Dissenting Report from Government Senators

1.1 The referral of matters relating to the *Bell Group of Companies (Finalisation of Matters and Distribution of Proceeds) Act 2015 (WA)* (Bell Act), on 29 November 2016 to the Legal and Constitutional Affairs References Committee (the committee) for inquiry and report (the inquiry) instigated a complex, time-consuming and expensive Senate committee process that has failed to educe any relevant supporting evidence in relation to its Terms of Reference (TOR), or yield any particular benefit at all for the Australian taxpayer.

1.2 The conduct of the inquiry revealed three core allegations that were levelled at the government generally, and at Senator the Hon George Brandis, Commonwealth Attorney-General (Attorney-General) more specifically, by Labor and the Greens Political Party regarding the Bell Act:

(a) that an agreement existed between the Commonwealth and the government of Western Australia regarding the division of proceeds from the Bell Group liquidation;

(b) that the Attorney-General was party to the alleged agreement; and

(c) that the Attorney-General instructed the former Solicitor-General not to argue the constitutional inconsistency between the effect of the Bell Act and the operation of the *Income Tax Assessment Act 1936* in the Bell Group litigation.

1.3 Over the duration of the inquiry—which has lasted more than six months, involved four dedicated public hearings, and has dominated questioning in the Attorney-General's portfolio at Senate Estimates from Labor and the Greens Political Party Senators—no evidence that supports these allegations has been provided.

1.4 The substance of the issues raised in the TOR relates to the passage of the Western Australian government's Bell Act, which was drafted in response to the protracted nature of the winding-up of the Bell Group of Companies (Bell liquidation)—the most complicated and costly corporate winding-up in Australian history—and the subsequent High Court of Australia (HCA) action[1] (Bell Group litigation) that resulted in the Bell Act being struck out.

1.5 Government senators have formed the view that the allegations summarised in paragraph 1.2 (above) were confected by Labor and the Greens Political Party in a politically-motivated attempt to discredit the Attorney-General. All three allegations lack foundation and are comprehensively refuted by the evidence to the inquiry.

1.6 The inquiry has heard testimony from 11 senior public officials from the Attorney-General's Department (AGD), the office of Australian Government Solicitor (AGS), the Australian Taxation Office (ATO) and the Department of Treasury

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1 *Bell Group N.V. (in liquidation) v Western Australia; W.A. Glendinning & Associates Pty Ltd v Western Australia; Maranoa Transport Pty Ltd (in liq) v Western Australia* [2016] HCA 21 (16 May 2016).

(Treasury). Public hearings, debate, speeches and questions without notice on the inquiry's subject matter have generated hundreds of pages of Hansard transcripts. However none of this activity, as anticipated by government senators, has unearthed any evidence that supports the false and politically opportunistic allegations upon which the inquiry, and its TOR, were based.

1.7 The conduct of this inquiry has diverted the personnel and resources of senior parliamentary offices, and senior public officials, away from their core business serving the interests of the Australian taxpayer. The Labor Party and the Greens Political Party have once again demonstrated their willingness to divert the resources of the Parliament, and the Australian taxpayer, into pointless inquiries designed to further their own electoral objectives at public expense.

1.8 The Labor and Greens Political Party members of the committee have alleged that the Attorney-General did not defend the Commonwealth's interests as vigorously as he ought. This allegation is fundamentally disproved by the facts. The ludicrous and frankly offensive proposition that the Attorney-General interfered with the ATO's intervention in the Bell Group litigation has been comprehensively disproved by compelling evidence presented to the inquiry by senior officers of the ATO and the AGD.

1.9 Evidence to the inquiry clearly shows that there was no collusion between the Commonwealth and the government of Western Australia in relation to the Bell Group liquidation, the Bell Act or the Bell Group litigation, and that at no time was any action taken by the Attorney-General that disadvantaged the Australian taxpayer.

1.10 The accusation that the Attorney-General attempted to influence the Solicitor-General's position regarding the Bell Group litigation has similarly been comprehensively disproved by evidence to the inquiry.

1.11 Evidence to the inquiry comprehensively refutes the accusation that the Legal Services Amendment (Solicitor-General Opinions) Direction was issued as a result of an alleged disagreement between the Attorney-General and the Solicitor-General in relation to the Bell Group litigation.[2]

1.12 Government senators are completely satisfied that the Attorney-General's account of his involvement in matters relating to the Bell Act—including that the Attorney-General did not become involved until 3 March 2016—is absolutely consistent with the facts.

1.13 Evidence shows that Attorney-General has at all times acted with the utmost propriety, in accordance with advice and established legal processes, and has consistently and diligently defended the Commonwealth's interests.

1.14 The inquiry should have ended following its first hearing on 7 December 2016. At that hearing, Mr Andrew Mills, Second Commissioner of Taxation, gave the following evidence to the inquiry:

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2 *Committee Hansard*, 7 December 2016, p. 20; see also *Committee Hansard*, 7 December 2016, pp. 44–5; see also *Committee Hansard*, 17 February 2017, pp. 10–11.

> We were not, and did not, seek permission or approval from the minister for our decision or action. The ATO have upheld our position as an independent administrator and independence in our decisions throughout the course of this matter. Neither the commissioner nor I, or any other decision-maker in the ATO, were lent on by a minister or their office or directed to do anything other than what we did. The nature of the exchanges with ministers and their offices was to provide high-level explanations to them of our intentions and our decisions. This was done in the normal course of our duties, as we do with all high profile and significant cases.[3]

1.15 Mr Iain Anderson, Deputy Secretary, Civil Justice and Corporate Group, AGD, said this, also at the inquiry's hearing on 7 December 2016:

> CHAIR: So you will not tell us whether you witnessed Senator Brandis telling Mr Justin Gleeson not to pursue a particular line of argument?
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> Mr Anderson: I can say that I am not aware of any such instruction or direction from the Attorney to the Solicitor-General, and I note the Attorney has also commented in the media that he did not give any instruction to the Solicitor-General.
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> …
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> Senator McKIM: That is right, but that is not the same question as: 'Did you instruct the Solicitor-General not to run a particular argument?' That is just the point I am making.
>
> Mr Anderson: I take the point, but I go back to what I said initially—that I am not aware of any instruction from the Attorney to the Solicitor-General not to run an argument.[4]

1.16 Inexplicably, the inquiry continued even after the Commissioner of Taxation gave this evidence to the Senate Economics Legislation Committee on 1 March 2017:

> Second Commissioner Mills and I have been at the specific inquiry on this. There have been a lot of questions and answers. I can simply say that we had a view around the course of action we should take. We did not deviate from that view. We took that course of action. No-one sought to inappropriately or otherwise persuade us to discontinue from that view. So, whichever way you cut it, that is our position. We always had that view. Whether or not people were having discussions outside of us, no-one ever sought to inappropriately influence the course of action that we had, continued and did.[5]

1.17 That should have been the end of the matter. No-one has suggested, nor could suggest, that Mr Anderson, Mr Jordan or Mr Mills has given misleading or false evidence to a Senate committee. Government senators note that none of this testimony is referred to in the majority report. There is a solitary reference in paragraph 2.49 of

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3 *Committee Hansard*, Wednesday 7 December 2016, p.2.

4 *Committee Hansard*, Wednesday 7 December 2016, p.53.

5 Economics Legislation Committee, *Committee Hansard,* Additional Estimates, Wednesday 1 March 2017, p. 98.

the majority report to the ATO 'provid[ing] information to show it had independently decided to intervene in the High Court proceedings'. The majority's failure to cite significant exculpatory evidence shows the dishonesty of Labor and Greens Political Party senators in conducting this inquiry.

1.18 Throughout this inquiry, the Labor Party and the Greens Political Party have made much of the Attorney-General's supposed attempts to issue a Legal Services Direction to the Commissioner of Taxation, which had it in fact been issued, could have had the effect of preventing the Commissioner from intervening in the High Court proceedings. Mr Mills gave evidence to the committee that the ATO heard 'bureaucratic whispers' such a direction was being considered. The ATO sought permission to obtain legal advice as to the Commissioner's obligations if such a direction was to be issued. However, the matter went no further. The Attorney-General informed Mr Mills on 7 March 2016 that he would not be issuing any such direction. No direction was ever issued. The committee has conceded it was never issued. Whether it was ever contemplated is irrelevant.

1.19 In light of the evidence referred to above, Government senators believe it is clear that neither the Attorney-General nor any other minister has a case to answer. Apparently, neither do the Labor Party and the Greens Political Party. The majority has not made any finding that any serving Minister acted improperly, or did otherwise than act in the best interests of the Commonwealth. After nearly seven months, four public hearings and two interim reports, the best that the majority can do is to 'note' that the Attorney-General 'contemplated' a state of affairs.

1.20 The committee majority's report (the report) itself is an exercise in speculation and equivocation. The report uses 'soft' language such as 'possible' and 'potential' (majority report paragraph 2.53) in an unsuccessful attempt to obscure the absence of facts and supportable conclusions. Government senators are concerned, but not surprised, that the resources of the Senate have been utilised in this cynical and opportunistic manner by the Labor and Greens Political Party majority of the committee.

1.21 The report also raises the issue of consultation between the Attorney-General and the Solicitor-General regarding potential amendment to the Legal Services Direction. Government senators note that Ian Anderson, and others, have stated that there is no connection between the Bell Act litigation and the Legal Services Direction. This issue was comprehensively considered, and found to be lacking in any factual basis, in a previous inquiry that has since been closed. The inclusion of this matter in this inquiry, and in the committee majority's report, only serves to confirm that Labor and Greens Political Party majority are far more concerned with personal political attacks than they are with educing factual evidence regarding the Bell Group matter.

1.22 The recommendations of the majority are an embarrassment to the Senate and diminish the Senate's standing and demonstrate ever so clearly why the Senate should direct its limited resource to serious enquires that do bring to the senate worthwhile recommendations that will improve governance or raise serious policy issues. The recommendations in this case do neither. For example:

- Recommendation 1 of the majority report refers to 'possible collusion' when there is no direct or plausible evidence of any 'collusions' in the normal sense of the word;
- the first dot point in Recommendation 1 says the Western Australian government was clearly operating under an 'understanding' when, firstly, there is no such evidence and secondly, for the Committee to allege an 'understanding' of another government is simply ludicrous;
- two of the dot points suggest that merely 'contemplating' a course of action is something unusual and worthy of Senate attention whereas Ministers are required to, and indeed would be failing in their duties if they did not, 'contemplate' various policy or procedural options;
- the fourth dot point is a misconstruction of the evidence to the inquiry which, the Senate should recall, examined the Attorney-General's 'involvement' in the Bell litigation, not his 'awareness' of the Bell matter itself. The Attorney-General would have had to be living under a rock not to be 'aware' of the Bell matter; and
- the last three dot points in Recommendation 1 are nonsense. At all times, as is confirmed by the evidence to the inquiry, the Attorney-General complied with the law, and with the practice and conventions of the parliament.

1.23 Government senators unreservedly reject Recommendation 2 of the report which scolds the Attorney-General for his interpretation and application of the principles of privilege. As previously stated, and confirmed by the evidence to the inquiry, the Attorney-General complied with the law, and with the practice and conventions of the parliament, at all times.

1.24 Government senators do not disagree with Recommendation 3 that affirms the principle of providing information in a timely manner to the Senate and its committees, and would call upon Labor and the Greens Political Party to commit to observing the same convention.

1.25 Government senators note Recommendation 4 that calls on the Senate to remind Senators of their obligation to act in taxpayers' best interests in a transparent manner. The extreme irony of this statement as a recommendation is that the inquiry itself has been an abject waste of taxpayer funds. Recommendations 3 and 4 amount to little more than the gratuitous lecturing of senators by the committee majority, and as such are an insult to all Senators.

1.26 Recommendation 5 is again a waste of the Senate's time as this occurs currently without fail and in the Bell inquiry case, is exactly what occurred according to the evidence.

Senator the Hon Ian Macdonald
Deputy Chair