2015

FURTHER 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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Ref: SSO 508-13

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1. INTRODUCTION

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**).

This Submission responds to the questions contained in the letter to the Honourable Attorney General, from Honourable Robyn Sweeney MLC, Chair of the Standing Committee on Legislation, dated 16 October 2015. It should be read in conjunction with:

(a) the Submission of the Treasurer of Western Australia and the Attorney General dated 5 October 2015; and

(b) the Supplementary Submission of the Treasurer of Western Australia and the Attorney General dated 23 October 2015.

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

2. RESPONSES

2.1. Question 1: Delay to implementation if there is a constitutional challenge

Should the Bill, if enacted, be challenged in the High Court on the basis it is unconstitutional, does the Government intend to delay its implementation until this challenge has been dealt with?

If, and when, there is any challenge; the extent of that challenge (to all, or part of the Bill), and the time any challenge will take to be determined, are currently not known. The object of the Bill is to facilitate an expeditious, fair and reasonable distribution of funds held by the Liquidator. Those funds have been available to be distributed since the Liquidator received them in June 2014. The Government has no present intention to delay implementation of the Bill if enacted. To delay implementation because of the initiation of further litigation would reward behaviours the Bill is intended to end.

2.2. Question 2: Conflict of interest

Regarding clause 72 of the Bill, do you believe there is any scope for a conflict of interest to arise, should the State Solicitor be requested to provide an opinion to the Authority, by virtue of any advice the State Solicitor has provided to the Insurance Commission of Western Australia? How would any risk of a conflict of interest be managed?

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

2.3. Question 3: Status of the Settlement Deed

In your submission, on pages 63 and 64, you give examples of the type of agreements and instruments covered by clause 27(4).

- *Is it correct to say clause 27(4) does not cover the 2014 settlement agreement between the banks and the liquidator due to the terms of clause 27(4)(d)?*

Clause 27(4) includes the Settlement Deed dated 17 September 2013 between the Banks as defendants in the Main Proceeding and the Liquidator, amongst others (completed in June 2014). Consequently, clause 27(5) applies to the Settlement Deed and it continues to have effect.

2.4. Question 4: BGUK's rights under the Settlement Deed

The Committee refers to the following passages in the submission of Ms J.B Stephenson, the liquidator of Bell Group (UK) Holdings Limited:

- *Paragraphs 13 to 16, where it is asserted that the Bill interferes with 'established and undisputed rights' under the 2014 settlement, thereby going beyond its stated purpose and policy (see also paragraph 12(e));*
- *Paragraph 18, where it is asserted that the Bill creates a conflict between clauses 22 and 25, on the one hand, and clause 27, on the other.*

What is your feedback on these statements?

The Government understands BGUK is concerned because it allowed Settlement Funds attributable to it pursuant to the Settlement Deed to remain with the Liquidator of the WA Bell Companies.

However, the operation of clauses 27 (4) and (5) ensure the Settlement Deed remains enforceable, together with any rights or entitlements owed to, or by, any party not otherwise affected by the Bill, such as BGUK. BGUK therefore is not adversely affected by the operation of clauses 22 and 25 of the Bill.

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

2.5. Question 5: Reference to "appropriate compensation" in the Bill

Why do the words 'appropriate compensation' appear in clause 4(c) of the Bill rather than 'just compensation', which may be argued to more closely align with the power of the Court to make orders as it deems just under section 564 of the Corporations Act 2001?

Clause 4 sets out the objects of the Act, clause 9 sets out functions of the Authority, and clauses 35 and 36 set out matters the Authority is required to take into account when making a determination. The Bill therefore provides for a regime which is separate, but analogous to s. 564. "Appropriate compensation" is, in the Government's view, more reflective of an objective standard for determining what amount is to be paid to a WA Bell Company creditor having regard to those matters, than "just compensation" which may invite false analogy with s. 564.

2.6. Question 6: Legislated distribution outcome

The Committee refers to paragraph 82 of the submission of WA Glendinning, where it states the Treasurer informed Parliament the quantum of the amounts the Insurance Commission of Western Australia considered an appropriate settlement. The Committee understands the Government has also referred, in the debate on this Bill, to what it states as a 'sensible outcome for the Bell litigation for the five creditors.'

- *Did the Government consider legislating this distribution, rather than providing, in the Bill, for the distribution to be determined by a process which involves an absolute discretion into whether any distributions will be made and, if so, the quantum of the distributions? If so, why were the mechanisms in the Bill chosen?*

Although legislating a distribution was, and remains, an option available to the Government, the Government was and remains keen that parties agree among themselves the distribution of the Bell litigation proceeds. If parties are not able to agree, only then will - pursuant to the Bill, - a suitably qualified person assess the appropriate amounts to be paid to the respective parties' in satisfaction of the WA Bell Companies' collective liabilities, having regard to the various relevant agreements, and other considerations set out in clauses 35 and 36, and recommend to the Governor what amount should be paid to each creditor.

2.7. Question 7: Maximum amount payable to a litigation funder

What is your understanding of the maximum amount, under the law, that is payable to a litigation funder as a percentage of the total sum that is recovered, as consideration for or reward for having provided funding for litigation by the liquidator?

A litigation funder is commonly understood to be a person or corporate entity whose business is to seek out opportunities to fund claims to be litigated by parties such as liquidators, or other unfunded parties. They consider the likely dollar amount required to prosecute the claim, the win/loss risk, and the return if successful. They then estimate the likely satisfactory return on investment to justify the risk, and agree a proportion of any recovered amount to provide that return. The percentage of the amount recovered by a party, such as a liquidator, which is payable to a litigation funder is not legislated or otherwise regulated. The amount payable to a litigation funder depends in each case upon the deal struck between the liquidator or, outside the insolvency context, person pursuing litigation, and the litigation funder.

In applications brought pursuant to ss. 477(2B) of the *Corporation Act*, Courts generally seem to approve percentages of recovered amounts payable to litigation funders of between 25 – 50 per cent, although there are recent instances of Courts awarding 100%. Approval pursuant to ss. 477(2B) is sought by a Liquidator to enter into a litigation funding agreement prior to litigation being undertaken or concluded.[1]

Notably however, it is not, as an investment, the proportion of the recovery that is as important to a litigation funder as the return on the capital at risk in the investment, often expressed by investors as the internal rate of return on that capital. Professional

[1] Approval of funding agreements between the Liquidator and Indemnifying Creditors was not sought pursuant to ss. 477(2B) as that provision does not apply to companies, such as TBGL and BGF, that were ordered to be wound-up prior to 23 June 1993.

litigation funders in Australia, the United Kingdom, and United States, appear to seek and achieve portfolio rates of return on capital invested of 100-150% per annum. The best case return on ICWA's (and therefore the State's) investment in the Bell litigation appears unlikely to exceed ICWA's current benchmark rate of return of approximately 15% per annum.

Entities who fund litigation for business, leveraging off risk and return, are in a very different category to creditors such as ICWA who, despite the already (often significant) potential loss of their debt, elect to fund a liquidator in an attempt to recover assets of a company for the benefit of its creditors as a whole, not merely themselves. Those creditors have already potentially lost the value of their debt, interest, and the opportunity cost of that money. By funding a liquidator, they may lose more.

In this particular instance, the risk the claim would not succeed was great; opposition to the claim by the Banks was intense; exposure to adverse cost orders against the liquidators was ever-present, and the liquidator's costs were immense. It is for this category of creditor that s. 564 of the *Corporations Act* was enacted. Section 564 provides for a reward to be calculated after, not before, litigation, having regard to risk, outcome, and other factors that make the outcome "just". In this case, those factors include that creditors will be better off if they recover as little as 1c in the dollar as, but for the funding provided by ICWA and the other Indemnifying Creditors, they would have received nothing.

2.8. Question 8: Payment in excess of maximum amount payable to a litigation funder

The Committee notes:

- *The agreement between the indemnifying creditors to share between them two thirds of the proceeds of the litigation.*
- *The Bill provides for determinations to be made for funding and indemnities as well as for liabilities of WA Bell Companies.*

Is there any scope for determinations to be made, under the provisions of the Bill, which would exceed the maximum amounts payable to a litigation funder under the existing law (i.e. section 564 of the Corporations Act 2001) with respect to the proceeds of litigation?

This question appears premised on an assumption there is a maximum amount a Court may order be paid to a creditor who funds litigation, pursuant to s. 564 of the *Corporation Act*. There are various authorities relating to the amount which can be awarded to a creditor under that provision. It is not settled whether there is a "cap" on that amount, or whether s. 564 empowers the Court to award a creditor an amount which exceeds, and does not discharge, the creditor's principal debt and interest. These are issues in contention in the proceedings currently on foot involving the Liquidator, the Indemnifying Creditors, and WAG in COR 146 of 2014 and COR 208 of 2014.

Consequently, as acknowledged in evidence given to the Committee by representatives of the Business Law Section of the Law Council of Australia on 6 October 2015, the Court in exercising its discretion under s. 564 may give a creditor a

percentage of the amount recovered by litigation lesser or higher than that generally approved in litigation funding agreements. Awards as high as 100% of the amount recovered by litigation have been made.

The potential for any of these outcomes is reflected in clause 36(5) of the Bill.

2.9. Question 9: Provision of particulars of liability

The Committee notes clause 30(1) of the Bill provides that persons must give the Authority full particulars of all liabilities of a WA Bell Company in relation to them within 30 days after receiving a notice from the Authority. The Committee also refers to paragraph 26 on page 35, Schedule 7 to the submission of WA Glendinning.

- *Is it the intention of this clause that, if a person does not provide such particulars within 30 days, they lose the right to prove their debt, or can the Authority give extensions of time?*
- *Would any such right be lost under the general law?*

Pursuant to reg. 5.6.39 (Notice to submit particulars of debt or claim) and reg. 5.6.48 (Notice to creditors to submit formal proof) of the *Corporations Regulations 2001* (Cth), creditors are allowed 14 days from the date on which notice is given to provide a liquidator with details of a debt or claim, or to prove a debt or claim. Out of an abundance of caution, clause 30 provides a creditor with 30 days in which to provide the same particulars to the Authority which, as it is more than double the statutory period permitted, was hoped would be sufficient. In most cases, those particulars will be well known to the creditors, as they have already been prepared in connection with proofs of debt lodged by creditors with the Liquidator. Accordingly, there is no provision for an extension of that period.

2.10. Question 10: Notice requiring provision of particulars

The Committee notes clause 30(2) of the Bill provides that after the transfer day, the Authority must publish in a daily newspaper circulating in Australia a notice requiring a person to give full particulars of all liabilities of a WA Bell Company in relation to them within 30 days. The Committee also refers to paragraph 27 on page 35 of Schedule 7 to the submission of WA Glendinning.

- *Do you believe such notice will come to the attention of all potential creditors located outside of Australia within a timeframe that will allow them to provide particulars of their claim within the 30 days timeframe?*
- *Are there other notification mechanisms that have been considered which might increase the likelihood of this occurring?*

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

ICWA is the only holder of bonds issued by the WA Bell Companies. Consequently, the "bondholders resident in other countries" referred to in paragraph 27 on page 5 of Schedule 7 of the WAG's submission, likely refers to the holders of bearer bonds issued by BGNV and guaranteed by TBGL. LDTC, on behalf of the BGNV bondholders, has lodged a proof of debt in the winding up of TBGL in respect of TBGL's guarantee obligations under the BGNV Trust Deeds. Since the BGNV Bonds

are bearer bonds, the identity of the holders cannot be ascertained from any register maintained by the issuer. As such, the Government anticipates notice under clause 30(1) will be provided by the Authority to LDTC, on behalf of the BGNV bondholders, and LDTC will then be responsible for distributing any amount paid to it in accordance with Part 4, Division 4 of the Bill with respect to TBGL's guarantee obligations, to those bondholders in accordance with the BGNV Trust Deeds. This process is consistent with the law currently in force and the provisions of the BGNV Trust Deeds.

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

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

2.11. Question 11: Consideration of size and importance of liability

Please explain the intended operation of clause 35(2)(e)(iv), which provides that the Authority, in making a recommendation to the Minister with respect to liabilities of WA Bell Companies, may have regard to the relative size of each liability and the relative importance of the satisfaction of that liability to the relevant creditor. The Committee also refers to paragraph 33, at the bottom of page 36 and the top of page 37, Schedule 7 to the submission of WA Glendinning.

In any insolvent winding up there is a process of apportioning assets which remain in an insolvent entity, to creditors, pro-ratably under s. 556 of the *Corporations Act* according to the amount owed to them by the insolvent entity. That provision also assigns a priority of payment and provides particular protection for specific categories of creditors, such as employees and lessees, which the law deems to be more vulnerable than other categories of creditors. The voluntary administration procedure in the *Corporations Act* also allows for different creditors or categories of creditors to be treated differently, depending on the circumstances of a particular case. It is with this rationale in mind the Bill uses the wording in clause 35(2)(e)(iv).

2.12. Question 12: Definition of "creditor"

The Committee refers to page 75 of your submission, where it states one of the issues regarding the construction and operation of section 564 of the Corporations Act 2001 is whether the Insurance Commission of Western Australia can be regarded as an assisting creditor for the purposes of section 564. Is this, in combination with the fact that the Law Debenture Trust Company could be regarded as the creditor for the purposes of receiving compensation for funding the litigation, the reason why clause 36(1) refers to 'a creditor of any kind', rather than just a 'creditor' as stated in section 564 of the Corporations Act 2001?

Yes.

2.13. Question 13: Protection of persons from liability

The Committee refers to pages 89-90 and paragraph 9.10 on page 98 of your submission with respect to the protections given to certain persons and organisations

in the Bill. Could you describe any basis upon which there would be a cause of action lying against such persons and organisations for preparing and/or recommending the introduction of the Bill into Parliament?

This clause was included in the Bill out of an abundance of caution. The Government refers to paragraph 81 of the BGNV's submission lodged with this Committee, and the letter from Lipman Karas to the State Solicitor dated 29 May 2015 tabled in the Legislative Assembly on 15 September 2015 (Paper No. 3276), as an example of the type of threats made against the Government and those assisting it. While the Government does not concede that such a cause of action lies, as a matter of prudence and in anticipation of such threats, such protection was provided.

2.14. Question 14: Identification of creditors

Given the potential number of creditors of WA Bell Companies, is there confidence that all will be able to be identified and contacted for the purpose of obtaining a release pursuant to clause 38(3) (for example, persons holding bearer bonds)?

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

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

2.15. Question 15: Report or recommendations provided to the Governor

The Committee refers to the last paragraph of page 91 (and the top of page 92) of your submission. Is the reference to 'the report or recommendations provided by the Administrator to the Governor' meant to refer to the draft report referred to in clause 32(2) of the Bill, given that it appears that a report or recommendation provided by the Administrator to the Minister or Governor is not regarded as a public document?

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

In addition, pursuant to clause 43 of the Bill the Administrator will prepare a final report on how the Administrator carried out the Authority's functions as outlined in clause 9 of the Bill. That final report will be laid before each House of Parliament, pursuant to clause 43(2).

It is not intended that the report of the Authority under clause 34, submitted by the Minister to the Governor under clause 37, will be a public document. Consequently, any creditor seeking to establish a reviewable error in relation to the decision making process (as referred to in pages 91 to 92 of our Submission dated 5 October 2015) will need to rely on the draft report prepared by the Authority pursuant to clause 32(2),

and provided to the creditor under clause 30(3), or the final report laid before each House of Parliament pursuant to clause 43(2).

2.16. Question 16: Remarks by Office of the Information Commissioner

In its submission to the Committee, the Office of the Information Commissioner made the following remarks on the Authority being treated as an exempt organization in Schedule 2 of the Freedom of Information Act 1992 pursuant to clause 71 of the Bill:

> *...the basis for making the Authority exempt from the operation of the FOI Act is not clear to me. Further, it is not apparent to me that there is a real need for the Authority to be exempt from the FOI Act or that the protections provided by the exemptions in the FOI Act are not sufficient or adequate.*
>
> *In the event the Authority was subject to the access provisions of the FOI Act and the Authority was not inclined to disclose certain documents that may be sought, there appears to me to be sufficient protection from disclosure within the exemptions in Schedule 1 to the FOI Act. For example, clauses 1, 4 and 6 of Schedule 1 would provide exemptions from disclosure where:*
>
> 1. *disclosure would reveal the deliberations or decisions of Cabinet or the Governor in Executive Council;*
> 2. *disclosure could reasonably be expected to have an adverse effect on the commercial or financial affairs of third parties and disclosure of that information would not, on balance, be in the public interest; or*
> 3. *disclosure of the deliberative processes of the Authority, the Government, a Minister or another agency would, on balance, be contrary to the public interest.*

What is your feedback on these remarks?

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

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

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