STANDING COMMITTEE ON LEGISLATION

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

TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
WEDNESDAY, 23 SEPTEMBER 2015

PRIVATE SESSION
(MADE PUBLIC BY RESOLUTION OF THE LEGISLATION COMMITTEE)
REDACTED VERSION

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 PAUL EVANS
State Solicitor, State Solicitor's Office, sworn and examined:

Mr ROGER JACOBS
Assistant Parliamentary Counsel, Parliamentary Counsel's Office, sworn and examined:

The CHAIR: Thank you for coming. 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.

[Witnesses took the affirmation.]

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

The Witnesses: Yes.

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 and 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 and please try to speak in turn. Even though this is a private hearing, you should note that the committee retains the power to publish any private evidence. The Legislative Council may also authorise publication. This means that your private evidence may become public. Please note that you should not publish or disclose any private evidence to any other person at any time unless the committee or the Legislative Council has already publicly released the evidence. I advise you that premature publication of private 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 Evans: Chair, I will pass on an opening statement on the basis that we were invited here to brief the committee in background. As I understand it, the Attorney General and the Department of the Attorney General have been invited to make submissions to the committee by 2 October. I will be involved in the preparation of that and that will address in some greater detail the underpinnings of the bill and what it will do. We have a couple of options as to how we could proceed. I think Mr Travers has previously been briefed prior to the introduction of the bill on some of the aspects of the bill; I do not think other members have been. I have prepared some materials which reflect, but in some degrees expand upon, materials that Mr Travers has previously seen to aid the committee to understand the background of the bill and in a sense to set the frame of reference for questions that you may wish to ask and, indeed, for the way in which the committee may proceed with its inquiries—that is, to know who to ask questions of and what to ask questions about in a sense. If that would assist, we can proceed on that basis.

The CHAIR: That would assist us greatly, thank you.

[11.20 am]

Mr Evans: What I have just handed over is a document entitled "The Bell Group litigation" and it is entitled in the matter of the bill. It represents a pastiche of some briefing materials that previously have been provided to members on other occasions, supplemented by some historical material to frame the background to the proposed legislation. Perhaps if I can take you in the first instance to slide 3, which is a very brief summary of the background, regrettably, one cannot understand the

context in which the bill has its genesis unless one goes some distance into history in a sense to understand where we have been to get to where we are today.

The CHAIR: Is this a public document?

MrEvans: [redacted] I hope that much of what is in here is relatively uncontroversial because it is actually culled in significant part from position papers that have been put forward by all parties at different times in the proceedings—somebody's relatively trite history, in a sense. Slide 3 gives a very high level summary of the Bell Group of Companies and what is, in fact, a 20-year path from 1993 through to 2015, as does page 4, which gives an outline time line of really the six key events which lead to the bill.

Back in the WA Inc era of the late 1980s, the Insurance Commission, then the State Government Insurance Commission, was directed to co-invest with Bond Corporation in the Bell Group, initially through an acquisition of shares in the Bell Group. Both Bond and the Insurance Commission acquired approximately 19.9 per cent of Bell Group Ltd. That, it has been said, allowed Bond to circumvent the operation of the then takeovers provisions in the securities legislation. As a condition of investing in shares, Holmes à Court required the Insurance Commission, through the government, to also invest in bonds that one of his companies held. The Insurance Commission accordingly came to hold some $162 million worth of shares at acquisition price and some $150 million worth of bonds at an acquisition cost of $140 million. Bond Corporation then proceeded to take over Bell Group Ltd and it is fair to say, albeit in the vernacular, pillage it and its subsidiaries. As a result of the deteriorating position of the Bell Group, partly because of the involvement of Bond, partly because of changes in global markets following 1987, the Bell Group's lenders, who were a group of Australian banks and a group of European banks, sought and obtained security for what were otherwise then unsecured negative pledge loans. A little later, the Bell Group became obviously insolvent. The banks moved to enforce their security, sell assets and reduce those loans. The principal asset in realistic terms was actually The West Australian Newspaper Group and the associated companies, and there were others. The companies fell into liquidation progressively and the liquidators—there were at the time two; Mr Totterdell, the liquidator of Bell Group Ltd and Mr Woodings, the liquidator of Bell Group Finance—sought funding to undertake investigations and potentially litigation against the banks to see whether the bank securities were valid or should be set aside and the securities proceeds recouped. That was provided by a group of creditors of companies and I will turn to those in a minute. Between 1995 and 2013, litigation ensued between liquidators and the banks achieving at the high point a judgement of $2.7 billion and, ultimately, a settlement for $1.7 billion plus the banks foregoing their claims against the group, effectively, about $2.1 billion net outcome. That settlement was effected in 2013, consummated by the middle of 2014, and then the distribution issues arise between the key creditors as to how the settlement fund of $1.7 billion will be carved up between the creditors. At present, there are 14 commenced or foreshadowed or concluded proceedings active since the middle of 2014 in relation to distribution issues, and there may be more in due course.

Hon KEN TRAVERS: How many of those have been commenced by the state?

Mr Evans: The state has commenced two of them, in a sense; one a counterclaim in 1996 and one the principal, what I call, issues claim in 2014. There are, I think, possibly two procedural claims that we might have also commenced to deal with adjectival issues to try and get access to information in one case. I will take that on notice, Mr Travers. It is not more than four, but it might be only three.

Hon KEN TRAVERS: Maybe if you take it on notice, just give us the 14 actions that you referred to. I think you said commenced, concluded or foreshadowed, so what are the 14; whether they have been commenced, concluded or foreshadowed; and who are the parties?

Mr Evans: I would indicate in relation to proceedings that the state did commence, those proceedings are for principally, though not entirely, the clarification of issues; that is, there were lots of issues that existed where parties were unwilling or unable to state a position. So to some extent out of frustration some aspects of those proceedings were commenced to actually try to pin people down to a position. They are rightly regarded as being adjectival to the liquidators' principal proceedings in large part, although not entirely; I will come to that in a little while.

The following slides just really recount those six points in some greater detail. Slide 5 gives a very brief history of the Bell Group and introduces what I might call the key players. Bell Group Ltd, which is the parent entity of the group Bell Group Finance, the group's treasury company—it occupies a central position in relation to the flow of funds within the Bell Group; Bell Group NV, now a principal funding creditor and a principal protagonist in relation to the distribution issues. It is a Curaçao-incorporated special purpose company, which was constituted with the purpose of issuing the Eurobonds back in the late 1980s. Bell Group UK, which is the group's principal operating holding subsidiary in the United Kingdom—there are a number of companies beneath it and related to it—also has a principal role. In addition, there were two partly owned public companies which are of some importance—Bell Resources Ltd and JN Taylor Holdings. Bell Resources Ltd was largely sold off, although it is under its new guise as Australian Consolidated Investments Ltd an interested creditor in the distribution issues. JN Taylor Holdings is an interested creditor in the distribution issues. Both of those held significant amounts of cash at the time of the Bond takeover which they did not hold for very long, and that gives rise to some of the issues in the insolvency.

Slides 6 and 7 indicate in broad terms the bank borrowing position. I have said in there that there was a syndicate of Australian banks; actually, technically, that is not correct. There were a number of Australian banks which had varying relationships. They were not entirely syndicated, although Westpac Banking Corporation did tend to act as lead representative on a number of aspects of the banking facilities. But in 1990 they were owed approximately $252 million net outstanding after receipts to date. That debt was significantly cleared by the sale of assets pursuant to the securities which were effected in January 1990. The Bell proceedings concerned very much that transaction on 26 January 1990 in relation to the creation of those securities.

[11.30 am]

Slide 8 indicates that in addition to bank debt, the Bell Group made use of bond issues. There were relevantly five bond issues. Two of those were domestic bond issues; that is, they were Australian dollar–denominated registered bonds. Those were issued internally within the group and they came to be wholly held by the Insurance Commission—$75 million issued by Bell Group Finance, $75 million issued by Bell Group Ltd. And there were three Eurobond issues which were in bearer form; that is, you have no idea who owns the debt until they actually present the debt instrument for payment. Those debt instruments were issued by Bell Group NV and they were guaranteed by Bell Group Ltd. There are several hundred million dollars' worth of debt in those instruments. The relationship of Bell Group NV to the Bell Group was a significant part of the Bell proceedings.

In order to fund the inquiries, the liquidators at the time entered into a variety of agreements in a number of phases in order to initially fund investigations, then to fund more detailed inquiries and then to actually fund the litigation. Slide 9 captures those in very brief compass. There are in fact in total I think 30 separate instruments entered into over a period of a little over 10 years, which govern funding arrangements between the creditors. And not all creditors funded all things. The cast changed and their relative contributions changed over time. I will talk a little more about that further in the slides.

We are relevantly concerned, as slide 10 makes clear, with three key indemnifying creditors: the Insurance Commission, which is a creditor of the Bell Group Ltd as landlord and bondholder, and of Bell Group Finance as bondholder; the Australian Taxation Office, which was a creditor of

multiple companies across the Bell Group; and Bell Group NV, which is a creditor of the Bell Group and Bell Group Finance through its bondholding. There are two other key players that need to be brought to the table, in a sense. One is Mr Reijtenbagh, who sits significantly behind Bell Group NV, through Plaza BV, his funding entity, and the Law Debenture Trust Corporation PLC, which is the trustee for each of the bond issues and has a role to play. There is some dispute about what that role is, but it is a participant. It is a professional trustee company in London, a very reputable company that acts as trustee for securities issues across the world.

Hon KEN TRAVERS: When you say that ICWA is the landlord and a bondholder, what do you mean by the landlord?

Mr Evans: In the late 1980s—I cannot say precisely when—in another WA Inc transaction, the Insurance Commission purchased the Bell Group's headquarters, which was the Forrest Centre, and in doing so, it took the premises of it to a lease. Rental accrued under that lease. At the point of liquidation it had not all been paid. There is some $3 million worth of rental outstanding, which is a claim in the liquidation, so a relatively modest sum in the scheme of things, but it has a separate claim, as creditor qua landlord from its claims as qua bondholder.

The primary funding agreements are what we call the agreements for indemnification. They were entered into in 1995, from memory. They were the agreements by which those indemnifying creditors agreed to fund the preliminary stages of the litigation; first the investigations which included compulsory examination of officers, document recovery and review, and then the commencement of proceedings. Obviously, the liquidator could not get a free ride. Nobody was going to hand him a blank cheque and say, "Go and spend money willy-nilly." The parties expected a return in relation to that. The mechanism that was adopted then was recourse to a provision that was in the corporations legislation at the time. It has its roots in the bankruptcy legislation back to the late 1890s, which is what is now section 564 of the Corporations Act. I set that provision out over the page. The agreement between the parties was that the liquidator would apply for an order in favour of the indemnifying creditors; that, in substance, 66.7 per cent of any amount recovered as a result of litigation would be paid to the indemnifying creditors. There were certain agreements between themselves as to what proportions they would be paid in, ultimately, but that was the allocation. And then the balance one-third creditor would go to creditors' claims, including the claims of the creditors themselves. So that was structurally the largely common understanding of the parties; that was a reward for funding. Now the contemplation at the time was that an application be made to the court for that order before substantive financial commitments were made. That failed for two reasons. First, the proceedings had to actually be commenced before the application could be prosecuted. Because of the limitation period, time limits were on the point of running out and proceedings had to be issued.

Secondly, when the application was finally made and prosecuted, from memory, in 1996, it was unsuccessful and the court held that it either did not have power to, and in any event if it did have power it ought not make orders at that time because of a large number of known uncertainties about outcome; that is, the judge was being required to presume what would happen in the litigation and make a funding allocation when he should actually know what was going to happen. The court listed some eight matters at the time which were called, "The catalogue of uncertainties." That catalogue has grown since 1996. There was also as part of the arrangements—this was actually on the insistence of Bell Group principally but also the Insurance Commission—they realised that because of the way in which funds would flow through the group, and I will take you to that in a moment, and the position of the Australian Taxation Office as a creditor of the group, potentially, a very large part of any recovery could be diverted off to the ATO rather than being distributed amongst the creditors generally or the funding creditors. Consequently there is an agreement called the Western Interstate Assignment Agreement—WIAA as its referred to in the pack—under which the liquidator, as liquidator of Bell Brothers, one of the subsidiaries, agreed to transfer 57 000 shares in the company called Western Interstate to the liquidator of Bell Group Finance to

be held on trust for the indemnifying creditors. That transaction was for the benefit of BGNV, ICWA and the ATO. They held the interest in the trust in the same proportions as their funding percentages. There is some controversy now about the operation of that agreement and indeed of Western Interstate. Finally, there was a question about where the money would flow once it was received by the indemnifying creditors, in particular, by the Insurance Commission but possibly also by Bell Group NV, which at that stage was a subordinated creditor, not an unsubordinated creditor. The question was as to whether there were modifications that needed to be made to subordination arrangements to ensure that the money ended up in the right place and did not get diverted off somewhere else. That was an agreement of not entirely perfect obligation because it required some complex steps to be taken to give any effect to it, which could not be perfected by the parties who were then negotiating. Those are the three component parts to what I call the benefits package, the reward for funding. Over the page is section 564. That is the form in the Corporations Act 2001. It has been in that form in the corresponding corporations law as it was at the time. The indemnifying creditors' original interest, which broadly across the group reflected their debt position and the commitment that they were prepared to make to fund, was the commonwealth through the ATO 7.5 per cent, ICWA and LDTC 37.5 per cent, and BGNV 55 per cent, and that is what is written into the original agreements for indemnification. The reason it is ICWA and LDTC is because of the position of ICWA as a bondholder sitting behind the trustee, whereas BGNV actually sits above its trustee.

[11.40 am]

That lasted for three years to 1999. In 1999, the proceedings were progressing but not in the way which had been anticipated; they were already more expensive than had been contemplated at the time they were commenced. There were some disputes between the indemnifying creditors and between the indemnifying creditors and the liquidators, and, indeed—this is at this stage confidential, though whether it really matters is dubious—between the lawyers and the liquidators. There was a lot of uncertainty, and a lack of confidence had developed in relation to the legal advice and the representation and the way in which the matter was proceeding. At that point, Bell Group NV, effectively Reijtenbagh as the funder of Bell Group NV, made a decision that it did not want to play anymore. There had been at all times an option in the agreements for indemnification, which permitted an indemnifying creditor to opt out of funding. At the point at which they opted out of funding they forfeited their interest other than to their direct investment. In 1999, BGNV stopped funding and it formally withdrew from and terminated its involvement in the suite of indemnity agreements. Again, there was some dispute about what its correspondence meant and we may have, at some stage, a fight about that. However, there were two dynamics at play in the proceedings, which made it difficult for BGNV to go away. One was that legal advice had been obtained by the liquidator and shared with the creditors that the prospects of one limb of the claim, which was being prosecuted against the banks, would be enhanced by the presence of BGNV in the proceedings. It is what is called the equitable fraud claim. The equitable fraud claim ultimately failed at every stage; it failed at both the trial and in the Court of Appeal—the only limb of the claim that failed in both places. Secondly, the Insurance Commission and the liquidators were at the time negotiating with a funder in England for what is called after-the-event litigation insurance, which by then was becoming available in the UK insurance market. That would mitigate some of the risks that the liquidator and the Insurance Commission were running in relation to the funding of the litigation. The after-the-event insurance insurer wanted to maximise the position of the litigation and therefore wanted to hold BGNV in place if the legal advice was that that was beneficial. That gave BGNV a negotiating position in relation to the ongoing conduct of the litigation it otherwise would not have had and resulted in a renegotiation of the funding agreements. That was affected by way of what is called the "Third Amending Agreements" to the Agreements for Indemnification, the post-termination inter-creditor agreement or PTICA, which you will see some reference to, and certain other agreements. At the same time, the ATO decided it did not want

to play anymore as well and the ATO pulled out, but in an arrangement between the Insurance Commission and the ATO, the Insurance Commission agreed to keep funding the ATO's share of the arrangements. From that point forth, from 1999 the Insurance Commission became the sole funder of the litigation.

The CHAIR: Excuse me, Paul, I would really love to be here—I find it fascinating—but I have to go and I will leave you in the hands of our Deputy Chair, Lynn. Thank you.

Hon KEN TRAVERS: At that point, how much had been spent on the funding?

Mr Evans: As of 1999, if you turn down to —

Hon KEN TRAVERS: If it comes up later, we will wait until you get there.

Mr Evans: If you turn down to slide 27, it will give you an idea. It would be around 50 at that stage. I can give you a precise figure. We have accumulative cash flow but the figure will be in the high 40s to low 50s from recollection.

Hon KEN TRAVERS: I am happy to take it on notice.

Mr Evans: At that stage the interests of the parties were rejigged, and that appears at slide 15, effectively economically by virtue of the arrangements that were entered into. The Commonwealth changed its position to nine per cent, ICWA and LDTC to 53.5 per cent, BGNV to 37.5 per cent, so the primary rearrangement is between the Insurance Commission and Bell Group. Bell effectively, at that stage, acquired a carried interest in the litigation.

On slide 16 I have set out what we know about Bell Group NV's funding. BGNV is in liquidation in both Curaçao, which is its principal domicile, and in Australia; it has an Australian liquidator, Mr Gary Trevor. Doubtless you will hear from Mr Trevor as some stage. The funding arrangements we have been able to extract from public source documents, which are basically the reports in the liquidation in Curaçao, have enabled us to get an idea of what that funding. In substance —

Hon KEN TRAVERS: Before you go any further, those figures you have on slide 15, is that the distribution of the 66 —

Mr Evans: Per cent; that is right. Only the rights to the 66 per cent.

Hon KEN TRAVERS: Then the other 33 per cent would then go —

Mr Evans To the creditors.

Hon KEN TRAVERS: To the creditors in normal distribution?

Mr Evans: Yes, that is correct. So we are only concerned with, effectively, the distribution of that, which are the proceeds of the funding agreements.

So the expectation and concept, in broad terms—all this, I have to say, has now been put in issue—is that you get your money back; that is, what you have contributed to the conduct of the litigation. That would be pretty standard for a funding arrangement. You then get your compensation or reward—characterise it how you would—for the risk you have taken. Then you go in and claim as a creditor according to your creditor rights. In a single company liquidation that would be relatively simple; this is not, regrettably, a single company liquidation.

Hon LYNN MacLAREN: That is an understatement.

Mr Evans: So, BGNV is funded by, we think, only Plaza—the documents are a little obscure. There may be others, but we think it is only Plaza; certainly only Mr Reijtenbagh turns up to the meetings we have had. But, effectively, under that funding agreement, which is the original $22 million plus about $45 million they have spent since effectively advancing BGNV's interests alone —

Hon DONNA FARAGHER: This is Plaza?

Mr Evans: This is Plaza to BGNV. BGNV has not spent a cent—that is a prejudiced view; in our view, BGNV has not spent a cent advancing the interests of creditors since 1999. It has, however, invested money in protecting and advancing its own interests, in particular to achieve a successful outcome in an argument that it was not subordinated as a creditor, and also in relation to distribution issues. From the liquidator's reports in BGNV, that appears to be about $A45 million. Under the funding agreements, whoever is funding—Plaza, we think—will get back those advances; let us call them now $65 million. Plus, since a rearrangement in 2009—that is, after success at trial—80 per cent of the first $225 million of net recoveries, 75 per cent of the next $225 million of net recoveries, and 70 per cent of the balance, including interest, both simple and compound, on the money they advanced. Net-out figure? On any view that we take of how much BGNV should get, between 75 and 80 per cent of any dollar that goes to BGNV would go to the funders, effectively.

[11.50 am]

I have said this is not a simple, linear one-shop liquidation. The next three slides show why. Page 16 has the primary Bell Group shareholding structure as at 1990. That does not include the English group, which is shown at slide 18; nor does it include the downstream Bell Resources, Weeks Petroleum and JN Taylor Holdings' corporate structures, each of which would occupy another page. The shareholding, generally, is relatively clean; that is, most companies are wholly owned subsidiaries of other companies in fairly linear streams—not always; there are a few anomalies and externalities. But where things start getting tricky is when you factor in debt between the companies. We cannot do that without having access to all the liquidator's books and papers. Slide 18 indicates where we think the money from the bonds went—where it goes after that is entirely a different question—and what the other debt transactions are. We have a window into the net outcome because of a model that the liquidator has prepared of financial outcomes. The liquidator would need to explain it to you; I could not pretend to do so. But suffice to say, a lot of these companies lent money to each other. A lot of that money ended in Bell Group finance, but not all of it. Therefore, in a liquidation scenario, movements between companies follow both debt and equity paths, depending upon the specific company. In many cases—I will come to this again in a minute—money will pass through the same company several times, not necessarily always on the same path.

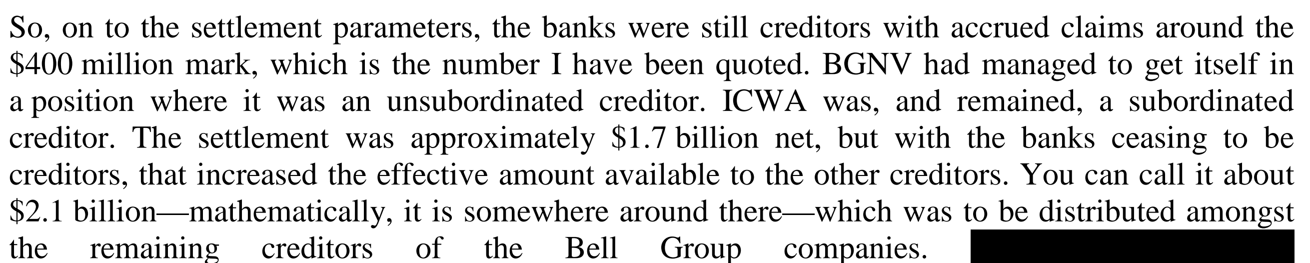
Many of those companies no longer exist; that is, they have been deregistered. That is one of the reasons for the amendments that are now proposed: to address the fact that, for tax purposes, it may be necessary to reregister some of the companies that have been deregistered. These charts were originally provided by the liquidator for the purposes of the litigation. We have not attempted to recast them to reflect some of the factors of the bill, for example, or work out which companies are deregistered and which are not. That will be a work of some exercise that may or may not be worth undertaking. We have been content, for these purposes, to go back and take what the liquidator had made available previously and do a little bit of overlay in relation to it. Suffice to say that dropping out of that not-straightforward set of diagrams is the key actors picture at page 20. The key actors picture simply seeks to identify who the players left on deck are at the end of this story, the banks having quit field largely. The key actors are the Australian Taxation Office, Bell Group NV, a company called WA Glendinning, ICWA—through the Law Debenture Trust Corporation—and Bell Group UK. The bond structures are shown on page 20; the ATO and BGUK structures are not because they are different. All we have captured there is where the bond cash flows. Page 21 recaps all of the preceding, and makes a comment about the WA Glendinning position; you will hear, doubtless, at some stage from Mr McLernon, because he is counsel, in relation to WA Glendenning's position.

Page 22: what did this cost? Remembering that the liquidator has been successful, in unprecedented liquidation in Australia, in securing a settlement fund that now is approximately, including accrued interest, about $1.8 billion after 20 years of litigation. It cost around $200 million in direct legal costs expended by the Insurance Commission, about $26 million in direct legal costs of BGNV, and

the ATO, expended for the benefit of the creditors generally—that is, in securing the settlement. In addition, there are, of course, BGNV's separate legal costs in advancing and protecting its position, the ATO's separate legal costs, and ICWA's internal costs, which are not inconsiderable, in protecting its position over the years. It is probably right to say that the gross legal fees of all parties, and I include the banks' legal representation, in relation to that trial and appeal and settlement is closer to $600 million than $500 million over 20 years. We do not know because we do not know what the banks have spent, obviously, but the impression is they spent more than the liquidator did. So it is certainly not less than $500 million; it is probably closer to $600 million.

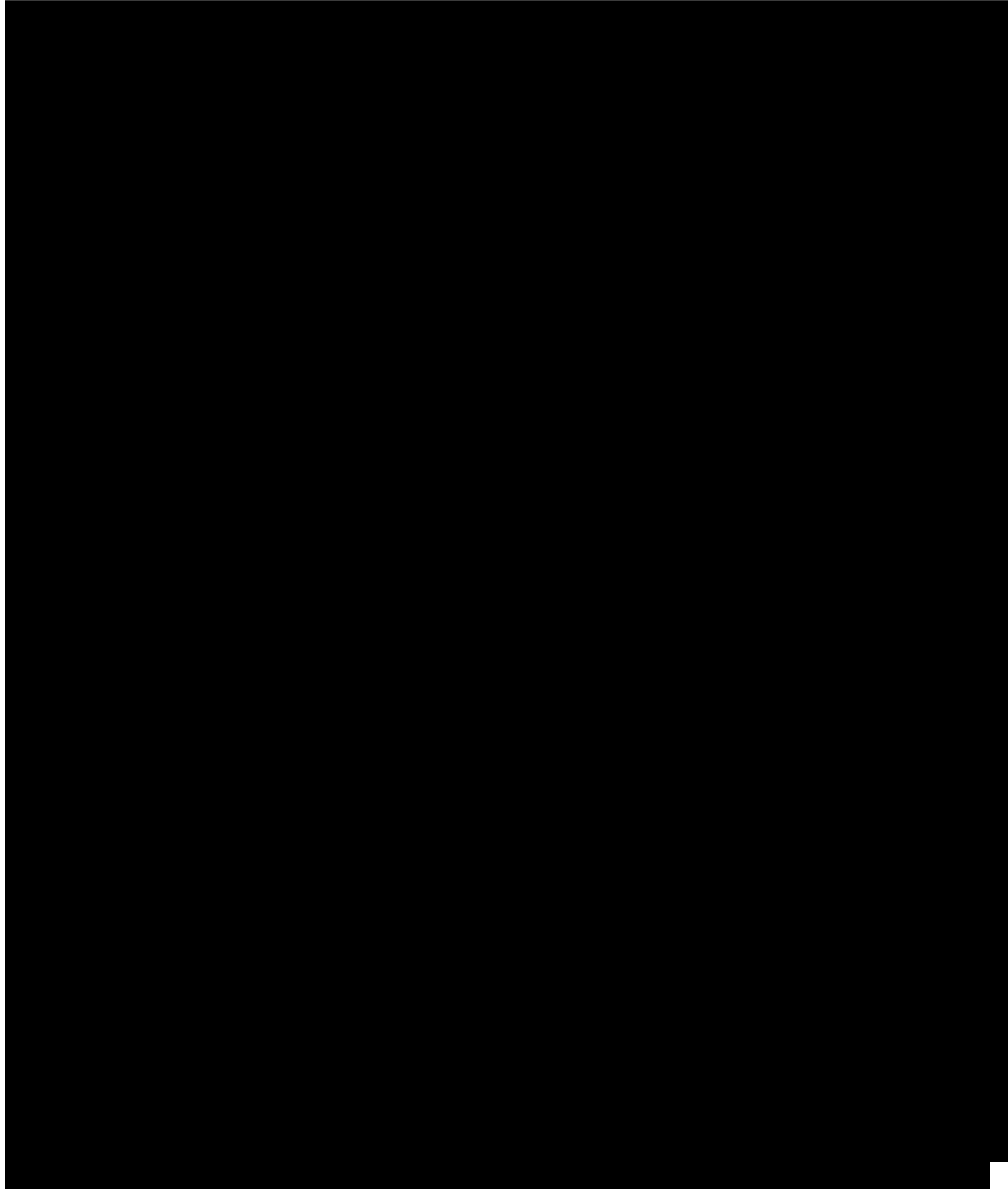
Graphics 23 and 24 just show when the spend occurred and who contributed the spend and when. It is a bit of background. Slides 25 through to 27 just capture the key points of the history of the proceedings and the settlement; 27 in particular covers what I call the high points in relation to the litigation. It is the largest civil litigation ever conducted in this state and probably the second or third largest civil litigation ever conducted in Australia. The trial has gone for an unprecedented duration—404 sitting days over three years in Australia and the United Kingdom. The judgement took two years to deliver. It was, at the time, the longest judgement ever written in a civil trial in Australia. It was pipped shortly thereafter by Justice Austin in New South Wales in the One.Tel judgement, who got an extra 100 or so pages in. The appeal took four months to hear and a year to deliver judgement on the appeal. The appeal from the banks' perspective was manifestly unsuccessful. They went from owing $1.7 billion to owing $2.7 billion. Not surprisingly, they appealed to the High Court. Special leave was granted, and the matter had been listed for trial at a time when a measure of sanity prevailed and a settlement was achieved. I was not involved in any of this, but I understand there had been several attempts to settle the proceedings over the course of them, and they had all failed, and they had all failed materially. Very interestingly, and entirely anecdotally, I was speaking only yesterday to one of the early counsel for the banks, a very eminent counsel, who told me that he had written an opinion back in the 1990s saying that the plaintiff's—that is, the liquidator's—case was entirely hopeless. He was a little disappointed by the judgement, but the attitude throughout the conduct of the litigation was, "Take no prisoners; give no ground; do not settle—win." And every step was taken to procure that outcome. That is why it cost so much and took so long. We have to recall the liquidator, who was a relatively small liquidation practice in Perth, was taking on three of the four biggest Australian banks and three of the largest English and global banks in Lloyds Bank, HSBC and, I think, Standard Chartered Bank. It was something of a David and Goliath contest.

So, on to the settlement parameters, the banks were still creditors with accrued claims around the $400 million mark, which is the number I have been quoted. BGNV had managed to get itself in a position where it was an unsubordinated creditor. ICWA was, and remained, a subordinated creditor. The settlement was approximately $1.7 billion net, but with the banks ceasing to be creditors, that increased the effective amount available to the other creditors. You can call it about $2.1 billion—mathematically, it is somewhere around there—which was to be distributed amongst the remaining creditors of the Bell Group companies.



That takes us to 29. With the banks gone, there are five principal remaining creditors. There are some others, and you will see that in the following slides, but they are relatively minor. The Insurance Commission, the ATO, BGNV —

[12 noon]



Hon KEN TRAVERS: Now ICWA, this is now dealing with the creditors as opposed to the funders of the litigation.

Mr Evans: That is right, because three of these are funders; two of them are not funders. Can I say this: nominally, BG UK was a funding party, but it is an indemnified funding party. Its actual

economic contribution is zero; it has all been paid for by the liquidator, which means, effectively, it has been paid for by the indemnifying creditors.

Hon KEN TRAVERS: So ICWA as a creditor, is that related to the bond or related to other —

Mr Evans: It is in both capacities. It is as a landlord and as a bondholder.

Hon KEN TRAVERS: And there are no other claims by purchase? You made the point there that WA Glendinning bought its claim. Is ICWA also a creditor through bought claims?

Mr Evans: ICWA has one bought claim, which is the JN Taylor Holdings claim.

Hon KEN TRAVERS: Right; and what is the value of that?

Mr Evans: It is $291 million. It is shown in slide 35.

Hon KEN TRAVERS: Right; and I assume that that is the main claim of the creditor, not the bond—the land.

Mr Evans: That is the claim that is not subordinated; that is a non-subordinated claim.

Hon KEN TRAVERS: It would, under normal law, be paid out well in advance of the bond, as would the WA Glendinning debts.

Mr Evans: Yes.

Hon KEN TRAVERS: How did they come to acquire the JN Taylor —

Mr Evans: I was not privy to that, and it is not something I have paid a huge amount of attention to. I can take it on notice to tell you a little bit more about that. It was acquired from the liquidation of JN Taylor Holdings some years ago. They paid some money for it. It is not a huge amount of money, but it is real money, and it was facilitated by the lawyers who are now acting for BGNV, albeit in a different guise at the time—one of the curiosities in this matter.

Hon KEN TRAVERS: If you can take that on notice to provide as supplementary the way in which it came and what they paid for that debt, seeing as you are kind enough to tell us what WA Glendinning did.

Mr Evans: Yes. What I understand is that strategically it was part of the overall position of bolstering the position of the indemnifying creditors generally in relation to the distribution. It was an insurance policy.

Hon KEN TRAVERS: But, fundamentally, in terms of as a creditor rather than a funder, that is the main claim that ICWA will have —

Mr Evans: That is the main claim.

Hon KEN TRAVERS: — rather than the landlord. I mean, the landlord would be a claim, but I assume that you are going to be paid cents in the dollar of $3 million, so it is negligible, the bondholder—I doubt any money will flow through by the time you pay out all of the subordinated creditors.

Mr Evans: The unsubordinated creditors.

Hon KEN TRAVERS: Sorry, the unsubordinated creditors, so, as a creditor, that is their main claim.

Mr Evans: That and the Western Interstate shareholding interest. Might I refer you to the Western Interstate assignment agreement, under which ICWA shares with the ATO funds that would flow through Western Interstate. Western Interstate is the largest creditor of Bell Group Finance.

Hon KEN TRAVERS: Right; and that is shown earlier in one of the slides, is it?

Mr Evans: It is referred to earlier. The Western Interstate position is shown in slide 36. It is owed $758 million. That is an intrinsic part of the funding arrangements negotiated in 1995

Hon DONNA FARAGHER: Can I just clarify? On page 39 you are saying that WA Glendinning is a creditor. It bought this for $125, and it is claiming $180 million-plus.

Mr Evans: Yes, and that is correct. On its face value, that is the value of the claim. In very brief terms—we do not understand it in great detail—the WA publishing assets, which have been sold by the banks and were floated off in a public listing—WA Newspapers and the *Albany Advertiser* were the two relevant entities, as I understand—had on their books an inter-company loan due from Bell Group Finance, which, as I understand it, represented money that had been upstreamed from the publishing assets to BGF treasury in order to reduce group debt. The publishing assets were obviously productive assets; that is, they generated cash flow, and the cash flow was stripped out and remitted up. Post-float, and in a circumstance where the companies were hopelessly insolvent and all in liquidation, those debts were presumably of no tangible value, and $125 is probably what they were worth, which is absolutely nothing. It may just have paid the cost of drawing the instrument for the transfer. Now, of course, they are worth potentially quite a lot of money. How much is debatable.

Hon KEN TRAVERS: I assume there would have been a tax loss that would have been of benefit to the float.

Mr Evans: Presumably, if there was an allowable deduction in relation to that, which would depend on whether it was a capital transfer, effectively, or whether there was actually an income transfer, and whether they were to claim a loss on the loan at the time. It may have been a capital loss at the time.

Hon KEN TRAVERS: You would assume that would have been an incentive for the banks to try and clear that off so that it became part of the sale of the float.

Mr Evans: Yes. It might have been on the realisation. I am no tax lawyer; I would be speculating in relation to how that would have crystallised, but certainly in terms of cash collectability at the time of sale, one suspects that there was not a lot of prospect at the time. BGUK is a creditor by virtue of the settlement arrangements.

Hon KEN TRAVERS: That is because they needed to be funded by the liquidator to bring their assets and value into the claim.

Mr Evans: To bring their claim to the table; that is right. They were a judgement creditor in the proceedings as a result of that. Again, BGUK had—I do not understand the group structure well, but one of their assets, the Stoll Moss Theatres chain, was also the holding company for Holmes à Court's music assets. He had a portfolio of copyright ownership in relation to, amongst other things, The Beatles. Those were liquidated; the funds were repatriated to Australia. To the extent that was done by way of loan transfers, that would create a debt due. There were also some questions of whether assets which were shown under securities became debts which were payable.

Hon KEN TRAVERS: Is the agreement that underpins that in dispute, or is that one where there is general agreement now between the parties as to how that money will be dealt with?

[12.10 pm]

Mr Evans: That is not an agreement. There does not seem to be any material dispute in relation to that arrangement at this stage—not that I am aware of. I continue to be optimistic that new things will not come up, but I am usually disappointed.

Slide 30: the options which were presented as a result of this position; there is a large amount of money to be carved up. There are five creditors who have claims in relation to it. To a very large extent, they dispute each other's claims. One can litigate, one can mediate—we have tried that twice, once significantly—or one can legislate, and that is the issue for the committee. I will not say

anything more about that. I will indicate the view in relation to the mediation issues was that apart from the simple difficulty of getting everybody onto the same page in terms of the value of claims, and while the difference between the parties has narrowed, it has not narrowed anywhere near enough at this stage. It is an execution risk; that is, we may reach an agreement, but how do you actually give effect to it in a corporate structure like this, where there are still external interests? It is all very well for five creditors to sit down and agree to things between themselves, but there actually are other creditors out there, some of whom we do not even know who they are at this stage, who may well have other issues. Some of them, to be conspiratorial, might be creditors who are sitting around the table wearing a different hat, to emerge at a point in time when it is appropriate to do so to take the next chunk.

Hon KEN TRAVERS: So, if money goes through a company at some point, that is the point at which —

Mr Evans: That is a problem, and the difficulty is that we have never had final confirmation from the liquidator as to his view on how many schemes of arrangement will be required; that is, in order to make the flow of funds work in accordance with the fact that there is money in 11 different companies, they all owe each other—I will talk about the washing machine in a moment—they all owe each other money. To get the right money into the right place to pay out a settlement requires, we think—and the liquidator has not cavilled from this as I understand it—not less than 15 schemes of arrangement. Fifteen separate companies have to have schemes. They are interdependent; that is, logically, if any scheme failed, all schemes would fail, because it is essential to produce the outcome. Schemes of arrangements are tricky—I have done many of them in the past—in particular because of the need to identify classes of creditors. Members of classes vote together, but if you are in a different class, you do not vote with other creditors; you vote on your own as a class. Class definition in these schemes will be complex. The indemnifying creditors would probably be in one class, but they might not be; they might be in more than one class. So subordinated creditors might be in a different class from other indemnifying creditors, as an example. The difficulty that would be faced—and nobody has ever grappled with the detail of this—is that, for example, in company A, one might have three classes, and class 3 might have two or three members. It might only be over $100 000, and we might not know who owns that debt, but they would block the scheme. They will not know the scheme fails. Every class has to vote and has to approve a scheme; every class in every company. Execution risk is very significant, plus, to be frank, apart from the scheme arrangement risk, there is simply a problem of holding people to their agreements. If you take a view that the agreements that are presently in place, say X, and other people are saying Y today, then we might hold that view in relation to a settlement agreement in the future. We already had litigation arising out of the settlement deed that was executed in 2013, both commenced and foreshadowed. So execution risk is a very, very real consideration and mediation is a very, very real consideration which underlies the philosophy which, of course, calls upon policy of the bill mitigating an execution risk.

Hon KEN TRAVERS: Just to go to the detail of this bill as it is currently proposed, once the authority calls for submissions, each of those classes of creditors in each of those potential companies at that point would need to put forward what they believe they are entitled to —

Mr Evans: Yes, and why.

Hon KEN TRAVERS: —and why, at that point.

Mr Evans: Yes.

Hon KEN TRAVERS: So that, in theory, would flush out every past potential creditor.

Mr Evans: Yes, that is correct, because if you do not put your claim in, you do not get a second bite of the cherry. That, from a timing perspective in terms of efficient resolution, is a very important

consideration to bring forward the identification of claims and issues and to consolidate them into a single process for determination.

The DEPUTY CHAIR: I am very conscious that we have 10 minutes left of this hearing and there is quite a bit of material still to present to us. Do we want to set another time to continue this? We have a series of questions we have prepared for you that we were hoping you would take on notice, but there are still quite a few slides left. Is there more? Could we complete this in the next 10 minutes?

Mr Evans: I can leave the slides largely to you; after all, they are there to be read. Slide 32 says that there are a lot of distribution issues, and there are. That does not mean that we do not think there is a very clear path through them, but the fact that there are a lot of distribution issues simply means that we have a lot of process to go through to get to the answer. That answer should produce a return to the Insurance Commission, depending upon how you set the model and some of the assumptions you make are between $850 million and $1.15 billion—that is the position. I do not know whether you really want to twist your brains around the distribution issues. There is a larger version of that slide, because you will never read the one that is there. But if you do, I can give that to you to take away and ask some questions about it later on, if you want to. The balance of it identifies what the claims are and what the underlying complexity is, and the complexity is best captured in the notion of the "washing machine". This again is the liquidators' diagram at page 37. The notion of the washing machine is that money that comes into these various companies from the settlement has to go through and through and through the companies in multiple iterations before it is properly distributed. If you call the liquidator to give evidence, the liquidator will—should—tell you that he has a model that he has provided to the creditors on a confidential basis. We have all had the opportunity to play with that model. The model operates upon the basis of running the washing machine 60 times; so there are 60 cycles of distribution to produce an approximate outcome at the end of the day. It is that model that allows the parties to effectively quantify their views of their claims. That is how the Insurance Commission has quantified its claims and it is how other parties have manipulated the model or used variants of the model that they have devised themselves to quantify their claims, because it takes into account subordination or not; it takes into account tax or not; it takes into account a whole host of factors. One of the difficulties with it is that it takes into account now so many variables that there is almost an infinite universe of possibilities.

Hon KEN TRAVERS: The recent ATO assessments are another complexity.

Mr Evans: They are. The model actually accommodates those at a level, because it has a whole bunch of tax assumptions built in, but they are an additional complicating factor in relation to the process. As a back of the envelope—I did a calculation while I was getting bored at the mediation in Singapore—the model as it then was had 326 sextillion permutations on a mathematical basis. Most of them do not matter, frankly, but when you start setting switches in, it makes it all a bit crazy; you can end up with crazy permutations. We have kind of worried about 20 or 30 between the parties.

Hon KEN TRAVERS: Of the companies that you listed earlier that are beneficiaries, two were outside WA, so obviously that has an impact on what the WA legislation can impact on. In terms of this "washing machine", how many of the companies are outside WA? I note you said earlier that there are a number of actions already commenced in the UK and other jurisdictions.

[12.20 pm]

Mr Evans: There are a couple of marginal relevance outside, but the legislation would effectively allow those to be netted out, because the reality is that the liquidator has all the money. He has both the UK companies' money and he has Maranoa's money, because it is all held in two bank deposits, and the legislation addresses that and effectively allows that money to be accumulated and netted off against external claims. Maranoa has only one external creditor, it is the ATO for $1 million, so far as the liquidator has identified. BG UK has only one external creditor that has been identified.

That is another group company downstream from it. The beneficiary of that is Her Majesty's Treasury in the United Kingdom. They are the beneficiary, purely serendipitously, because under UK law you cannot reinstate a company that has been deregistered for more than 20 years. That company has been deregistered for more than 20 years. If it could be reinstated, that money would come straight back to Australia, into the group. It cannot be reinstated, therefore it gets escheat to the UK Crown. Effectively, apart from a serendipitous beneficiary in the UK Crown, who I might not have a great deal of compassion for in the circumstances, the only external beneficiary of the 11 recipient companies is the ATO, which is a creditor—core creditor, in any event—for $1 million. Otherwise, the money will simply recycle internally amongst the WA companies. It facilitated the solution that has been put forward in the bill.

The following really talks about the bill, and you do not need to hear about that particularly. You will no doubt have questions about it. I can take you at length through the logic tree underlying the present identified issues. It is actually spread across five A3 pages, but all of them are simply questions. As I say, we have a way through them. We know what litigation we need to fight at the moment, based on the identified issues. We have a view about our success and we have a view about the value of success to the Insurance Commission, and that value is very significant. The question is when that value is realised and how much cost is incurred by all of the creditors in resolving the issues that are presently joined or foreshadowed. Some of those issues are one-day legal arguments. Some of them are potentially multi-week civil trials in relation to events that happened in the late 1980s and early 1990s. So, for example, JN Taylor Holdings, which has been admitted as a claim in the liquidation of the Bell Group since the early 1990s, Totterdell admitted that claim back in about 1993; has now been foreshadowed to be challenged. It is a question about the conduct of the investment of the funds of JN Taylor Holdings under the administration of the Bell Group and the Bond Corporation in 1989 through 1991 and whether that occasioned loss. So we have to re-run, effectively, what was happening in the Bell Group back in 1991. Similarly, in relation to Western Interstate, to the extent that it has been foreshadowed to be challenged both in Western Australia and, potentially, in London, we need to examine what was happening in the UK group and fund the flows between the UK and Australia in 1988 and 1989. The principal witness in relation to those matters would be Alan Bond, who died a few months ago—itself a significant piece of civil litigation in one or both jurisdictions. Can I assist you further in relation to this?

The DEPUTY CHAIR: Yes, probably. We have a series of questions. I think you have gone through more information than I have been able to take on board in one go. Thank you very much for the slides.

Hon KEN TRAVERS: I just ask one other question on slide 44 and the ratio of $199 million to $700 million at 250 per cent. Is the $700 million a combination of ICWA's funding return and its creditor return?

Mr Evans: It is. It is a compromise on that, obviously. As I indicated, the anticipated outcome is materially higher than that. That is based upon the figures of the Treasurer in the Assembly as being a reasonable compromise to get everyone to the table, if a reasonable compromise were achieved. That would, in fact, almost be only funding return. So if you actually broke up the return of the funding and the section 564 award on the basis that the agreements contemplate, there would be no return or immaterial return on the debt; that would simply be return on the litigation investment. That is actually why we have cast the indicative numbers purely on a modern concept of being a return on investment and litigation because the debt is now so profoundly historical, to some extent, it loses its relevance. All costs are sunk, we are forward-looking as to what the parties have committed to the litigation. That is the way it has been cast. There are obviously different ways of looking at it.

Hon KEN TRAVERS: The ultimate issue there is that is only an indicative view of the Treasurer; the way in which the authority administers the act could produce a completely different outcome.

Mr Evans: Exactly. There is one issue that obviously arises. There has been a lot of press flutter and no doubt lobbying about everybody having rights. Nobody has any rights at the moment. Everybody has claims which have to be litigated and vindicated. Nobody knows what they are going to get. Everybody has a view about what they are going to get, depending on how they manipulate the model. We have a very firm view about what the Insurance Commission should receive, based upon our analysis of the issues and the advice that has been obtained, but nobody knows. And nobody knows what the authority will decide in relation to those issues.

The DEPUTY CHAIR: I am just conscious of the time. I want to thank you very much for that presentation. As I said, that is full of information that we will have to sort through. We do have a series of questions that have been prepared. We simply want a marked-up copy of the bill. Can you provide that to us?

Mr Evans: I gather Mr Jacobs has arranged for a copy to be transmitted to the Treasurer's office to be transmitted to the committee clerk.

The DEPUTY CHAIR: Were there any other hot topic questions that members wanted to ask right now or shall we just request that you take them on notice and provide as much information as you can in response to them?

Hon DAVE GRILLS: Just skipping forward to the end of the objectives and the legislative solution, it says what the solution will do and how it goes with the Corporations Act and what the objects of the act are. They are all positives. Is there a downside to the legislation?

Mr Evans: You will have seen and no doubt will hear in due course about the issues that others have identified and advanced. We might go put them under the rubric first of a generic rule of law issue. That has been put in a number of ways, particularly around the taking away of vested rights. The short answer to that is, as I say, everybody has claims; nobody yet has rights until the court determines what those rights are. That would be many years and many millions of dollars in the future for that to take place. This is a means of actually getting claims vindicated out of the fund in a short amount of time in an efficient manner and to deal with the effects of litigation and the capacity of litigation to distort that process. I am a litigator. I have been a litigator for 25 years. That is where I made my living for a long time. It can be a very good thing; it can also not be a very good thing. This is probably litigation that has passed from being a good thing into not being a good thing some years ago. You will see some sovereign risk questions that have been put forward—this is terrible and it sends a really bad message about the fact that states can change the rules. It is a fact that you do change the rules from time to time. They have to. This is a very, very special set of circumstances. The legislation does not take anybody's power station away from them. It does not confiscate productive investment assets. It provides a means for sorting out a problem.

Hon DAVE GRILLS: So the legislation would have to suit the outcome for this particular —

Mr Evans: It has been tailored to a particular result. There has been a fair bit of effort put in in the explanatory memorandum and the second reading speech pointing out just what a unique set of circumstances this is and why it comes in at the very end of the banks. After the professionals or the global investors have left the field, it has come down to litigation funders and the tax office to sort out the differences. The tax office is a litigation funder as well.

Hon KEN TRAVERS: I would have thought it is around the sovereign risk issues. Correct me if I am wrong, but if this legislation was attempted to be passed by the commonwealth Parliament, it would potentially fall foul of the provisions about taking property on just terms.

[12.30 pm]

Mr Evans: That is a really interesting question because of course if and to the extent it takes property, it does provide a mechanism for providing value back for that property.

Hon KEN TRAVERS: Which is why it is just terms, not the fair market value. The vibe comes in, as they would say in *The Castle*.

Mr Evans: I have actually used that in the course of these proceedings once already. I cannot say that it would or would not fall foul. Certainly, it is not the case that it confiscates any property without providing a mechanism for the claimant to that property to vindicate a claim against a known fund of money and to receive money back for that. Whether that represents precisely the sum of money that might be vindicated in a number of years' time after a number of levels of curial argument or not is a different question. That is why we would like not to go down that route because that would be the way to define it—the perfectly correct answer in the perfect world.

The DEPUTY CHAIR: I think we have to wrap up the hearing. Thank you so much for coming in today.

Mr Evans: You are welcome.

The DEPUTY CHAIR: We will provide you with the questions that we have.

Mr Evans: Unless you particularly want them on an earlier basis, I would probably incorporate the questions on notice into the submission, which is due on 2 October. If there is anything you need to know sooner than that, of course I am happy to accommodate.

The DEPUTY CHAIR: No, there is not. That is a good time line.

Hon KEN TRAVERS: I think you said that the marked-up copy is already coming. Maybe Alex can go through and see if there is anything else that we would like earlier and highlight that to you; otherwise, have the answers to your questions as an addendum to your submission.

The DEPUTY CHAIR: I do not think we will need them earlier.

Mr Evans: Can I pose an invitation to the committee? You will doubtless hear from a number of people in relation to this so I expect you to hear from the liquidator, I expect you to hear from the liquidator of BGNV, I would expect you to hear from WA Glendinning and you may hear from the tax office. It might be worth considering that there may be some benefit in taking evidence, particularly from the liquidators, at least in part in private session and in part without their counsel. You may find that they tell you different things—more frank things—in those circumstances than they might otherwise do. I possibly throw that out as an invitation.

Hon KEN TRAVERS: They would have the choice as to whether they have counsel there to assist them or not, as you know, under our standing orders. That would ultimately be their choice.

The DEPUTY CHAIR: Yes, but we can offer it to them.

Hon KEN TRAVERS: We would be having them in. If they want their counsel sitting there to provide advice, our standing orders would not allow us to say, "No, you can't; they've got to leave."

The DEPUTY CHAIR: But we could invite them.

Hon DAVE GRILLS: Thanks very much for such a detailed way of going in. I found that very beneficial.

The DEPUTY CHAIR: I did, too. Thanks a lot.

Hearing concluded at 12.33 pm