STANDING COMMITTEE ON LEGISLATION

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

TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
TUESDAY, 6 OCTOBER 2015

SESSION TWO

Members

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

Hearing commenced at 12.21 pm

Ms VICTORIA BUTLER
Deputy Chair (WA), Insolvency and Reconstruction Law Committee of the Business Law Section, Law Council of Australia, sworn and examined:

Mr STEPHEN DOYLE
Legal Practitioner Director, Warren Symington Ralph, sworn and examined:

Mrs BARBARA GORDON
Lecturer, Law School, University of Western Australia, sworn and examined:

The CHAIR: On behalf of the committee, I would like to welcome you to the meeting. Before we begin, I must ask you to take either the oath or affirmation, and when you do, could you please state your full name and the capacity in which you appear before the committee.

Ms Butler: My name is Victoria Jane Butler. I am here in my capacity representing the Business Law Section of the Law Council of Australia.

[Witness took the oath.]

Mr Doyle: My name is Stephen Hogarth Doyle. I am a legal practitioner director of Warren Symington Ralph.

[Witness took the affirmation.]

Mrs Gordon: My full name is Barbara Maria Gazis Gordon. I am a legal practitioner. I am a lecturer at the Law School of the University of Western Australia, and I appear here in that capacity, as a member of the Law Council BLS. I also need to say that I also act as legal counsel to Resource Capital Funds in West Perth.

[Witness took the oath.]

The CHAIR: Thank you. You will have all signed a document titled "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. I remind you that your transcript will become a matter for the public record. If some reason you wish to make a confidential statement during today's proceedings, you should request the evidence be taken in closed session. If the committee grants your request, any public or media in attendance will be excluded from the hearing. Please note that until such time as the transcript of your public evidence is finalised, it should not be made public. I advise you that publication or disclosure of the uncorrected transcript of evidence may constitute a contempt of parliament and may mean that the material published or disclosed is not subject to parliamentary privilege.

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

Ms Butler: Thank you. As we mentioned at the outset, we represent the Business Law Section, otherwise known as the BLS, of the Law Council of Australia. The BLS has concerns with the Bell bill. It is, to say the least, an unusual piece of legislation. It is draconian and raises sovereign risk

issues. It usurps the law around corporations and insolvency that has been developed over many years, through both the corporations legislation and case law. It usurps our judicial system. We do appreciate the opportunity to highlight the BLS's concerns so that you can take them into account when considering this bill. Of course, we are aware of the long-running Bell litigation against various banks that was resolved in 2013. Of course, we have no wish for the settlement funds that were received around 2013 to be squandered on future long-running litigation proceedings. We do not underestimate the issues that are involved here, but the fear of long-running future litigation, assuming for the moment that is a valid fear, must be considered against the potential costs of the proposed Bell bill.

We have tried to understand the underlying issues behind this bill. We obviously do not have the involvement that the parties do. If we have properly understood the discussions between the Treasurer and the shadow Treasurer in the Legislative Assembly, it appears that the underlying dispute that this bill is attempting to address is about the percentage of uplift to which the funding creditors are entitled after return of their funding contribution. In normal circumstances, a liquidator would bring a court application under section 564 of the Corporations Act. The court then makes such orders as it deems just with respect to the distribution of litigation proceeds. There is a body of case law that outlines the factors that a court will consider in making this determination. The courts are set up to deal with such an application. In the discussion before the Legislative Assembly, the Treasurer referred to an agreement made in 1996 by which the funding creditors were apparently to receive two-thirds of the litigation proceeds. He mentioned that ICWA has advanced funds of around $200 million. He also referred to some proposed numbers under which ICWA would receive $700 million of the proceeds. This would appear to be his desired outcome, and we would presume that it is also ICWA's desired outcome.

A letter from the liquidator of one of the funding creditors, read into *Hansard* before the Legislative Assembly, states that that funding creditor considers that a payment of $700 million is unduly favourable to ICWA, given the extreme weakness of its legal position. Apart from that, we cannot comment on what the parties think about ICWA's desired position and, more importantly, we cannot pre-empt what a court would say. However, there is a question about whether a court would award two-thirds of the net proceeds in an uplift to the funding creditors. In our experience, and in more recent times, litigation funders seem to be agreeing to take between 20 and 40 per cent of the net proceeds, so there is a question about the reasonable entitlement of funding creditors, and whether this bill is a means to circumvent a potential court's finding in order to benefit the state.

There are new proposed amendments to the bill, as set out in the notice paper dated 14 September 2015. These amendments were not before the Legislative Assembly. As we understand it, one purpose of those amendments is to carve out disputes with the ATO, and provide for the administrator to act on behalf of each of the relevant companies in taking those tax disputes before the courts. There are three points to be made here: one, it seems that disputes with the one creditor are being treated differently from disputes with other creditors; two, the state is prepared to entrust the judicial system with these types of disputes but not others; and three, these provisions undermined the suggestion that the Bell bill will expeditiously resolve all disputes without the need for further legal proceedings.

Moving on to one of the BLS's greatest concerns, this bill provides a blueprint for any dealings involving the state. It provides for the expropriation of property, and it provides for the voiding of certain contracts. It squarely raises sovereign risk as an issue. It potentially adversely affects the reputation of Western Australia as a place to do business where the state abides by the law and respects private contractual and proprietary rights.

[12.30 pm]

This in turn raises the concept of the rule of law and explains the importance of it. What is the rule of law? As part of our submission, we have provided the Law Council's policy statement on rule-

of-law principles, which sets out the council's view of that principle. In our submission, we have highlighted the relevant key principles to consider when looking at the Bell bill. I will outline those key principles and our analysis of the bill in respect of them.

The first principle to consider is that the use of executive power should be subject to meaningful parliamentary and judicial oversight, particularly powers to seize property. In this bill, all property vested in or held on behalf of a WA Bell company is transferred and vested in the authority. The effect of the bill is to remove the funding creditors' rights under the current law in relation to distribution of proceeds. Much seems to be made of the proposition that the funds will be distributed back to the creditors. In particular, mention has been made of clause 4(f) of the bill, stating that an object of the bill is —

> to make —

Fair and —

> reasonable provision for the satisfaction of liabilities owed to creditors having regard to the uncertainties existing as to the nature and extent of those liabilities;

But it is worth stopping there and looking at how a recommendation will be made. In particular, can I take you to clause 36 of the Bell bill, please? You will see there that subclause (3) lists the matters to which the authority "must" have regard and the matters to which the authority "may" have regard. But if you turn to subclause (4), the authority has the absolute discretion as to the amount recommended to be paid to a person. Importantly, and I will come back to this, subclause (6) provides that a recommendation need not contain reasons. If I take you to subclause (9) —

> A failure by the Authority to comply with any provision of this section —

So, that would include having regard to the objects of the bill —

> does not invalidate a recommendation made by it under this section.

So, in effect there is no binding requirement on the authority to make a recommendation giving due consideration to any of the matters outlined or any other legal principles. Even if there were, without reasons, no-one would know if the authority gave due consideration to those matters. There is also no requirement for the Governor to provide reasons in making a determination. But reasons are essential to fairness in decision-making. They contribute to rationality in decision-making. Reasons ensure transparency and consistency in decision-making. Reasons promote accountability. On top of that, there is no right of review of the recommendation given by the authority or the resulting determination that is made. The rules of natural justice are expressly excluded. In those circumstances, there is no meaningful parliamentary and judicial oversight of the exercise of powers under this bill.

That brings me to the next principle. Executive decision-making should comply with the principles of natural justice and be subject to meaningful judicial review. As I have just mentioned, in this bill there are no rights of judicial review and the rules of natural justice are expressly excluded. It is possible that there could be an absolutely absurd result whereby the authority makes a recommendation, and it is then accepted as the determination to pay, for instance, 100 per cent to one of the funding creditors, or some other absurd result, and there is no means to actually counteract that result.

Moving on to the next principle to draw attention to, legislative provisions which create criminal penalties should not be retrospective in their operation. Clauses 48 to 50 provide for certain offences that carry a fine of $200 000 or imprisonment of five years, or both. Those clauses will be deemed to come into operation on the day before the bill was introduced into the Legislative Assembly. This is of concern to the BLS. Until passed, the bill is subject to change and therefore the conduct giving rise to the criminal penalty can be changed. An approach whereby there are

criminal penalties retrospective in operation means that the government of the day could force certain behaviours when the bill has not been passed and may never be passed.

Moving on to the next principle, everyone is entitled to equal protection before the law and no-one should be conferred with special privileges. I have already mentioned that the bill usurps the existing law on distribution of settlement proceeds. It potentially has the effect of advancing a particular creditor's position over other creditors, other than in accordance with existing law. For instance, as I have already said, it is far from clear to us that the existing law would result in ICWA's apparently desired outcome. We have also noted in our submission that the amendments to the bill appear to create different rules for determination of the ATO's claims.

At this point, I would like to make a correction to our submission. In paragraph 15, we refer to clause 73. That has now been amended to clause 72 and the second part of what was clause 73 has been deleted. So, now the bill allows the authority to submit to the State Solicitor a question concerning the functions or powers of the authority. Having said that, our question whether this is appropriate still stands.

Those are the points that we wish to raise at the outset but we would be very happy to take any questions.

The CHAIR: Thank you. That was very thorough.

Hon KEN TRAVERS: Before we get started, sorry, but I missed your name at the beginning.

Mrs Gordon: It is Barbara Gordon.

Hon KEN TRAVERS: You pointed out that you represented a company.

Mrs Gordon: I do not represent that company here. I work for that company—just for the purposes of full disclosure.

Hon KEN TRAVERS: Are they involved in the litigation?

Mrs Gordon: No.

Hon KEN TRAVERS: Okay. I did not know the name, and I just wondered if that was because you were declaring that there was some potential interest.

Mrs Gordon: No. I just for the purpose of completeness was stating both of my roles.

Hon KEN TRAVERS: I appreciate that. It was not a company that I had heard of before in any of these matters, so I just thought —

Ms Butler: That it was another one.

Hon KEN TRAVERS: Yes, so I thought I should clarify that.

The CHAIR: On page 2 of the submission, it is stated that the bill is an attack on the separation of powers. Can you expand on that with reference to the clauses of the bill? I understand why you think it is, but I would like to know what you say about that.

Ms Butler: Rather than a particular clause, it is actually the mechanics of the bill that is in issue. The normal existing law, if you like, is that a liquidator would be able to make certain decisions, and they would be subject to judicial review, or, as I mentioned, you would make an application directly to the court. Here, it is completely overriding the judicial system. It has knocked them out and instead we have set up this authority which seems to have a wide range of powers, including, in effect, judicial and executive powers.

The CHAIR: Thank you. Does anyone else have any questions?

Hon NICK GOIRAN: I will direct my questions to Ms Butler, and the other witnesses can respond as needed. In fact, in respect of the first question, I do need all of you to respond. Have any of you,

or your firms that you work for, worked on any matter to do with what is broadly referred to as the Bell litigation?

Ms Butler: I am a partner with Jackson McDonald. As far as I am aware, we have not been involved with any part of the Bell litigation. Personally, I certainly have not; as far as I am aware, no-one in the firm has.

Mr Doyle: The answer is no.

Mrs Gordon: No.

Hon NICK GOIRAN: The Attorney General in his second reading speech to the Legislative Council, in response to the suggestion that the bill is universally condemned, said the following, which I will quote —

> I can say emphatically that it is not; the majority of people with whom I have spoken, professional and otherwise, have been supportive of the bill. It is primarily those with an interest in extending the life of the Bell litigation and the funds to hire professional lobbyists who have sought to voice their objections through the media and other means. The bill in fact represents a wonderful opportunity to ensure a fair and equitable distribution of the Bell litigation proceeds and a swift end to this matter to the benefit of this state.

I take it that none of the three witnesses, from the information you have just given, are involved in the funding or the hiring of professional lobbyists. But can you indicate if you have any interest in extending the life of the Bell litigation?

Ms Butler: I have no such interest.

Mr Doyle: No such interest.

Mrs Gordon: No such interest.

Hon NICK GOIRAN: Nevertheless, you do condemn the bill.

[12.40 pm]

Ms Butler: We have raised concerns with it that we think ought to be properly addressed.

Hon NICK GOIRAN: So by way of amendment?

Mrs Gordon: When we say we condemn the bill, if you present the bill from a broad perspective to a member of the public or to a student of mine at university and say, "What is being proposed here is a situation with a state government-owned entity that is in a dispute with other parties and has been engaged in long-running litigation and the government is now proposing to take the assets of the companies involved into its own hands and to determine who gets what from those proceeds when it is one of the possible recipients of that", most people say, "They cannot do that." That is the response. It is that fundamental trust in our government to exercise restraint, when it is legislating, to not overstep that mark.

Hon NICK GOIRAN: So your evidence to the committee is that it is not those with an interest, necessarily, in the litigation who have concerns about the bill. Reasonable other citizens of Western Australia might have concerns?

Mrs Gordon: If they understood the mechanisms that the bill is putting into place.

Hon NICK GOIRAN: There was some mention about retrospectivity in your submission, particularly around possible retrospective criminal offences. The Attorney General, in his second reading speech, says that the bill does not create retrospective criminal offences. Can you just indicate why it is that the Law Council of Australia says that the Attorney General is incorrect?

Ms Butler: We simply point to clauses 48, 49 and 50. They create offences. Then subsection (2)— sorry, subclause 2(1)(c) provides that sections 48 to 50 will come into operation as set out in

subsection (2). Then subsection (2) says that they are deemed to come into operation at 12 noon on the day before the day on which the bill for this act was introduced into the Legislative Assembly.

Hon NICK GOIRAN: Sorry, just take me to the section that you are referring to there?

Ms Butler: Sorry. The clauses in question—the offence causes—are 48 to 50.

Hon DONNA FARAGHER: Can I just clarify? You are referring back also to section 2 relating to commencement.

Ms Butler: Precisely; thank you.

Hon NICK GOIRAN: Sorry, I think you said subclause (2), but you meant section 2.

Ms Butler: I am so sorry, yes. Section 2(1)(c), which refers to sections 48 to 50 coming into operation as set out in subsection (2). Then subsection 2(2) there says sections 48 to 50 are deemed to come into operation at 12 noon on the day before.

Hon NICK GOIRAN: Right. The Attorney General, in his second reading speech says, and I quote —

> To protect its objects the bill creates certain offences which come into effect on the day the bill was introduced into Parliament. That ensured the parties could organise their affairs in the light of the provisions of the bill. The bill does not criminalise conduct committed before the bill was introduced.

Ms Butler: I can only reiterate that point. And I guess the other point to be made there is that the clauses have already changed as this bill has progressed through Parliament. So there is nothing stopping the conduct that is prohibited from being changed yet again.

Hon NICK GOIRAN: Okay, so the position of the Law Council of Australia is that it is not retrospective in the sense of criminalising behaviour prior to the introduction of the bill, but just the mere fact that it criminalises activities post the introduction of the bill and prior to its —

Ms Butler: The day before; up until the passing of the bill.

Hon NICK GOIRAN: Yes.

Mrs Gordon: Can I clarify? It criminalises conduct that occurs before the bill becomes law. So to say that it is not retrospective because, from the introduction of the bill, people are aware of the existence of the bill, does not really answer that question.

Hon NICK GOIRAN: Presumably, the point is that it is retrospective —

Mrs Gordon: The point is that it is retrospective to it becoming law.

Hon NICK GOIRAN: Yes.

Mrs Gordon: Our point is that if we accept the Attorney General's comment as a valid statement, any government of the day could introduce a bill—as outrageous as they want it to be—in circumstances where they want to coerce certain conduct, and they say, "This conduct will be criminalised when this bill becomes law", even if the bill never becomes law. There is a sort of coercive mechanism occurring in relation to this.

Hon NICK GOIRAN: As a citizen of Western Australia, you would never really know under what law you are operating.

Mrs Gordon: And it could change.

Hon NICK GOIRAN: The bill could be in place until such time as sitting in the Parliament until the next election.

Mrs Gordon: It could be; it may never become law.

Hon KEN TRAVERS: Effectively, it is giving the right to the executive to make the laws over the Parliament for that period because, obviously, people are now—I think we heard from our earlier witness—taking action as a result of that threat, even though the Parliament may or may not ever pass that law based on an action of the executive.

Ms Butler: Correct.

Mrs Gordon: Yes. If the concern was that there would be a dissipation of assets, there are other mechanisms through the law in order to preserve the status quo or to injunct the distribution of assets out of a fund where there are legitimate disputes in relation to that.

Hon KEN TRAVERS: You made comment earlier about the way in which the bill, particularly with the amendments, treats people differently. Do you think that those amendments and the reason for that is to try and circumnavigate potential issues with respect to its constitutionality? Because, obviously, the main amendments relate to the Australian tax office which, fundamentally, is still going to override, I would have thought, state legislation, whatever we do. Do you think that is why they have been treated differently or are there other areas where the bill treats people differently?

Ms Butler: I am not aware of any other areas. I do not know the reason why the amendments seek to carve out the ATO disputes.

Hon KEN TRAVERS: Right.

Mrs Gordon: I am just speculating; again, I do not know. It occurred to me that it, perhaps, was to improve the position of the fund as against the ATO. So if the authority was able to participate in the dispute of those matters following the legislation, then the debt of the ATO may be reduced; its ability to prove for a debt may be reduced. I am just speculating. It is not clear to us.

Hon KEN TRAVERS: The other thing is in your comments you talked about the fact that there is no requirement for reasons to be given at any stage by either the authority or the Governor when finally making a decision. In a sense, if none of those decisions are appealable, what is the purpose of reasons in that case if you then cannot appeal it anyway?

Ms Butler: We think that is a two-pronged problem; both of them create two very potentially fuzzy scenarios that no-one really has any transparency to see through.

Hon KEN TRAVERS: You also referred us to clause 35 of the bill, which has the list of the "musts" and obviously that refers us back to the objects of the bill. In terms of your professional capacity—I am not sure whether you are able to answer this—obviously, there is a range of areas in the objects and a range of musts where, potentially, there will be conflicts. Is there an automatic hierarchy that you would see in the way this bill is structured as to the hierarchy with which those conflicts should be resolved? Or is it coming, literally, down to the discretion of whoever is chosen as the administrator?

Ms Butler: I think that is exactly right, and that is the difficulty. If it was a normal application to the court, you would have case law that the court would consider. Here, I cannot take any guidance from the wording of the act as to what should be taken in priority—what they all mean. These are words that are not necessarily backed up by a history of case law. In those circumstances, that is exactly the problem. Whoever is chosen to be the administrator has a full discretion to consider any or all of those reasons, or none of those reasons. We just do not know.

[12.50 pm]

Hon KEN TRAVERS: So, your view is that the bill, as it is currently structured, does not give any direction as to the hierarchy should there be conflicts between those matters that must be considered?

Ms Butler: That is correct.

Mr Doyle: Perhaps just to amplify those comments, there are not any real principles in the bill as to how the decision-making will occur. There is some guidance, but, as I have already pointed out, it is of little value. In *Hansard* there seemed to be a number of references to doing things on a fair and reasonable basis or an equitable basis. If those principles were appropriate—I am not saying they are—then I do not see them actually reflected in the bill, whereas the comments were made in *Hansard*. There seems to be an assumption that the language used in the bill reflects the statements in *Hansard*, and I am not confident that it does. Having said that, I am not suggesting that simply putting in "fair", "reasonable" and "equitable" is the way to go because I think there are already principles established by the common law, in equity and statute law that could decide these things anyway, given the facts.

Hon KEN TRAVERS: We recently had a case where the State Solicitor was advising with respect to the FOI act that even though something was clearly stated in the explanatory memorandum, the act did not actually meet that requirement. So, if it is just a comment in the second reading debate, that is going to have even less merit in a court or for anyone making a legal decision about it.

Amongst all those hierarchies, one of the objects of the act is —

> to provide appropriate compensation to the creditors who funded the Bell litigation, taking into account the funding provided and the associated risks assumed …

My reading of the way this bill is structured is that it then does not give any guidance as to what appropriate compensation would be. But what I think you presented to us was that there would be plenty of case law to suggest that somewhere between 20 and 40 per cent of the net proceeds would be a reasonable entitlement. Is that a reasonable assessment, based on the case law, if it was under the Corporations Act?

Ms Butler: Sorry, the 20 to 40 per cent talks about if we have a litigation funder rocking up with an agreement. At the moment it looks like it is about a 20 to 40 per cent of the uplift that they will take. You have picked an important point, though, in that the objects talk about what is appropriate. The courts will look at what is just, and in looking at what is just they will consider a whole heap of factors. There is a number of cases that will give a lesser percentage, higher percentage or will give back some of the debt or all of the debt. It depends on the circumstances, and the judge will look at a number of factors to come up with a determination. But at least we have some parameters there and some back case law that can lead us to a result that we can explain.

Hon KEN TRAVERS: I think we heard from the earlier witness—I think you might have been here—that the maximum of that would be no more than the costs incurred and the total amount of any debts they had owing to them. Would that still be a limit under the current law?

Ms Butler: I would have to look at that further, I think.

Mrs Gordon: I understand the point that the previous witness made in that regard. This goes to the spoils of the funding as a result of having been a litigation funder. So, yes, I understand that maximum limit under section 564. We had not had a chance to actually consider that before we heard your last witness. Can I just make a point about appropriate versus just? Under section 564, the court considers all the circumstances to determine what is just. Under this legislation we are only talking about what is appropriate having regard to the guidance that is given in the legislation, to the extent that there is guidance.

Hon KEN TRAVERS: I think it refers somewhere to the agreements that were struck between the liquidator.

Mrs Gordon: But in particular in the hope that there would be agreements following the introduction of the bill; they must have regard to those, and they may have regard to the other funding agreements in that context.

In terms of the lack of transparency, the concern we have about the lack of transparency is about these determinations being made and no reasoning being given, so you cannot really tell whether or not those factors were taken into account. One thought we have had right through all of this was that if it is actually known what the state wants, why is that not set out in the legislation as a distribution that is then legislated for, rather than creating this lack of transparency by virtue of the decision-making of the authority that we will not have reasons for and we will not have any right to appeal from?

Hon KEN TRAVERS: And ultimately can be decided by the Governor, which will be on the recommendation of the cabinet anyway, under the bill. Ultimately, we could go through this whole position and the government could decide, "What we want is this", and that could be the ultimate determination.

Mrs Gordon: In extreme circumstances ultimately there may be no determination and it can all go to the state, or $1 is distributed and then everything will go to the state by virtue of the vesting provisions at the end of it.

The CHAIR: Given that this has been going on and it is long and convoluted, and the High Court decision in 2013 that was brought down took eight years to get settled with the $1.7 billion—it is probably a bit more than that—and given that it is unique, is there any other legislation around Australia that you know of that does this? I have heard that there was one in South Australia that was quite unique, not like Bell because that is —

Mrs Gordon: The legislation we have heard mentioned in *Hansard* related to the James Hardie matters in New South Wales. Would you like me to comment on that?

The CHAIR: Yes.

Mrs Gordon: The fundamental difference between this legislation and the James Hardie legislation is that there was an agreement between the state and the other parties to that issue. Do you know the full background to that?

The CHAIR: Yes, I know a little bit about the James Hardie —

Mrs Gordon: Okay. The government stepped in because assets had been taken out of Australia and into the Netherlands from the James Hardie group, and the asbestos-liable entities that were left behind had insufficient funds to meet the claims of these as-yet-unidentified future claimants. So there were a number of problems that the law did not provide a ready means of redress for in those circumstances, in particular that the extent of the claims that would be made in the future against these entities was not known. So the government stepped in by virtue of representing the public and these potential future claimants. A representative of any asbestos claimants was also appointed, then the James Hardie entities had representatives as part of the negotiations, and an agreement was come up with. Given the uncertainties around the law in that case and given the difficulty of bringing the assets back from overseas, an agreement was reached and the government legislated by way of implementation of the agreement. The government was not a party to the dispute; the government was not an asbestos claimant. So there are a couple of fundamental differences here: it is not the government's own dispute; it was stepping in on behalf of members of the public whose identity was not yet known. It implemented an agreement and dealt with the holes in the law in those circumstances.

Hon NICK GOIRAN: But as a matter of principle then, if in this situation all the litigants were to come to an agreement, including the state, the Law Council of Australia would not object to this bill?

Ms Butler: No.

Hon NICK GOIRAN: Because the premise is that it is being done by consent.

Mrs Gordon: And it would just be a mechanism for giving finality to the agreement of the parties.

Hon NICK GOIRAN: And indemnification for the people involved.

Mrs Gordon: With the qualification about the retrospectivity.

Hon NICK GOIRAN: Sure.

Mr Doyle: Perhaps with one possible caveat, that would be that the agreement should not be brought about by coercion through this particular bit of legislation.

Hon NICK GOIRAN: Yes, the authentic consent would have to be given; the die is cast already in that sense, is it not?

Mr Doyle: Unless it was taken off the table.

Hon NICK GOIRAN: Yes.

I just have a question for you. One proposal that has been considered in terms of amending the legislation is the idea of quarantining the authority or the scheme only to the amount of the funding with the liquidator, which relates to the funding of the litigation to date. So specifically, or primarily, the Insurance Commission of Western Australia and the funding they have provided to create the $1.7 billion. Would the Law Council of Australia still have a concern with the bill if it was quarantined only to that provision?

[1.00 pm]

Ms Butler: Without having thought through that completely, my thinking is probably not because such funding, so the cost of it, would have a priority under section 556. In normal circumstances a liquidator would pay that. I assume that in this case the liquidator would like the court direction in order to give him some protection, given what has happened in this matter, but, as a matter of principle, the repayment of a priority cost such as that would not contravene the law and I cannot see that there is any particular problem with that.

Hon NICK GOIRAN: Sure, and it would still allow the combatants to have their day in court with respect to the balance of their claims.

Ms Butler: That is correct.

Hon KEN TRAVERS: I just wanted to clarify: Are you going to come back to us with information about that point about what would be the maximum payment, in your opinion? Is that something you are able to come back to us, as the BLS, about what would be a maximum amount that could be paid to a funding litigator? Because if the JN Taylor debt is never admitted, then ICWA is nothing more than a litigation funder, I would say potentially, arguably, so what would be the maximum? What would be your opinion on the maximum that could be paid?

Ms Butler: We could probably give you —

Hon KEN TRAVERS: Whether the current law actually has that cap of no more than the total —

Ms Butler: I see.

Mrs Gordon: I understand. The point under section 564, which is the provision that enables the liquidator to go to the court for an order in terms of whether one creditor should get more than the others, that is a different question as to whether or not any funding agreement is valid.

Hon KEN TRAVERS: We will probably get an answer to the question another way, so that is all right.

Mrs Gordon: We were very conscious of the fact that we are coming in here being negative in the context of legislation that is trying to address a terrible problem, and we do not want to minimise the extent of that problem at all. Your proposal now in terms of the restructuring of the legislation to just confine it to costs is probably better than what I am about to propose. To bring it more in line with James Hardie in achieving an agreement, if achieving an agreement of the parties is impossible, is it possible that instead of having this statutory, state-controlled authority with no

transparency, that an advisory committee to the liquidator was set up where the parties appointed independent experts and that committee, by way of a dispute resolution process, made the determination? So we keep it outside of the state's control. We do it by way of agreement between the parties in relation to the mechanism for resolution of the dispute.

Hon KEN TRAVERS: Are you talking about a formalised arbitration process as opposed to the previous system, which was about trying to get it through mediation or some sort of arbitration process?

Mrs Gordon: Some sort of formalised process that was given legislative finality where the parties agreed to the process.

Hon DONNA FARAGHER: But what if they never agree to the process—what then?

Mrs Gordon: Then you are where you are.

The CHAIR: Some people say that if we put this bill through as is with the amendments that it could possibly be challenged in the High Court. Is it the Law Society's opinion that somebody could do that? I am not saying "would" or "definite", but "could" they do that—challenge it?

Mr Doyle: In?

The CHAIR: The way the bill is written, once it goes through—if there are no amendments, no changes—and becomes legislation, one of those parties could take it to the High Court to say that it was unconstitutional?

Mr Doyle: In our submission we pointed out that we were not advising on constitutional law but we did think that constitutional law issues were a real possibility. I would expect that someone will take some very significant constitutional points because the law in that area is unsettled. Nevertheless, the bill, I think, shows elements of having been drafted to try and address those issues. But what the final result will be, I could not say. As we said in the submission, the committee or the government really needs to take some advice on the constitutional law issues from an independent person. Nevertheless, this is my own comment, I find the whole structure that has been set up is extraordinarily elaborate and complicated. As Barbara said earlier on, the simple way would be just to pass legislation with a table saying, "This is how much you're going to get." But that I think sheets home the real issue here: would Parliament want to take responsibility for saying that?

The CHAIR: No, because they want to put it in the hands of the liquidator to.

Mr Doyle: No, they are putting it in the hands of someone else who —

The CHAIR: Someone else to —

Mrs Gordon: Who is not a liquidator and who is not subject to the duties that a liquidator is subject to.

Hon NICK GOIRAN: Plus then, would the Parliament not be standing in the shoes of the court in that situation? At least with this legislation—not that I am one to defend this piece of legislation—it is setting up a scheme where some other individual is appointed to make the decision. That proposal would actually have the Parliament making the decision.

Ms Butler: Or appoint to make a recommendation.

Hon KEN TRAVERS: Ultimately, the cabinet makes the decision.

Mr Doyle: Which is the point. There is a veneer, but there is a process. But I suspect in reality whatever decision comes down would be one that will probably —

Hon NICK GOIRAN: Pragmatically I agree, but at least it is not the Parliament standing in the shoes of the court and then making the determination.

Mr Doyle: It is hard to know exactly, but I am just trying to highlight that if you take away the veneer, that is what you see.

Hon KEN TRAVERS: I want to make sure I have got this right because obviously we are looking at the detail of the bill and not the policy of the bill. One of the issues you raised is the lack of the appealability of the bill. But if we were to recommend that the bill be able to be subject to appeal, is it likely that that would then make this issue more complex in the courts than if it was to continue to proceed under the existing laws of the state, because of some of those issues we have talked about where there is no case law and there is ambiguity as to priorities and hierarchy of matters?

Ms Butler: I think that is a fair comment, yes.

Hon KEN TRAVERS: What about making elements of it disallowable, so even the final determination having to be tabled in Parliament and be subject to section 42 or something similar?

The CHAIR: A live hornet's nest.

Hon KEN TRAVERS: No, because, effectively, one of the points that has been made here is the Parliament will be effectively handing over—for want of a better term—a blank cheque for somebody else. I think we have all agreed that it is not actually the authority that makes the final decision, but it will be the Governor, he or she, who will be acting on the recommendation of the cabinet as is the custom and practice. Would that then mitigate some of your concerns if we were to make elements of the bill disallowable in the Parliament so that the ultimate power is still resting with the legislature and not the executive, or would it still be offensive?

Mr Doyle: I do not think that is an answer because, one, you will not know how the decision was determined because there are no reasons and it probably would not have been decided according to what we would advocate, according to the law—common law, statute law, equity. Possibly some of the actions that people might take, depending on how the legislation is drafted, could be criminal in trying to thwart implementation of the legislation. I do not think it really promotes good, transparent, open decision-making, which is the point that I think we are trying to make: that there should be someone who is accountable and reviewable. I do not dismiss this lightly, but simply having something tabled and then disallowed, no-one really knows how any of those decisions were reached.

Hon KEN TRAVERS: Part of that could be that they are required to provide their reasoning for how they arrived at that, which of course then is a problem for the Parliament that we ultimately become the determiner, not the cabinet and government.

Mr Doyle: Sure, but we do not even know what principles are going to be applied either. I think it is a bit of, "Let's see how we can fix this up", when the courts, given time and the facts could provide an answer, and the fund, as I understand it, is actually intact and presumably earning interest and not going anywhere.

[1.10 pm]

Hon KEN TRAVERS: My final question is: obviously, a lot has been made about the length of litigation between the banks and the liquidators up until now and therefore there is the suggestion that this will continue. Is it your view that if it was left to operate under the existing law or we came up with a bill that more closely reflected the existing law, it would go on for as long again as we have seen up until now?

Ms Butler: I think that is the fear only because there has been such long litigation to date.

Hon KEN TRAVERS: One of the things I get is that there is confusion; they are quite separate matters.

Ms Butler: You are absolutely right. We are talking now about the distribution of proceeds, so it is separate from the litigation, if you like, that has carried on for a number of years. What I do not have is an insight into the nature of the actual parties. To me, the issues here are fairly discrete, but I do not have, thank goodness, the knowledge of the parties and the points they are likely to raise. I cannot really give you a better answer than that I am afraid.

Hon NICK GOIRAN: It does seem a little unfair to blame the current combatants for the length of time that the banks have been embroiled with the liquidator in actually getting the $1.7 billion settled in the first instance, which I think was at least 15 years.

Ms Butler: Precisely. It is difficult to put your frustration on the current parties.

Hon KEN TRAVERS: We should be maybe focusing on how the banks have behaved in Australia in respect of the length of litigation up until now.

Mr Doyle: You would be having some very interesting discussions if this legislation was being brought to try to fix the problem with the banks.

Mrs Gordon: We stress in regard, too, that as a template this could have been used for that purpose.

Hon KEN TRAVERS: Yes, indeed, although would it not have required to be done under the commonwealth? Would we be able to do it under state law, do you think? And then, of course, the just-terms provisions of the Constitution come into play. That is why you can do it under state law, because just terms do not come into play.

Mrs Gordon: In the end, the question for you to some extent is not so much whether you can do it; it is whether you should do it.

The CHAIR: I was just wondering if you had any comment to make on what effect, if this legislation is passed, it would have upon the administration of the commonwealth taxation system, given that the ATO is involved. You do not have to make comment on that; you can pass if you like.

Ms Butler: I do not think that I can make a comment on that.

The CHAIR: On behalf of the committee I would like to thank you all very much for coming in. It has been very informative and very good of you to appear before us. If there are any other questions, I am sure you would be very happy to answer them.

Hearing concluded at 1.13 pm

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