



Law Council
OF AUSTRALIA

Business Law Section

The State Solicitor
Level 16, Westralia Square
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PERTH WA 6000
Via email: p.evans@ss0.wa.gov.au

16 June 2015

Attention: Paul Evans

Dear Sir,

Bell Group of Companies (Finalisation of Matters and Distributions of Proceeds) Bill 2015

1. I refer to the WA State Government's recently announced Bell Group Companies (Finalisation of Matters and Distribution Proceeds) Bill 2015 (**Bell Legislation**).
2. This letter has been prepared jointly by the Corporations Committee and the Insolvency and Reconstruction Law Committee of the Business Law Section of the Law Council of Australia (**BLS**).
3. Representatives of the BLS who attended the meeting at your offices with yourself and representatives of the Insurance Commission of Western Australia (**ICWA**) have asked me to express their thanks for that meeting. That meeting provided the BLS representatives attending with a practical insight to the background leading up to the introduction of the Bell Legislation. In particular, it provided the BLS representatives with an understanding of the various matters of particular concern to ICWA, which have led to ICWA to seek to have the Bell Legislation prepared and introduced to the WA Parliament.
4. I refer to the comments made by the Law Society of Western Australia in its letter to the State Treasurer dated 3 June 2015, and also the statements made by the WA Bar Association and the Australian Bar Association in their joint media release dated 3 June 2015, both raising serious concerns in relation to the Bell Legislation. The BLS shares those concerns and endorses the comments made by the Law Society of Western Australia and the WA Bar Association and the Australian Bar Association in those communications.
5. The BLS would also like to comment regarding the timing of the introduction of the legislation. The BLS acknowledges that the Bell Group litigation, involving two major banking groups who brought proceedings against the liquidator for a period

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of approximately 16 years, did indeed involve complex legal issues and resulted in protracted litigation. However, the particular circumstances that the Bell Legislation seeks to address do not concern those parties, or those proceedings.

6. The BLS understand that:

- (a) the \$1.7 billion arising from the litigation settlement was paid into the liquidator's account on 27 June 2014;
- (b) subsequently, debate arose amongst the remaining major creditors regarding the proper distribution of those funds according to the law;
- (c) ICWA has commenced proceedings seeking orders in relation to the construction and operation of the funding agreements.

These matters have apparently occurred within a nine month period and the proceedings referred to above are still in progress. It does not seem to the BLS, as observers of the proceedings, that the current matters that are at issue between the funding creditors and that are before the Courts are so exceptional as to give rise to a need for legislation as extraordinary as the Bell Legislation (and creating a dangerous precedent for future and other governments to cite).

It is concerning to the BLS that the Bell Legislation, as a template, provides for the expropriation of the property by, and to, the State. Further, it provides for the voiding of private contracts in circumstances where one of the parties to the contracts is, in effect, the State itself. On the face of it and, as a precedent, this template could be used in any legal proceedings (actual or potential) involving the State, or any State body. This squarely raises rule of law and sovereign risk concerns and potentially adversely affects the reputation of Western Australia as a jurisdiction where the State observes and respects private contractual and proprietary rights. The BLS notes your position that there is a sovereign risk associated with a failure to have a system that allows a timely resolution of disputes. Nonetheless, for the reasons outlined in this letter, the BLS is concerned that the Bell Legislation, in its current form, raises serious sovereign risk issues.

The Bell Legislation, by its nature, undermines confidence in the judicial process by removing the matter from the courts and the arbitral process. It is an attack on the separation of powers and the rule of law by putting matters that are being dealt with by the courts into the hands of the executive and to compound the concern, putting a matter in the hands of the executive when one of the parties is in effect the State of Western Australia. The Crown (legislative, executive and judiciary are the 'source and fountain of justice') and the 'State', as party to litigation, should act with complete propriety, fairly and in accordance with the highest ethical standards.

7. The BLS also asks whether options other than the Bell legislation in its current form have been considered. For instance rather than a model which involves expropriation, is it possible to use a model which would give finality to future proceedings by giving legislative force (should that be necessary) to an agreement between the parties and preventing future claims? For example:

- (a) Is it possible to delay introducing the legislation to see if an agreement between the parties can be reached, following which there could be legislation to give effect to that agreement and impose a time limit on bringing claims in Western Australia?
 - (b) Has consideration been given to the possibility of implementing a deed (or deeds) of company arrangement approved by a majority of creditors which could determine the distribution of the available funds and provide for the release of all residual claims? If extending the application of the provisions of Part 5.3A of the Corporations Act 2001 (Cth) to a pre-1993 winding up is an issue, the BLS does not oppose, in principle, the application of post-1993 insolvency law to facilitate a resolution of the matters in issue.
8. As a Section of the Law Council of Australia, the BLS evaluates proposed government legislation based on the Law Council's Policy Statement on Rule of Law Principles¹. The BLS is concerned that the Bell Legislation represents a significant departure from those Rule of Law Principles in a number of respects. I refer you in particular to the following provisions from the relevant Policy Statement:
- (a) *Principal 1a – Legislative Provisions which create criminal or civil penalties should not be retrospective in their operation* – The Bell Legislation contains serious criminal penalties, notably the proposed sections 47 to 49, which are deemed under sub-section 2(2) to have come into operation on the day before the Bell Legislation was introduced to the Legislative Assembly;
 - (b) *Principal 1b – The intended scope and operation of offence provisions should be unambiguous and key terms should be defined. Offence provisions should not be so broadly drafted that they inadvertently capture a wide range of benign conduct and are thus overly dependent on policy and prosecutorial discretion to determine, in practice what type of conduct should or should not be subject to sanction* – I refer to the concerns raised at paragraph 9 below in relation to the proposed section 47;
 - (c) *Principal 2a – Everyone is entitled to equal protection before the law and no one should be conferred with special privileges* – in removing the matter from the courts, the Bell Legislation potentially has the effect of advancing the position of ICWA (in effect, the position of the State) at the expense of the other creditors;
 - (d) *Principal 6b – The use of executive power should be subject to meaningful parliamentary and judicial oversight, particularlypowers to seize property.... Mechanisms should be in place to safeguard against misuse or overuse of executive powers* – The Bell Legislation expropriates property and voids all existing funding arrangements between the liquidator and the various other parties. The BLS notes that, in reliance upon those funding

¹ See <http://www.lawcouncil.asn.au/lawcouncil/imaLCAges/-PDF/a-z-docs/PolicyStatementRuleofLaw.pdf>

arrangements, the parties have paid large amounts to support the litigation, enabling the liquidator to recover a fund of \$1.7 billion. Those contracts are, by the terms of the Bell Legislation, to be avoided and replaced by the unfettered discretion of the Administrator. By virtue of the proposed section 67, there are no rights of review;

- (e) *Principal 6d – Executive decision making should comply with the principles and natural justice and be subject to meaningful judicial review –* By virtue of the proposed section 67, there are no rights of judicial review and the rules of natural justice are expressly excluded.

9. I understand that when representatives of the BLS met with you on the 25th May 2015, they raised with you concerns which had been expressed by various committee members with regard to the content of section 47 of the Bell Legislation in particular. The concern is that broad drafting of this section could potentially capture activities which are expected as ordinary and legitimate expression of free speech in our democracy, such as, for example:

- (a) the preparation or signing of any petition to the Parliament urging that the Bell Legislation not be passed;
- (b) briefing the media to write or speak about the implementation of the Bell Legislation;
- (c) lobbying members of parliament to oppose or not to vote for the Bill;
- (d) lobbying members of parliament to seek amendments to the Bill;
- (e) lobbying the State Government not to introduce the Bell Legislation into the Parliament or the Opposition to speak against the passing of the Bell Legislation, or aspects of it.

I understand from your response given at that meeting that it is your position that the reference in section 47 to the “*operation of the Act or the achievement of its objects*” is intended to be interpreted as a reference only to distribution of the fund in accordance with the Bell Legislation. The BLS considers that the current wording of the proposed section 47 has the potential to go much further than this intention and formally requests that your consideration be given to a proposed amendment to expressly preserve a right of free speech in relation to the Bell Legislation.

10. The BLS understands that the Bell Legislation has been drafted with a view to addressing what are considered to be extraordinary and exceptional circumstances. Without expressing a view on this matter, the BLS notes that an opportunity to make the extraordinary and exceptional nature of the Bell Legislation known in the form of the legislation itself, the explanatory memorandum or the (partially heard) second reading speech has not been made. It cannot be assumed that parties examining the legislation in force or contemplated in the Western Australian jurisdiction will be familiar with the particular circumstances that gave rise to this legislation. Indeed, the length of time which has elapsed

within the State since the “*WA Inc*” events may mean that many persons resident within the State do not have any detailed personal knowledge of the same.

11. The BLS considers it important to mitigate any damage to the reputation of the jurisdiction that the Bell Legislation has the potential to cause from a sovereign risk perspective. The BLS therefore requests, should the State Government decide to proceed with the Bell Legislation, that a revised explanatory memorandum be issued and that the balance of the second reading speech clearly articulates that the Bell Legislation is unique and has been introduced solely for the purposes of addressing the particular circumstances in question. In particular, the point needs to be clearly made that it is not intended to form a model for any future legislation.
12. If you wish to discuss any aspect of this letter with the BLS, please do not hesitate to contact the Chair of the Corporations Committee, Bruce Cowley, on 07 3119 6213 or via email: bruce.cowley@minterellison.com or the Chair of the Insolvency and Reconstruction Law Committee, Michael Lhuede, on 03 8665 5506 or via email: mlhuede@piperalderman.com.au.

Yours faithfully,



John Keeves, Chairman
Business Law Section

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