

3 June 2015

Hon Dr Mike Nahan MLA
Treasurer
13th Floor, Dumas House
2 Havelock Street
WEST PERTH WA 6005

Dear Treasurer

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

I write regarding the Government's recently announced *Bell Group Companies (Finalisation Of Matters And Distribution Proceeds) Bill 2015 (Bell Legislation)*.

The Law Society wishes to record its concern with some of the key aspects of the Bell Legislation for the following reasons.

1. The rights of the remaining Bell Group creditors exist under an established legal regime, which is capable of resolving the disputes between them. The Bell Group creditors have also organised their affairs in accordance with that regime. It would be contrary to the Rule of Law for legislation such as the proposed Bell Legislation to trammel those existing rights.
2. While the Government considers the circumstances of the Bell Group litigation justify the approach it has adopted with the Bell Legislation, the Society opposes any law that removes or compulsorily acquires a person's property or commercial rights without just compensation. Government action and legislation that has this result is unjust.
3. The legislation provides that the Authority that it establishes may seek advice from the State Solicitor. The State Solicitor is also the advisor to the Insurance Commission of Western Australia as creditor and the State Government in seeking to implement the Bell Legislation. The Society considers this approach places the State Solicitor in a position of an actual conflict of interest. These arrangements should be re-assessed.
4. The Society has always opposed and in the case of the Bell Legislation continues to oppose the creation of criminal offences with retrospective operation. In this regard, the Bell Legislation is contrary to the Rule of Law and the requirement that a person be able to ascertain the law that applies to them at any given time and not be punished for conduct that they could not have known was criminal at the time of undertaking such conduct. I draw your attention to the Law Council of Australia's *Rule of Law Principles* policy

statement¹ and note the Commonwealth's prohibition on the creation of retrospective offences.²

While the retrospectivity may only apply from the time at which the Bell Legislation was introduced into Parliament, this does not provide sufficient notice to those it may affect. Nor is it consistent with the above propositions to rely upon a mere introduction of the Bell Legislation into Parliament, where such legislation may never be enacted or at least not enacted in the form as it was introduced.

5. The Society does not, in any event, consider there is sufficient justification for legislation of this type to provide criminal sanction for conduct that is contrary to the Bell Legislation. The use of criminal sanction for such commercial issues between creditors is particularly punitive, especially where the matters involved have arisen over the decades prior to the proposed introduction of such criminalisation. This is particularly so where the State Government is, in effect, one of those creditors.

Ultimately, the Society considers the Bell Legislation is objectionable and has the potential to seriously damage the reputation of the State as a jurisdiction which is free of sovereign risk. The Society urges the State Government to withdraw it and allow the division of the proceeds of the Bell litigation to be undertaken according to existing and established law.

Finally, the Law Society is concerned by your characterisation in the press of the litigation around the Bell Group as a "feeding frenzy for lawyers", sentiments that you repeated during a radio interview. Such comments imply that in some way, the legal practitioners involved have not only unnecessarily prolonged such litigation but also that they have done so for their own benefit rather than in the interests of their clients.

Legal practitioners will and should always work to protect the legitimate rights of their clients. The Society has no reason to believe that the lawyers involved in the Bell Group litigation have done anything other than appropriately work to protect their client's interests, while always having proper regard for their obligations to the Court.

¹ See <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/PolicyStatementRuleofLaw.pdf>. The Law Society of Western Australia is a constituent member and I am a director of the Law Council of Australia.

² See <https://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSectorGuidanceSheets/Pages/Prohibitiononretrospectivecriminallaws.aspx>

As such, the Society is concerned that your comments serve to undermine the public's confidence in the legal profession and as such the administration of justice in this State. For these reasons, your comments are regrettable.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'M Keogh', written in a cursive style.

Matthew Keogh
President

cc: The Hon Michael Mischin MLC
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