Law Council
OF AUSTRALIA
Business Law Section

The Committee Clerk
Standing Committee on Legislation
Legislative Council
Parliament House
PERTH WA 6000
Via emaili: lclc@parliament.wa.gov.au

2 October 2015

Attention: Ms Filomena Piffaretti

Dear Ms Piffaretti,

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

1. I refer to the invitation of the Hon Robyn McSweeney MLC in her capacity as Chair of the Standing Committee on Legislation (Standing Committee) for the Business Law Section of the Law Council of Australia (**BLS**) to provide a written submission in relation to the Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015 (**Bill**).

2. I **enclose** a written submission which has been prepared jointly by the Corporations Committee and the Insolvency Committee of the BLS. Please note that the authors of this submission have never had any involvement or personal pecuniary interest in the Bell litigation.

3. Representatives of the BLS would be pleased to appear before the Standing Committee if requested.

4. If you wish to discuss any aspect of this letter with the BLS, please do not hesitate to contact the Chair of the Corporations Committee, Bruce Cowley on 07 3119 6213 or via email bruce.cowley@minterellison.com or the Chair of the Insolvency Committee Michael Lhuede on 03 8665 5506 or via email mlhuede@piperalderman.com.au.

Yours sincerely,

John Keeves, Chairman
Business Law Section

Enc.

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BLS

Submission of the Business Law Section of the Law Council of Australia in relation to the Legislative Council Standing Committee on Legislation Inquiry into Bell Group of Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015

Background

1) The Business Law Section of the Law Council of Australia (**BLS**) was established in August 1980 by the Law Council of Australia. Its membership is comprised of practising lawyers and academics throughout Australia with an interest in law affecting business.

2) The BLS welcomes the referral of this matter to the Legislative Council Standing Committee on Legislation Inquiry into Bell Group of Companies (Finalisation of Matters and Distributions of Proceeds) Bill 2015 (**Bill**). Given the nature of this particular legislation the BLS agrees that all members of the Legislative Council should be briefed in a manner that is as fulsome and objective as is possible.

3) The Bill came to the attention of the BLS because it deals with matters of civil and political rights which underpin our democracy. The preservation of these rights in our democratic system depends upon the Government exercising restraint when exercising its power to make legislation.

4) The Bill will put into place a regime that usurps the current law and judicial system that would otherwise deal with the issues relating to the adjudication of claims and distribution of funds.

5) We have read much commentary about this legislation being necessary in order to resolve a longstanding and intractable dispute. However, as noted in section 4(a), the Bill relates to the distribution of funds arising from a settlement that occurred in 2013. Thus, the issues sought to be dealt with by the Bill have become relevant only within the last two years. It is of concern that the Bill was introduced just prior to the first attempt at a Court-sanctioned mediation regarding the distribution of proceeds. The introduction of the Bill appears to have been counter-productive to that mediation proceeding.

6) Further, the Explanatory Memorandum to the Bill estimates that the time to resolve taxation matters would run up to a decade, with up to 32 companies involved in the dispute. It would appear that, with the amendments as set out in the Supplementary Notice Paper No. 134 Issue No. 1 dated 14 September 2015 (**Amendments**), it is now contemplated that tax disputes against the Australian Taxation Office will be run by the Authority as administrator of the WA Bell Group Companies. We do not know if the original estimate in the Explanatory Memorandum applies to those tax disputes.

7) Much has been made of the complexity of the factual background giving rise to the Bell Litigation. However, the BLS notes that 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?

Sovereign risk

8) It is concerning to the BLS that the Bill, as a template, provides for the expropriation of private property by, and to, the State. Further, it provides for the voiding of private contracts in circumstances where one of the parties to the contracts is, in effect, the State itself. On the face of it, and as a precedent, this template could be used in any

legal proceedings (actual or potential) involving the State, or any State body. This squarely raises sovereign risk concerns and potentially adversely affects the reputation of Western Australia as a jurisdiction where the State observes and respects private contractual and proprietary rights.

9) The BLS acknowledges the State Solicitor's argument that there is a sovereign risk associated with a failure to have a system that allows a timely resolution of disputes. However, there is existing law and a judicial process that can adequately deal with the matters the subject of the Bill.

Separation of powers

10) The Bill, by its nature, undermines confidence in the judicial process by making any current proceedings before the courts without utility and preventing the parties from bringing other proceedings before the courts as appropriate. Our judicial system is set up to deal with complex factual and legal issues but the Bill purports to take such issues outside the judicial system.

11) The Bill is an attack on the separation of powers by putting matters that are being dealt with by the courts into the hands of the Executive and to compound the concern, putting a matter in the hands of the Executive when one of the parties is, in effect, the State.

Rule of law

12) The rule of law is a concept which means different things to different people but fundamentally it requires that both the government and citizens know the law and obey it.[1]

13) As members of the Law Council of Australia, the BLS members evaluate proposed government legislation based on the Law Council's Policy Statement on Rule of Law Principles dated March 2011 (a copy of which is **enclosed** at Annexure A). The BLS is concerned that the Bill represents a departure from those Rule of Law Principles in a number of respects. In particular, we refer to:

    a) *Principle 1a – Legislative Provisions which create criminal or civil penalties should not be retrospective in their operation* -

        The Bill contains serious criminal penalties, notably the proposed sections 48 to 50 (formerly 47 to 49), which are deemed under sub-section 2(2) to have come into operation on the day before the Bill was introduced to the Legislative Assembly. These sections provide for potential retrospective criminality by creating offences that can be committed before the law is in force. The fact that amendments to sections 48 and 49 have already been proposed highlights the problems with seeking to impose criminal liability on the basis of legislation in bill form. It is, by its nature, subject to possible change and the obligations it imposes are uncertain. Such an approach is inherently unsound and of serious concern. For example, it could be used by the government of the day to force certain behaviours in circumstances when a bill has not and may never be duly passed.

    b) *Principle 1b - The intended scope and operation of offence provisions should be unambiguous and key terms should be defined. Offence provisions should not be so broadly drafted that they inadvertently capture a wide range of benign conduct and*

[1] Based on the summary by the Rule of Law Institute of Australia, available at www.ruleoflaw.org.au

are thus overly dependent on police and prosecutorial discretion to determine, in practice what type of conduct should or should not be subject to sanction -

The BLS outlined a number of 'free speech' concerns in its earlier letter to the State Solicitor. The BLS acknowledges and appreciates that those specific concerns in relation to the content of the former section 47, now amended as section 48 of the current Bill, have been largely addressed. However, due to the retrospective application of section 48 it is still objectionable in so far as it continues to purport to deprive private litigants of the ability to enforce or exercise existing legal rights prior to the Bill being duly passed and receiving Royal Assent. Further, section 48 of the Bill will only resolve our concerns to the extent that it is not further changed prior to the commencement date of the legislation owing to the retrospective nature of the commencement of the offence provision.

c) *Principle 2a – Everyone is entitled to equal protection before the law and no one should be conferred with special privileges -*

In removing the matter from the processes set out in the *Corporations Act* and the courts, the Bill potentially has the effect of advancing a particular creditor's position over other creditors other than in accordance with the existing law. On our reading of the Bill, there is no requirement that any legal principles be applied in the determination of the distribution of the proceeds (see sections 33(3), 35 and 36). The BLS questions whether such a bill would be proposed if the proceedings concerned only private entities and no statutory entities. Further, the reason for the Amendments, and whether the Amendments advantage or disadvantage the ATO, is not completely understood by the BLS but the Amendments appear to create different rules for determination of the ATO's claims to those applying to the other creditors.

d) *Principle 6b – The use of executive power should be subject to meaningful parliamentary and judicial oversight, particularly: powers … to seize property… Mechanisms should be in place to safeguard against misuse or overuse of executive powers –*

The Bill expropriates property and voids not only the existing funding agreements between the liquidator and the various other parties but also deprives the creditors of their rights to claim debts owed to them according to usual law. By virtue of the proposed section 68, there are no rights of review.

Further, sections 7(7) and 8(3) provide that the Authority and the Administrator are not organisations for the purposes of the *Public Sector Management Act 1994.* We note that the *Financial Management Act 2006* Part 5 applies to the Authority (section 14) and the Minister may require a report (section 15). We question whether these mechanisms provide sufficient oversight.

By virtue of the new Division 3A, the Administrator is appointed as an administrator of each WA Bell Company, with the rights and powers of the company and its officers. The Administrator's powers usurp those of the liquidator but the Administrator is apparently not subject to any law that would otherwise apply to a liquidator or company officer.

e) *Principle 6d– Executive decision making should comply with the principles of natural justice and be subject to meaningful judicial review –*

By virtue of the proposed section 68, there are no rights of judicial review of the decisions of the State-appointed Authority and the rules of natural justice are expressly excluded.

Neither the Authority's recommendation nor the Governor's determination need contain reasons (sections 35(3), 36(6) and 37A(4)).

Constitutional and Administrative law questions

14) There may be significant and complex constitutional issues (Commonwealth and State) arising from the legislation and its operation which may make the legislation or anything done under the legislation susceptible to challenge. This would in turn lead to a further range of complex legal issues to then be addressed in reversing any actions taken. The BLS expresses no views on any constitutional or administrative law issues but assumes that the Standing Committee is taking independent expert advice on such issues.

Other issues

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

a) a question concerning the functions or powers of the Authority; or

b) a question relating to a determination or recommendation under Part 4.

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

16) The Explanatory Memorandum mentions that the Bill ensures a fair and expeditious end to the Bell litigation, providing for an "equitable" distribution of funds. However, there is no assurance or requirement to equitably distribute the funds or give effect to any legal or equitable principles. Even if there was such a requirement, there are no safeguards to ensure that it is given effect. The Bill expressly dispenses with the usual safeguards designed to ensure that powers are exercised as intended.

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

18) As it currently stands, the Bill states that the Authority must have regard to any agreement between any of the creditors entered into after 12 noon on the day before the introduction of the Bill into the Legislative Assembly (section 36(3)(b)). However, this is rendered fairly meaningless by:

a) the absolute discretion conferred on the Authority (section 36(4));

b) the lack of requirement for reasons (section 36(6));

c) the lack of right of appeal (section 68);

d) the validity of the Authority's recommendation not being affected by the Authority's failure to have regard to any agreement (section 36(9)); and

e) the abolition of the rules of natural justice (section 68(1)).

19) If legislation does have a place in relation to the subject matter of the Bill, the BLS suggests it is not in the manner proposed. It would be preferable that the parties reach an agreement and legislation then gives effect to that agreement so as to give finality and prevent any future proceedings. The Bill raises sovereign risk issues, is draconian in effect and is of concern for the reasons outlined above.

20) The BLS hopes that the Standing Committee is able to make an objective and independent assessment of whether there are any other potential solutions that may be explored.

John Keeves
Chairman, Business Law Section

Annexure A

Law Council of Australia Policy Statement
Rule of Law Principles dated March 2011

Law Council
OF AUSTRALIA

POLICY STATEMENT

Rule of Law Principles

March 2011

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Introduction

A key objective of the Law Council of Australia is the maintenance and promotion of the rule of law. For that reason, the Law Council often provides analysis of federal legislation and federal executive action based on its compliance with so-called "rule of law principles".

This document seeks to articulate some of those key principles. It is intended to act as a guide to the framework often employed by the Law Council and its committees in evaluating the merits of government legislation, policy and practice.

This document is not intended to offer a comprehensive definition of the "rule of law". It is acknowledged that what is encompassed under the banner of that phrase is a matter of some contest and that it is a concept which is not necessarily amenable to an exhaustive definition.

In particular, it is acknowledged that there is considerable public debate about two matters:

- the intersection between human rights and the rule of law and the extent to which the rule of law is necessarily predicated on respect for human rights.
- the intersection between democracy and the rule of law and the extent to which the rule of law necessarily assumes that laws are passed by a democratically elected legislature formed following free, fair and regular elections.

It is not necessary to definitively resolve either of those debates in this document.

Instead, this document focuses on the most basic tenets of the rule of law — and those which are most often invoked in Law Council submissions and advocacy.

With respect to broader human rights principles, it is noted that Australia is a party to the seven key international human rights treaties and has also signed or ratified a number of optional protocols to those treaties. These international treaties, which Australia has voluntarily entered in, set out in clear terms Australia's international human rights obligations. Australia is bound to comply with their provisions and to implement them domestically. For that reason, in an Australian context, regardless of the extent of any agreed overlap between the rule of law and human rights, it is entirely appropriate to evaluate government legislation, policy and practice by reference to its compliance with international human rights law.

Key Principles

1. The law must be both readily known and available, and certain and clear

In particular, people must be able to know in advance whether their conduct might attract criminal sanction or a civil penalty. For that reason:

a. Legislative provisions which create criminal or civil penalties should not be retrospective in their operation.

b. The intended scope and operation of offence provisions should be unambiguous and key terms should be defined. Offence provisions should not be so broadly drafted that they inadvertently capture a wide range of benign conduct and are thus overly dependent on police and prosecutorial discretion to determine, in practice, what type of conduct should or should not be subject to sanction.

c. The fault element for each element of an offence should be clear.

2. The law should be applied to all people equally and should not discriminate between people on arbitrary or irrational grounds

In particular, no one should be regarded as above the law and all people should be held to account for a breach of law, regardless of rank or station. Furthermore:

a. Everyone is entitled to equal protection before the law and no one should be conferred with special privileges.

b. Where the law distinguishes between different classes of persons, for example on the basis of age, there should be a demonstrable and rational basis for that differentiation.

3. All people are entitled to the presumption of innocence and to a fair and public trial

In particular, no one should be subject to punitive action by the state unless he or she has first been found guilty of an offence by an independent, impartial and competent tribunal. Inherent in this is a prohibition on indefinite detention without trial. Furthermore:

a. No one should be compelled to testify against him or herself. Where a person is subject to questioning by the state, he or she should be given appropriate warnings about this right. Where a person is compelled to provide information to the state, there should be a prohibition on that information, or further information derived from it, being used in proceedings against that person (that is there should be use and derivative use immunity)..

b. Upon arrest and/or charge, a person should be fully and promptly informed of any offence which he or she is alleged to have committed and, at trial, an accused person should be afforded a meaningful opportunity to interrogate and challenge the information which is relied upon against him or her.

c. A person who is subject to criminal charge should be tried without undue delay. Where the time delay between the conduct constituting an offence and the prosecution for that offence is such that it will unduly prejudice a person's ability to defend themselves, proceedings should be stayed, except where the person has caused or substantially contributed to the delay.

d. Persons awaiting trial should not generally be detained in custody, unless they are a demonstrated flight risk or their release poses a demonstrated risk to the community or ongoing investigation.

e. The state should be required to prove, beyond reasonable doubt, every element of a criminal offence, particularly any element of the offence which is central to the question of culpability for the offence. Only where a matter is peculiarly within the defendant's knowledge and not available to the prosecution, should the defendant bear the onus of establishing that matter. Even then the defendant should ordinarily bear an evidential, as opposed to a legal burden.

f. The state should be required to prove that a person intended, or at the very least was reckless about, each physical element of an offence in order for a person to be found guilty of that offence. Strict and absolute liability should only be applied to less serious offences and where such an approach is necessary for the success of the relevant regulatory regime.

g. A person convicted of a crime should have the opportunity to have his or her conviction and sentence reviewed by a higher tribunal.

4. Everyone should have access to competent and independent legal advice

In particular, everyone should have access to a competent and independent lawyer of their choice in order to establish and defend their rights. Furthermore:

a. The state should provide adequate resources to guarantee access to a competent and independent lawyer in circumstances where individuals do not have the independent means to retain a lawyer.

b. Lawyer-client communications should be regarded as confidential, except where lawyer and client are together engaged in conduct that is calculated to defeat the ends of justice or is otherwise in breach of the law.

c. Lawyers should not be subject to sanction or discrimination as a result of the legal advice or representation they have provided, except where that advice fails to comply with agreed standards of professional conduct.

d. Lawyers should be given timely access to relevant information and documents about their client in order to enable them to provide effective legal assistance to their clients.

5. The Judiciary should be independent of the Executive and the Legislature

The existence of an independent, impartial and competent judiciary is an essential component of the rule of law. On that basis:

a. Procedures for appointing judicial officers should be based on identifying individuals of integrity and ability with appropriate training or qualifications in law and should not be such that they compromise the independence of those appointed.

b. The term of office of judges, their independence, security, remuneration, conditions of service, pensions and the age of retirement should be adequately secured by law.

c. Judicial officers should have the power to control proceedings before them and, in particular, to ensure that those proceedings are just and impartial.

d. The allocation of cases to judges within a particular court should be an internal matter of judicial administration.

e. Legislation, particularly legislation which seeks judicial authorisation for executive action, should not limit judicial discretion to such an extent that the Judiciary is effectively compelled to act as a rubber stamp for the Executive. The Judiciary should always have sufficient discretion to ensure that they can act as justice requires in the case before them.

f. In criminal matters, judges should not be required to impose mandatory minimum sentences. Such a requirement interferes with the ability of the judiciary to determine a just penalty which fits the individual circumstances of the offender and the crime.

6. The Executive should be subject to the law and any action undertaken by the Executive should be authorised by law

Executive powers should be carefully defined by law, such that it is not left to the Executive to determine for itself what powers it has and when and how they may be used. In particular:

a. Where legislation allows for the Executive to issue subordinate legislation in the form of regulations, rules, directions or like instruments, the scope of that delegated authority should be carefully confined and remain subject to parliamentary supervision. Moreover, the Executive should not be able to issue an instrument which creates new offences or confers new powers on Executive agencies.

b. The use of executive powers should be subject to meaningful parliamentary and judicial oversight, particularly: powers to use force; to detain; to enter private premises; to seize property; to copy or seize information; to intercept or access telecommunications or stored communications; to compel the attendance or cooperation of a person; or to deport a person. Mechanisms should be in place to safeguard against the misuse or overuse of executive powers.

c. Where the Executive has acted unlawfully, anyone affected should have access to effective remedy and redress.

d. Executive decision making should comply with the principles of natural justice and be subject to meaningful judicial review.

7. No person should be subject to treatment or punishment which is inconsistent with respect for the inherent dignity of every human being

In particular:

a. No person should be subject to torture. Information obtained by torture should be inadmissible in any legal proceedings. Adequate provision should be made to prosecute and punish the perpetrators of such conduct.

b. No person should be subject to cruel, inhuman or degrading treatment or punishment. No person should be held in conditions of detention which amount to cruel, inhuman or degrading treatment. Information obtained by cruel, inhuman or degrading treatment should be inadmissible in any legal proceedings. Adequate provision should be made to prosecute and punish the perpetrators of such conduct.

c. No person should be subject to the death penalty.

8. States must comply with their international legal obligations whether created by treaty or arising under customary international law

Both states and individuals are entitled to expect that other states will comply with and honour their international legal obligations, including obligations relating to the promotion and protection of human rights. States must avoid inconsistencies between their international legal obligations and their domestic laws and policies.

Authorised by LCA Directors
Law Council of Australia
19 March 2011

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