10 – 20 years of litigation and the consequence cost and expense, but can and will litigate, if required. Each party has its position. Some declare theirs more vociferously, assertively, and objectionably than others. It does not make their assertions any more correct, or their claims more meritorious.

6.1. The Bill is not *ad hominem* - paragraphs 4-8

66. BGNV alleges the Bill is *ad hominem*. Without conceding the correctness of that assertion, the Bill is certainly intended to achieve its objects set out in clause 4.

67. In *Australian Building Construction Employees' and Builders' Labourers Federation v Commonwealth* (1986) 161 CLR 88 at 96 the High Court said:

> "*It is well established the Parliament may legislate so as to affect and alter rights in issue in pending litigation without interfering with the exercise of judicial power in a way that is inconsistent with the Constitution ... [I]t is otherwise when the legislation in question interferes with the judicial process itself, rather than with the substantive rights which are at issue in the proceedings.*"

68. In *Australian Building Construction Employees' and Builders' Labourers Federation v Commonwealth*, the Commonwealth enacted legislation which deregistered the Builders' Labourers Federation, having the effect of making redundant legal proceedings which the union had commenced in the High Court. Accordingly, the legislation did not deal with any aspect of the judicial process. The High Court held that it did not matter that the motive or purpose of the Minister, Government and Parliament, in enacting the statute, was to circumvent the proceedings and forestall any decision which might be given in those proceedings.

69. In *HA Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547 the High Court again took a similar approach, holding that parliament's power to enact a special law relating to the use of land was not affected by the pendency of legal proceedings involving the same land under another law enacted by parliament.

70. Clause 67 of the Bill has the effect of staying any proceedings in a Court with respect to property of a WA Bell Company, unless leave of the Court is sought. That is a practical consequence of the transfer of the property of the WA Bell Companies to the Authority, and not a direction to the Court as to the manner and outcome of the exercise of its jurisdiction in respect of a

proceeding. As such, the Bill does not offend the principle of judicial integrity. Nor is it inconsistent with the Court's decisional independence. The Bill therefore falls very far short of satisfying McHugh J's description in *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51 (at 118) of legislation that *"... might undermine public confidence in the impartial administration of the judicial functions of State courts."*

6.2. Independence of the Administrator – paragraph 12

71. ***12***: the Administrator will be an independent, experienced, and qualified person, assisted by professional staff, and is entitled to seek a report prepared by the Liquidator. The Liquidator is impartial, and with his staff, has many years of professional, and Bell-related, experience.

6.3. Distribution issues – paragraph 13

72. ***13***: As stated in paragraph 31 and part 4.3 above, JNTH is a creditor of TBGL, and has been admitted to proof in the liquidation of that company for $291 million since March 1996. The liquidator is currently reviewing the debt underling that claim.

6.4. Misconceptions and inaccuracies – paragraphs 15-75

73. The Government in its submission at Part 9 (page 94) deals with many of the concerns raised by BGNV in its submission generally but, in particular, in paragraphs 15 – 75 of BGNV's submission.

74. The following commentary deals with some, but not all of the more egregious assertions by BGNV.

75. ***18 – 23***: As the funder of the Curacao-based Curatoren, and Mr Trevor as Australian liquidator of BGNV, and the recipient of 70 – 80% of any amount received by BGNV, Plaza BV exercises considerable influence over the decision-making processes of BGNV; the Curatoren, and Mr Trevor.

76. ***24 – 27***: ICWA has at all times preferred and encouraged discussion between the parties to resolve issues in dispute. It is disingenuous to suggest otherwise. The Government and ICWA however wished those issues that required resolution to be before the Court, to involve the Court in that process. The parties met in Sydney in July 2014 at ICWA's suggestion, to discuss the way forward.

77. ***28 – 31***: the Bill was in fact intended to provide a framework within which any agreement agreed by the parties could be implemented without further litigation or dispute.

78. ***34 – 36***: although it is not, in the Government's view, a necessary step the Commonwealth took in issuing assessments, that contingency has been allowed for in amendments now before the Legislative Council.

79. ***37 – 40***: it is not correct to say the Bill removes creditor rights without compensation. The Bill requires the Authority to take into account when making its assessment of what amount is to be paid to each creditor, all contractual and other entitlements.

80. ***41 – 45***: there are now 15 proceedings, including in the Western Australian Supreme Court; the United Kingdom High Court, and the Federal Court, which have been commenced (or, in one case, revived) since September 2013. ICWA has commenced 3 of those (1 of which has now been completed). The others have been commenced by other parties. The Liquidator has been forced to commence many at the instigation of BGNV.

81. ***65 – 69***: clause 36 of the Bill *is* similar in concept to s. 564 of the *Corporations Act*; ICWA *is* a creditor of BGF; ICWA, not LDTC, *did* fund the Bell litigation for approximately $198 million (BGNV provided no funding after 1999), and ICWA contends it *is* entitled to an award pursuant to s. 564 of the *Corporations Act*.

82. ***70 – 75***: matters since Settlement have been made "*hellishly complex*", in large measure because of BGNV. BGNV at paragraph 71 say "*There is nothing hellishly complex about a s.564 application*", when BGNV have done little but make that a complex application by raising as many issues as it possibly can, such as those to which it refers in its paragraph 67. In addition, any s. 564 application cannot be resolved without first resolving issues raised pursuant to some 31 heads of relief set out in West Australian Supreme Court COR 208 of 2014, being the action commenced by ICWA.

83. *77 – **84***: the Bill provides a guarantee against further litigation; the approach adopted by BGNV however, does not.

6.5. State's proposal for an agreed schedule – paragraph 96

84. It is incorrect to state "*the bulk*" of the $55 million the Treasurer proposed be paid to ICWA will be returned to the Australian Bell Group companies and therefore, by operation of the Bill, the State. Any "flow-back" from BGUK arises from debts owed by BGUK to BGF. Those debts amount to just under one third of BGUK's total debts. The costs and expenses of the BGUK liquidation will need to be satisfied prior to any amount being distributed by the BGUK liquidator with respect to the debt owed to BGF.

85. Furthermore, the Treasurer's stated numbers do not involve a "*sleight of hand*". Rather, those numbers take into account that certain funds held by Bell Group companies which are not WA Bell Companies, will not immediately be subject to the Bill (although some of those funds will later be caught as they "flow-back" to WA Bell Companies). In addition, the Treasurer's stated numbers take into account that the Liquidators' costs and expenses, and the debts of other, minor unsecured creditors, would be paid from the total funds available.

86. Consequently, while the State may receive an amount in addition to the $700 million the Treasurer proposed be paid to ICWA, that additional amount would not be in the order of $100 million, as asserted by BGNV.

7. CONCLUSION

87. This is an extraordinary set of circumstances and issues which the parties have attempted to resolve, but have not been able to. The administrative, judicial, commercial, and reputational cost to this State of not resolving the

various matters in dispute is itself significant. The Government has proposed to do so by a method which is pragmatic, reasonable, and fair. The impact of the Bell Group liquidation over the last 20 years has been significant, and the Government has determined it is time to bring this chapter of the State's history to a close, in a manner that is pragmatic, fair, and reasonable for all stakeholders, including the people of this State.

The Government commends the Bill to the Committee.

HON DR MIKE NAHAN MLA
TREASURER
23/10/2015

HON MICHAEL MISCHIN MLC
ATTORNEY GENERAL; MINISTER FOR COMMERCE
23/10/2015