

Chapter 2

Key issues

2.1 During the course of this inquiry the committee obtained information which indicates that the Attorney-General, Senator the Hon George Brandis, was considering issuing a direction to the Australian Taxation Office (ATO) which would prevent the ATO from intervening in the constitutional challenge in the High Court concerning the *Bell Group of Companies (Finalisation of Matters and Distribution of Proceeds) Act 2015 (WA)* (Bell Act). The committee's interim report noted information provided by the ATO that the Commonwealth is entitled to significant funds, in the order of at least several hundred million dollars, from the liquidation of the Bell Group of companies (Bell Group).¹ Had the High Court not struck down the Bell Act, the Australian government may have forfeited these funds to the Western Australian government; a significant loss to Commonwealth taxpayers.

Discussion between Commonwealth and Western Australian governments

2.2 One of the key issues of concern for this inquiry is whether there was any collusion over potential revenue from the Bell Group insolvency process between the Commonwealth and Western Australian governments that occurred before the introduction of the Bell Act into the Western Australian Parliament on 6 May 2015.

2.3 As noted in the committee's interim report, in April 2015 there was communication on the matter between the then-Western Australian and Commonwealth Treasurers, the Hon Dr Mike Nahan MLA and the Hon Mr Joe Hockey MP respectively. This communication seems to indicate there may have been a willingness from the Commonwealth to look favourably on the proposed Bell Act.

2.4 On 13 April 2015, Dr Nahan wrote a letter to Mr Hockey, following up a conversation that they had on the Bell Group matter. In this letter, Dr Nahan clearly indicated that the proposed Bell Act would 'displace certain provisions of the [Commonwealth's] Corporations Act'. The letter concluded:

I trust that our discussion and this letter have conveyed to you the narrow and unique circumstances driving the Western Australian Government to introduce the planned legislation. I also trust that you would therefore see no need for the Commonwealth to contest the legislation we plan to introduce into the Western Australian Parliament.²

2.5 Mr Hockey replied to this letter on 29 April 2017, acknowledging that the proposed legislation would displace Commonwealth legislation, should it be passed,

1 Legal and Constitutional Affairs References Committee, *Nature and scope of any agreement reached by the Commonwealth and Western Australian governments in relation to the distribution of proceeds of the liquidation of, and litigation concerning, the Bell Group of companies (the proceeds): Interim report*, 22 March 2017, pp. 15–16.

2 The Hon Dr Mike Nahan, Treasurer of Western Australia to the Hon Mr Joe Hockey MP, Treasurer, Letter of 29 April 2016, p. 2.

and noting that this should not set a precedent for states to undermine the existing Commonwealth framework:

Australia's corporate law, including the Corporations Act 2001, is dependent on a referral of power from each of the States in the federation. As you note in your letter, that legislation provides a mechanism for the States to retain their rights to make laws in relation to corporate law matters, even where those laws conflict with the Corporations Act.

The Western Australian Government is choosing to exercise its right to displace the Corporations Act in this instance given the unprecedented circumstances of the long running Bell Group liquidation. I note this should not be seen as a precedent for future actions which may undermine the national corporations scheme.³

2.6 Importantly, the letter failed to challenge the validity of the proposed legislation and did not express concern about the impact of it on Commonwealth taxpayers.

2.7 Additionally, Dr Nahan told the Western Australian Parliament on 25 November 2015, just before the Bell Act was passed, that he was confident the Commonwealth would not contest the legislation, which suggests that he had understood an agreement had been reached on the matter:

I do not think there is any indication from the Australian Taxation Office that it plans to do so. Its focus so far has been to get what it perceives as its fair share...The ATO has not said anything about a constitutional challenge...⁴

2.8 The Attorney-General has stated that he only became involved in the Bell matter on 3 March 2016, just days before the ATO intervened in the matter on 8 March 2016, as his 'office had been dealing with the matter prior to that time'.⁵ However, the former Western Australian Attorney-General, the Hon Michael Mischin MP, has stated that he had directly spoken about the Bell Act with Senator Brandis in early February 2016.⁶ That directly contradicted the statement that Senator Brandis made to the Senate on 28 November 2016. Senator Brandis has claimed that he cannot recall any such conversation:

At the time I made my 28 November statement, I had no recollection of the exchange to which Mr Mischin refers. I still have no recollection of it. Were I to say that I recall such an exchange, I would be misleading the

3 The Hon Joe Hockey MP, Treasurer of Australia, to the Hon Dr Mike Nahan, Treasurer of Western Australia, Letter of 29 April 2016, p.1.

4 *West Australian Assembly Hansard*, 25 November 2015, p. 8965.

5 Senator the Hon George Brandis, Attorney-General, *Senate Hansard No. 6, 2016*, 28 November 2016, p. 3325.

6 Shane Wright, 'George Brandis denies misleading Senate about phone call with WA Attorney-General', *The West Australian*, 1 March 2017, <https://thewest.com.au/politics/federal-politics/george-brandis-denies-misleading-senate-about-phonecall-with-wa-attorney-general-ng-b88401444z> (accessed 14 March 2017).

Senate, because I do not... That said, I do not dispute what Mr Mischin says. I am not in a position to do so, because I do not recall the exchange. I do not say that it did not happen. I merely say that I do not recall it.⁷

2.9 The Attorney-General has stated that he was not aware of any collusion between Dr Nahan and Mr Hockey concerning the Commonwealth forgoing revenue from the Bell liquidation, even though he was aware of their letters of April 2015.⁸ Even so, he conceded that in discussions with his office in early March, he did not completely discount the possibility that Mr Hockey had made an undertaking to the Western Australian government to not oppose the Bell Act:

I would have discussed with my office what the consequences would be if it looked as if, as a result of Mr Hockey's discussions with Dr Nahan, somehow the Commonwealth had given an undertaking not to oppose the Bell Act, which is what Dr Nahan and Mr Mischin were saying effectively, and we did discuss what the consequences might be and what should happen then.⁹

2.10 In this evidence, it seems that the Attorney-General was not only canvassing with his office any potential consequences of a possible collusion between Mr Hockey and Dr Nahan for the Commonwealth to forego revenue from the Bell matter, but also acknowledging that there was a clear perception that such a deal had been undertaken by senior Western Australian ministers, including his state counterpart Attorney-General, Mr Mischin.

2.11 The Commonwealth has a large revenue stake in the settlement of the Bell matter, at least several hundred million dollars. Any consideration of making a deal with Western Australia to forego this revenue would be a most serious matter. The committee remains concerned that the Western Australian government clearly understood that there was such a deal and that the Attorney-General has no recollection of conversations with his counterpart about legislation that could have considerably depleted Commonwealth revenues.

2.12 The questionable nature of any such deal is also demonstrated by the submission which was ultimately made by the Solicitor-General to the High Court:

The basic problem is that the drafter of the Bell Act has either forgotten the existence of the Tax Legislation, or decided to proceed blithely in disregard of its existence. No mechanism has been provided for in the Bell Act to allow for the continued operation or paramountcy of the Tax Legislation.¹⁰

7 Senate Legal and Constitutional Affairs Legislation Committee, *Senate Estimates Hansard*, 28 February 2017, p. 105.

8 Senator the Hon George Brandis, Attorney-General, *Senate Hansard No. 6, 2016*, 28 November 2016, p. 3328.

9 Senator the Hon George Brandis, Attorney-General, *Committee Hansard*, 8 March 2017, p. 22.

10 Bell Group N.V. (In Liquidation) ARBN 073 576 502 & Anor v. State of Western Australia, S248/2015, Federal Commissioner of Taxation seeking leave to intervene, proposed written submission, at [54], http://www.hcourt.gov.au/assets/cases/s248-2015/Bell-Group_CoT-Subs.pdf.

2.13 The constitutionality of the Bell Act was not simply questionable, the legislation had complete disregard for Commonwealth laws. It is therefore difficult to conceive a scenario where the Western Australian government would draft such legislation, with no regard to the Constitution, unless it was clear that there was a deal where the Attorney-General, the only person with capacity to intervene on constitutional grounds, would pay no regard to such inconsistencies.

Possible direction by the Attorney-General for the ATO to not intervene

2.14 On 8 March 2016 the ATO filed an application seeking leave to intervene in the High Court proceedings relating to the validity of the Bell Act.¹¹ The ATO explained that the decision to intervene in the High Court proceedings was an independent decision of the ATO which did not require the approval from any Minister, however the ATO did inform relevant Ministers of its intention to intervene in the proceedings.¹²

2.15 The committee was advised by the ATO that they heard rumours that the Attorney-General was considering issuing a direction which would prevent them from intervening in the High Court proceedings.

We had no knowledge of any proposed Attorney-General direction, but we did hear—and I think I have given this evidence before—bureaucratic whispers that led to speculation on our part that maybe such a direction was being considered. If that were the case—and this was in the days leading up to us having to file our application for leave to intervene—then we were concerned, were such a direction being considered (of which, as I say, we had no direct knowledge; it was merely rumours flying around) that we really should be in a position to know how we should respond in that situation. So we began to seek whether it was possible to obtain advice in relation to that.¹³

2.16 The committee was advised that the direction being contemplated was under the *Judiciary Act 1903* (Cth) (Judiciary Act) and that it was either the Attorney-General, the Attorney-General's Department (AGD) or the Attorney-General's office considering issuing the direction.¹⁴

2.17 The ATO noted that on 4 March 2016 they sought permission from the AGD to obtain advice from the Solicitor-General concerning the ATO's options should such

11 Mr Andrew Mills, Second Commissioner, Law Design and Practice, Australian Taxation Office, *Proof Committee Hansard*, 27 March 2017, p. 2.

12 Mr Andrew Mills, Second Commissioner, Law Design and Practice, Australian Taxation Office, *Proof Committee Hansard*, 27 March 2017, p. 2.

13 Mr Andrew Mills, Second Commissioner, Law Design and Practice, Australian Taxation Office, *Proof Committee Hansard*, 27 March 2017, p. 4.

14 Mr Robert Puckridge, Assistant Commissioner, Tax Counsel Network, Australian Taxation Office, *Proof Committee Hansard*, 27 March 2017, p. 6.

a direction be issued.¹⁵ The document received confirms that the advice sought was in relation to the ATO's options if the Attorney-General sought to prevent it from intervening in the Bell litigation. The ATO stated that it received an email from the AGD that it had referred the ATO's request to the office of the counsel assisting the Solicitor-General but that advice was not obtained.¹⁶ The ATO clarified that on 8 March 2016 it withdrew its request for legal advice because the Attorney-General contacted Mr Mills directly, in an 'unusual conversation', to inform him that he had no intention of issuing such a direction.¹⁷

2.18 Documents obtained through a freedom of information (FOI) request indicate that on 29 November 2016 at 8.13 am, an email was sent from Mr Andrew Mills, Second Commissioner of the ATO, to the Minister for Revenue and Financial Services, the Hon Kelly O'Dwyer, that refers to an email attachment: 'in light of the email we identified overnight (attached)'.¹⁸ Subsequently, on the same day at 8.27 am Mr Mills sent an email where it appears that a document was attached titled 'FW: Possible Attorney-General's direction under the Judiciary Act [DML=Sensitive: Legal]'.¹⁹

2.19 When asked by the committee whether it was possible to obtain the attached document, the ATO noted that the Senate had ordered for the document to be produced and that they were in the process of considering that order.²⁰ As outlined below, the ATO has now responded to that order and provided a copy of that document, which can be found on the committee's website.²¹

Consultation between the Attorney-General and Solicitor-General

2.20 In addition to evidence that the Attorney-General may have been considering taking steps to stop the ATO from intervening in the Bell litigation, the Attorney-General showed strong resistance to personally intervening on behalf of the Commonwealth.

15 Mr Robert Puckridge, Assistant Commissioner, Tax Counsel Network, Australian Taxation Office, *Proof Committee Hansard*, 27 March 2017, p. 7. See also additional information, freedom of information documents, Australian Taxation Office (received 19 June 2017).

16 Mr Andrew Mills, Second Commissioner, Law Design and Practice, Australian Taxation Office, *Proof Committee Hansard*, 27 March 2017, p. 9.

17 Mr Andrew Mills, Second Commissioner, Law Design and Practice, Australian Taxation Office, *Proof Committee Hansard*, 27 March 2017, p. 10.

18 Australian Taxation Office, Freedom of information documents (received 22 March 2017), p. 53.

19 Australian Taxation Office, Freedom of information documents (received 22 March 2017), p. 53.

20 Mr Jonathan Todd, General Counsel, Australian Taxation Office, *Proof Committee Hansard*, 27 March 2017, p. 15.

21 Additional information, freedom of information documents, Australian Taxation Office (received 19 June 2017).

2.21 The committee's interim report contains a lengthy discussion regarding evidence that showed the Attorney-General was personally loath to intervene in the Bell litigation and by the Attorney-General's own admission, the Solicitor-General was required to express his strong view that the Commonwealth should intervene before the Attorney-General accepted his advice and gave notice of intervention.

2.22 Consultation between the Attorney-General and the Solicitor-General at or around that date of the Bell litigation was the subject of a previous inquiry by this committee: *Nature and scope of the consultations prior to the making of the Legal Services Amendment (Solicitor-General Opinions) Direction 2016* (the Solicitor-General inquiry).

2.23 The events, including those relating to the Bell litigation, which preceded the Solicitor-General's announcement of his resignation on 24 October 2016, can be summarised as follows:

- (a) The Bell Act was passed by the Parliament of Western Australia on 26 November 2015.
- (b) The Attorney-General claimed that he 'consulted' the Solicitor-General at a meeting on 30 November 2015 about the issuance of the *Legal Services Amendment (Solicitor-General Opinions) Direction 2016* (the direction).
- (c) The Solicitor-General denies that consultation took place, and instead that any consultation referred to by the Attorney-General which took place on 30 November 2015 related to the issuance of a Guidance Note only, not a legally binding instrument.
- (d) On or around the 4 March 2016, rumours of a possible direction preventing Commonwealth departments from intervening in High Court proceedings, led the ATO to seek permission from the AGD to obtain advice from the Solicitor-General concerning the ATO's options in the Bell litigation should such a direction be issued.
- (e) On the 8 March 2016, the Attorney-General informed the ATO that no such direction was being prepared. On the same day the Commonwealth via the ATO intervened in the Bell litigation.
- (f) On 23 March 2016, the Solicitor-General met with the Attorney-General, the Secretary of the Department, and the Australian Government Solicitor, about matters unrelated to the direction, and the Attorney-General told the Solicitor-General that he would respond to the Solicitor-General's proposed Guidance Note revisions immediately after Easter. The Solicitor-General did not receive a response.
- (g) On 30 March 2016, the Commonwealth intervened in the High Court, following conversations between the Attorney-General and the Solicitor-General, where the Solicitor General put forward his strong view that the Attorney-General should personally intervene in the Bell litigation.

- (h) In late April 2016, the Attorney-General decided that a new direction, in addition to the Guidance Note, was necessary to address the issues that had supposedly been raised by the Solicitor-General.
- (i) On 4 May 2016, the new direction and Guidance Note were issued.²²

2.24 The above summary provides a fuller picture, which was not available to the committee during the Solicitor-General inquiry. The committee considers that it is open to infer, from the proximity of the discussions about intervention in the Bell litigation, that the direction issued by the Attorney-General was a consequence of the ATO's intervention in the Bell litigation; the Solicitor-General's provision of assistance to the ATO; and the Solicitor-General's strong view that the Attorney-General ought to also intervene in the Bell litigation. In short, it is apparent to the committee that it is highly likely that the Attorney-General issued the direction to constrain the Solicitor-General's independence in advising on controversial litigation.

Order for the production of documents

2.25 On 27 March 2017, the Senate made orders for the production of documents. The first order was that the Attorney-General be required to provide to the committee by noon 7 April 2017, the following documents:

- (a) correspondence between the Attorney-General and Ms O'Dwyer in March and April 2016;
- (b) a letter from the former Solicitor-General, Mr Justin Gleeson, to the Attorney-General regarding the High Court proceedings in the Bell matter, dated 15 March 2016;
- (c) the email chain between the offices of the Solicitor-General and Attorney-General entitled 'Bell—Commissioner of Taxation request for advice from the Solicitor-General—referral to Counsel Assisting the Solicitor-General [SEC=PROTECTED, DLM=Sensitive: Legal]', dated 6 and 7 March 2016; and
- (d) the submission from the Attorney-General's Department to the Attorney-General's office on the question of intervention in the Bell matter, dated 28 January 2016.²³

2.26 The second order, as noted by the ATO at the hearing on 27 March 2017 was:

That the Minister representing the Minister for Revenue and Financial Services be required to provide to the Legal and Constitutional Affairs References Committee, by no later than noon on 7 April 2017, the document relating to the Bell Group liquidation and the Bell Act entitled 'FW: Possible Attorney-General's direction under the Judiciary Act

22 Legal and Constitutional Affairs References Committee, *Nature and scope of the consultations prior to the making of the Legal Services Amendment (Solicitor-General Opinions) Direction 2016*, 8 November 2016.

23 *Senate Official Hansard*, No. 4, 2017, 27 March 2017, p. 2257.

[DLM=Sensitive: Legal]', which was attached to an email between officers of the Australian Taxation Office, dated 29 November 2016.²⁴

2.27 In response to the second order for the production of documents the Minister for Finance, Senator the Hon Mathias Cormann, tabled in the Senate a letter dated 31 March 2017 stating:

I am informed by the Minister for Revenue and Financial Services that neither the Minister, nor her office, have received a document entitled 'FW: Possible Attorney-General's direction under the Judiciary Act [DLM=Sensitive: Legal]'. As such, I am unable to provide it to the Legal and Constitutional Affairs References Committee.²⁵

2.28 On 15 June 2017, the committee wrote to the Commissioner for Taxation, Mr Chris Jordan AO, and again sought for the attached documents in the emails of 29 November 2016 at 8:13 am and 8:27 am, to be provided to the committee by 10:00 am on 19 June 2017.²⁶ In response to the request, the ATO provided information which confirms that it initiated a request for advice from the Solicitor-General concerning the legal obligations of the Commissioner of Taxation if the Attorney-General was to give directions under the Judiciary Act preventing the Commissioner from intervening. At the public hearing on 27 March 2017, the ATO confirmed that this advice was never obtained.²⁷

2.29 From the information available to the committee, it appears that the Attorney-General has not complied with the Senate's order of 27 March 2017 for the production of documents. The committee notes that on 23 March 2017 and 30 March 2017 the Attorney-General made claims of public interest immunity. However the committee notes that the claim made on 23 March 2017 was in relation to questions taken on notice during a public hearing on 8 March 2017,²⁸ and the claim made on 30 March 2017 related to questions put to the Attorney-General in the Senate Chamber on 30 March 2017.²⁹ It appears that the Attorney-General has not specifically addressed the Senate's order of 27 March 2017 to produce documents.

2.30 The committee notes that *Odgers' Australian Senate Practice* clearly states the importance of complying with an order of the Senate to produce documents:

Orders for production of documents are among the most significant procedures available to the Senate to deal with matters of public interest

24 *Senate Official Hansard*, No. 4, 2017, 27 March 2017, p. 2258.

25 Letter to the President of the Senate from the Minister for Finance (Senator Cormann), responding to the order of the Senate of 27 March 2017 (received 3 April 2017), p. 1.

26 Committee correspondence to the Australian Taxation Office, (sent 15 June 2017).

27 Mr Robert Puckridge, Assistant Commissioner, Tax Counsel Network, Australian Taxation Office, *Proof Committee Hansard*, 27 March 2017, p. 7.

28 Office of the Attorney-General answers to questions on notice from hearing 8 March 2017 (received 23 March 2017), pp. 2–3.

29 Senator the Hon George Brandis, Attorney-General, *Senate Hansard*, No. 4, 2017, 30 March 2017, p. 4.

giving rise to questions of ministerial accountability or the accountability of statutory bodies or officers.³⁰

2.31 The committee is also concerned with the government's record of complying with the Senate's orders to produce documents. The committee notes that between 2013 and 2016 the government's compliance with orders to produce documents was 19.7 per cent.³¹ This is compared to a compliance rate of 35.8 per cent in the previous three years, between 2010 and 2013.³²

Motion of the Senate

2.32 On 28 March 2017, the Senate noted the failure of the Attorney-General to provide answers to many questions concerning this inquiry and ordered the Attorney-General to appear before the Senate on 30 March 2017 to allow questions to be put and an explanation provided by the Attorney-General.³³ The motion stated the following:

(1) The Senate notes:

(a) the failure of the Attorney-General and officers of the Attorney-General's Department to provide any responses to many of the questions asked in the Legal and Constitutional Affairs References Committee inquiry into the nature and scope of any agreement reached by the Commonwealth and Western Australian governments in relation to the distribution of proceeds of the liquidation of, and litigation concerning, the Bell Group of companies (the proceeds);

(b) answers to these questions would enable clear facts to be established regarding the Commonwealth's actions, and give the public confidence the Commonwealth is acting consistent with its constitutional responsibilities and protecting its position with the states; and

(c) the failure to provide answers has significantly compromised the ability of the committee to fulfil the terms of reference of the inquiry.

(2) The Senate requires the Attorney-General, by 12.45 pm on 29 March 2017, to provide answers to the committee to questions taken on notice by him or officers of the Attorney-General's Department, listed in Appendix 1 of the committee's interim report tabled in the Senate on 22 March 2017, or alternatively make a substantive claim of public interest immunity that is acceptable to the Senate.

30 Harry Evans and Rosemary Laing, eds, *Odgers' Australian Senate Practice*, 14th Edition, Department of the Senate, 2016, p. 588.

31 Harry Evans and Rosemary Laing, eds, *Odgers' Australian Senate Practice*, 14th Edition, Department of the Senate, 2016, p. 581.

32 Harry Evans and Rosemary Laing, eds, *Odgers' Australian Senate Practice*, 14th Edition, Department of the Senate, 2016, p. 581.

33 *Senate Official Hansard*, No. 4, 2017, 28 March 2017, pp. 2406–2407.

(3) The committee report to the Senate on the Attorney-General's compliance with this resolution on 29 March 2017.³⁴

(4) The Senate requires that the Attorney-General be in the Senate at 9.30 am on 30 March 2017, so that a senator may ask the Attorney-General for an explanation in connection with his actions on this matter, and at the conclusion of the explanation any senator may move a motion to take note of the explanation; or if the Attorney-General fails to provide an explanation, any senator may move to take note of his failure to do so.³⁵

2.33 As required by the motion, the Attorney-General appeared before the Senate on 30 March 2017 and a number of questions were put to the Attorney-General by the committee. The questions taken on notice by the Attorney-General on this day were:

Firstly, Attorney, are you aware that the ATO sought legal advice on their position should you issue a direction that they not intervene in the Bell matter in the High Court? When did you become aware of this? What, if anything, did you or any of your staff do after you became aware of that?³⁶

2.34 The committee is not aware of the Attorney-General providing an answer to the above question. The committee additionally notes that the Attorney-General made claims of public interest immunity in relation to numerous questions. This will be discussed in greater detail below.

Failure to provide information in a timely manner

2.35 Throughout this inquiry a significant number of questions were taken on notice by the Attorney-General and the AGD where late responses were received. Because of this, this inquiry has been obstructed by the Attorney-General's failure to provide responses to questions in a timely manner. Due to the lack of information provided by the Attorney-General, the committee tabled an interim report on 22 March 2017 which made the following recommendations:

Recommendation 1

That the Senate reaffirm its commitment to the principles of ministerial responsibility and accountability regarding the answering of questions and provision information to the Senate and its committees in accordance with the standing orders and other orders of continuing effect, and notes that all senators, including ministers, are responsible and accountable to the Senate.

Recommendation 2

That the committee asks the Senate to insist that the Attorney-General respond to the committee's questions, noting the failure of the Attorney-General and officers of the Attorney-General's Department to provide responses to many of the questions that would enable clear facts to

34 *Senate Official Hansard*, No. 4, 2017, 28 March 2017, p. 2407.

35 *Senate Official Hansard*, No. 4, 2017, 28 March 2017, pp. 2406–2407.

36 Senator Nick McKim, *Senate Hansard*, No. 4, 2017, 30 March 2017, p. 2698.

be established regarding the Commonwealth's actions relevant to this inquiry.³⁷

2.36 As an example of the Attorney-General's disregard for the processes of Senate committees, the table below outlines the late responses provided by the Attorney-General and the AGD:

Department/office	Hearing date	Answers due	Answers provided
Attorney-General's Department	7 December 2016	21 December 2016	16 February 2017
Attorney-General's Department	17 February 2017	3 March 2017	24 March 2017
Office of the Attorney-General	8 March 2017	15 March 2017	23 March 2017 & 29 March 2017

2.37 At the hearing of 8 March 2017, the committee advised the Attorney-General that it was awaiting answers from the AGD in relation to questions it had taken on notice during the hearing of 17 February 2017 and that the reply date had passed. The Chair of the committee noted:

I understand [the AGD] wrote to us and advised us that those answers were sitting with you or your office.³⁸

2.38 In response, Senator Brandis replied that he would 'make sure those outstanding answers are provided in a timely fashion'.³⁹ However, the committee notes that answers to the questions were not provided to the committee until 24 March 2017, after the committee tabled its interim report. The committee notes its disappointment at the Attorney-General's apparent disregard for the committee's processes, and indeed for Senate processes more broadly.

Public interest immunity claim

2.39 In its interim report the committee discussed at some length the process for making a claim of public interest immunity, including legal advice to government not being an accepted ground.⁴⁰ At the time of tabling the interim report, the

37 Legal and Constitutional Affairs References Committee, *Nature and scope of any agreement reached by the Commonwealth and Western Australian governments in relation to the distribution of proceeds of the liquidation of, and litigation concerning, the Bell Group of companies (the proceeds): Interim report*, 22 March 2017, p. 23.

38 *Official Committee Hansard*, 8 March 2017, p. 23.

39 *Official Committee Hansard*, 8 March 2017, p. 23.

40 Legal and Constitutional Affairs References Committee, *Nature and scope of any agreement reached by the Commonwealth and Western Australian governments in relation to the distribution of proceeds of the liquidation of, and litigation concerning, the Bell Group of companies (the proceeds): Interim report*, 22 March 2017, pp. 19–22.

Attorney-General and the AGD had only implied that a claim of public interest immunity on the grounds of legal professional privilege might be made. The committee notes that a formal claim of public interest immunity was made by the Attorney-General on 23 March 2017 and again on 30 March 2017.

2.40 The information that was requested related to whether the Attorney-General was considering issuing a direction to the ATO to prevent it from joining the High Court proceedings. The committee reiterates that the effect of not joining the High Court proceedings may have resulted in the Commonwealth potentially forfeiting several hundred million dollars to the Western Australian government. Some examples of the questions asked during the public hearing on 17 February 2017, where a claim of public interest immunity was later made, are listed below:

Did the Attorney-General or his office at any point in the lead-up to 8 March express concern to you about reports or information that Commonwealth agencies such as the ATO were considering intervening of their own accord?

It is a fact, is it not, that on around 4 March the Attorney-General or his office asked you to draft a legal services direction that would prevent the ATO from intervening of its own accord?

It is a fact, is it not, that after you advised the ATO that they could not seek legal advice about the legality of this direction that would have stopped them intervening, that on or around 6 March 2016 the ATO made a formal request to your department through the Office of Legal Services Coordination.⁴¹

2.41 The Attorney-General asserts in his public interest immunity claim that:

...whether or not the Senate has accepted that matters pertaining to confidential legal advice to government are always and in all circumstances immune from disclosure is neither here nor there. The fact is that, in general, such matters are not disclosed. Plainly, as I acknowledged at the hearing, there may be exceptional circumstances in which to depart from that general practice. However, no such exception arises in the present context... the present case is one in which the potential harm of disclosure is particularly acute, and the grounds for non-disclosure thus particularly strong.⁴²

2.42 The Attorney-General goes on to say:

Applying those principles to this particular case, it is clear that the Committee's questions go to the heart of the Commonwealth's approach to constitutional litigation in the High Court. Disclosure of advice in this context would mean that in some of the sensitive litigation faced by the Commonwealth—constitutional litigation with a State—the

41 Senator Murry Watt, *Official Committee Hansard*, 17 February 2017, pp. 26–27.

42 Senator the Hon George Brandis, Attorney-General, answers provided to questions on notice from hearing of 8 March 2017 (received 23 March 2017), p. 2.

Commonwealth could no longer be assured that its dealings with its lawyers would remain confidential.⁴³

2.43 On 30 March 2017, following an order of the Senate requiring the Attorney-General to appear before the Senate to answer questions, the Attorney-General elaborated on his view about providing legal advice to Senate committees:

The requirement of *Odgers'*, which is one point of view about this, and not the only point of view, is that a public interest immunity claim be fully articulated.

...The question is what my obligations are, as a minister and as an Attorney, to protect the position of the Commonwealth in relation to its legal advice, and that is explained and set out in the answers that were given, which are embodied in the document I have just tabled.⁴⁴

2.44 In relation to claims of legal professional privilege, *Odgers'* states that:

It has never been accepted in the Senate, nor in any comparable representative assembly, that legal professional privilege provides grounds for a refusal of information in a parliamentary forum...It must be established that there is some particular harm to be apprehended by the disclosure of the information, such as prejudice to pending legal proceedings or to the Commonwealth's position in those proceedings.⁴⁵

2.45 The committee is not persuaded by the Attorney-General's claim of public interest immunity and is not convinced by the Attorney-General's argument that disclosure of the advice provided to government would constitute harm to the public interest.

2.46 The committee also notes the importance of holding Ministers and Senators to account, as stated in *Odgers'*:

All free systems of government need checks and balances against any excessive concentration of power and, so far as the Australian system is concerned, the Senate is the most important of the constitutional checks and balances, the more so because it is an elected institution.⁴⁶

2.47 The committee notes its disappointment that the Attorney-General has failed to properly understand his primary obligations to the Senate and its procedure and practice, which guarantees and supports government accountability.

43 Senator the Hon George Brandis, Attorney-General, answers provided to questions on notice from hearing of 8 March 2017 (received 23 March 2017), p. 2.

44 Senator the Hon George Brandis, Attorney-General, *Senate Hansard*, No. 4, 2017, 30 March 2017, p. 4.

45 Harry Evans and Rosemary Laing, eds, *Odgers' Australian Senate Practice*, 14th Edition, Department of the Senate, 2016, pp. 668–669.

46 Harry Evans and Rosemary Laing, eds, *Odgers' Australian Senate Practice*, 14th Edition, Department of the Senate, 2016, pp. 13–14.

Committee views and recommendations

2.48 The Bell Act would have prioritised the Western Australian government's claims for the proceeds arising from the liquidation of the Bell Group before the claims of other creditors, including the ATO. As outlined in the interim report, it is clear that the Western Australian government believed that a deal existed between it and the Commonwealth whereby the Commonwealth would not challenge the constitutional validity of the Bell Act. It is also clear that the Attorney-General himself was under the impression, at least initially, that such a deal had been made. The Commonwealth is entitled to funds in the order of at least several hundred million dollars from the liquidation of the Bell Group. The committee has further established that, had the High Court not determined that the Bell Act was invalid, the Commonwealth may have forfeited these funds to the Western Australian government. This would have been an unacceptable outcome. It is clear from evidence presented during this inquiry that the Attorney-General acted with some reluctance in defending the Commonwealth's interests in this matter, and had to at least be convinced to join the High Court proceeding by the former Solicitor-General.

2.49 The ATO has provided information to show it had independently decided to intervene in the High Court proceedings. The ATO indicated that it heard rumours that the Attorney-General would issue a direction to prevent it from intervening in the High Court proceedings. The ATO's concerns led it to consider options that could be available to them, should they have been issued with such direction. This included requesting legal advice from the Solicitor-General so that they could prepare for the possibility of a direction from the Attorney-General preventing the Commissioner of Taxation from intervening in the High Court proceeding. It is notable that the ATO took these rumours seriously enough to engage in preparatory action. Requesting the advice of the Solicitor-General would not have been done lightly.

2.50 The committee has been charged with the task of inquiring into the nature and degree of the government's involvement with the High Court proceedings. Through the committee process as well as through orders of the Senate, the committee has sought to ascertain the relevant information and documents relating to a direction contemplated by the Attorney-General. However, the Attorney-General has refused to provide the necessary information and has claimed public interest immunity on the grounds of legal advice to government. The committee notes that the Attorney-General has outlined the doctrine of legal professional privilege, however, has provided a weak explanation of the harm that would be caused if this information were disclosed. The committee does not accept these claims. In this regard, the Attorney-General displayed an attitude of wilful defiance to the Senate's orders which is not befitting of the Attorney-General.

2.51 The Attorney-General's refusal to answer questions or provide documents in relation to a direction under the Judiciary Act suggests that a direction by the Attorney-General, his office or department, was at least contemplated. This raises further suspicion that there was, in fact, collusion over potential revenue from the Bell Group insolvency process between the Commonwealth and Western Australian governments. Moreover it has resulted in the Senate being unable to fully appreciate

the circumstances of the government's involvement in the proceedings relating to the Bell Group liquidation.

2.52 Throughout this inquiry, the committee notes that it has been frustrated by the failure of government to provide information in a timely manner and by insufficient claims of public interest immunity. The committee notes the importance of ministerial accountability and the duty of ministers to act transparently and in the interests of the Australian people. As outlined in *Odgers'*, a cornerstone of Australia's system of government are the checks and balances within our system, of which the Senate is the most important of these constitutional checks and balances.

Recommendation 1

2.53 **That, in relation to possible collusion between the Commonwealth and Western Australian governments regarding potential revenue from the Bell Group insolvency process, the Senate notes the following:**

- **that the Western Australian government was clearly operating under an understanding that it had an agreement with the Commonwealth government that the Bell Act would not be challenged, depriving Commonwealth taxpayers of several hundreds of millions of dollars;**
- **that the Attorney-General contemplated that the former Treasurer, Mr Joe Hockey, may have entered into an agreement with the Western Australian government not to challenge the Bell Act;**
- **that the ATO was so concerned that the Attorney-General was contemplating a direction under the Judiciary Act which would prevent it from intervening in the High Court proceeding that it sought advice from the Solicitor-General;**
- **that statements made by former Western Australian Attorney-General, the Hon Michael Mischin, directly contradict Senator Brandis' statements to the Senate about when he became aware of the Bell matter;**
- **that the Attorney-General continues to refuse to provide answers to the committee to resolve outstanding questions about his involvement;**
- **that the government continues to refuse to provide documents requested by the committee; and**
- **that the committee's deliberations were frustrated by the failure of the Attorney-General and the government to provide information in a timely manner and by insufficient claims of public interest immunity.**

Recommendation 2

2.54 **That the Senate rejects the assertions of the Attorney-General that claims of legal and professional privilege, in and of themselves, are a valid justification to refuse providing information; and condemns the Attorney-General's wilful**

defiance of Senate protocol. Such claims should only be accepted where a clear reference to the specific harm can be sustained.

Recommendation 3

2.55 That the Senate affirm the principles of providing timely information where requested by a committee or by an order of the Senate.

Recommendation 4

2.56 That the Senate reminds Senators of the need to always act in the Commonwealth's best interests, particularly where taxpayer's money is at stake, and do so in a transparent manner.

Recommendation 5

2.57 That the Attorney-General, in the context of High Court cases impacting on the Commonwealth, allow for independent statutory authorities such as the Commissioner of Taxation to act without interference.

**Senator Louise Pratt
Chair**