Chapter 2

Key issues

2.1 This chapter sets out the facts of the collapse of the Bell Group of Companies (Bell Group) and subsequent litigation concerning the tax debt owed to the Commonwealth, considering the key issues relevant to the inquiry. This will include a discussion of the Western Australian Government's involvement in the matter through the enactment of the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Act 2015* (WA) (Bell Act), and the actions of Western Australian and Commonwealth ministers and relevant departments and agencies of both governments, in particular, the actions of the Commonwealth Attorney-General.

2.2 On 6 May 2015, the Western Australian Treasurer, The Hon Dr Mike Nahan MLC, introduced the Bell Act into the Western Australian Parliament, with a view to concluding the Bell Group litigation process. In his second reading speech, he outlined the purpose and aim of the bill:

> That litigation threatens to consume more time and resources of this State, judicial and otherwise, with no prospect of resolution in the short term.
>
> This Government is not prepared to allow the continuation of a third or possibly fourth, decade of expensive Bell litigation consuming the judicial and government resources of this State.
>
> Therefore the Government has introduced the Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015. This Bill ensures a fair and expeditious end to the Bell litigation, providing for an equitable distribution of funds held by the liquidator…
>
> This Bill provides a framework for the dissolution of those Bell Group companies registered in Western Australia, and the administration and distribution of the Bell litigation proceeds to avoid the perpetual litigation that appears to be inevitable on any issue associated with these companies.[1]

2.3 The Bell Act was passed by the Parliament of Western Australia on 26 November 2015.[2] The legislation prioritised the Western Australian Government's claims for Bell Group liquidation funds before the claims of other creditors, including the tax debts to the ATO.[3]

2.4 The Bell Act establishes the *Western Australia Bell Companies Administrator Authority* under sections 5F and 5G of the *Corporations Act 2001* (Cth) (Corporations

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1 The Hon Dr Mike Nahan MLC, Treasurer of Western Australia, *Western Australian Assembly Hansard*, 6 May 2015, p. 3167.

2 *Western Australian Assembly Hansard*, 26 November 2016, p. 9112.

3 Dr Nahan, Second Reading Speech, *Western Australian Assembly Hansard*, 24 March 2016, p. 1932.

Act) to manage the winding-up process of the Bell Group. It also establishes the *Western Australia Bell Companies Administrator Authority Fund* to expedite the winding-up process, maximise funds available to creditors, and prioritise creditors based in Western Australia.[4]

Constitutional issues

2.5 Following its enactment on 26 November 2015, proceedings challenging the constitutional basis of the Bell Act were immediately brought by non-government creditors, including W.A. Glendinning & Associates Pty Ltd, in the High Court of Australia (High Court). The proceedings were brought on the basis that the Bell Act was inconsistent with the *Income Tax Assessment Act 1997* (Cth) (Income Tax Assessment Act) and the *Taxation Administration Act 1953* (Cth) (Taxation Administration Act), under section 109 of the *Commonwealth of Australia Constitution Act 1901* (the Constitution), in addition to the reliance by the Bell Act on sections 5F and 5G of the Corporations Act.[5]

2.6 On 8 March 2016, the Australian Taxation Office (ATO) intervened in the case. The ATO was represented by the Solicitor-General of the Commonwealth, instructed by the Australian Government Solicitor. As the proceedings raised a constitutional issue, a notice under section 78B of the *Judiciary Act 1903* (Cth) was issued to the Commonwealth and the states and territories, offering the opportunity for the Commonwealth to intervene in the proceedings. Whilst the ATO is the relevant Commonwealth agency in the context of the Bell Act litigation, the Commonwealth also had an option to intervene in the proceedings in addition to the ATO.[6] On 30 March 2016 the Attorney-General intervened in the case on behalf of the Commonwealth.

2.7 On 16 May 2016, the High Court upheld the constitutional challenge to the validity of the Bell Act on the basis that there was an inconsistency between the Bell Act and the Income Tax Assessment Act and the Taxation Administration Act. This decision struck down the Bell Act under section 109 of the Constitution, without giving consideration to the argument presented by the Commonwealth in relation to sections 5F and 5G of the Corporations Act.[7] The High Court judgement includes a

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4 *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Act 2015* (WA).

5 High Court, *Short Particulars* Case S248/2015, p. 1.

Sections 5G and 5F of the Corporations Act allows State or Territory legislation to override the Corporations Act where the State or Territory law declares the matter it addresses is a matter that should be excluded from the Corporations Act, and there is direct inconsistency between the laws, so they cannot operate concurrently.

Section 109 of the Constitution addresses inconsistency between state and federal legislation and declares that valid federal laws prevail over inconsistent State laws, to the extent that they are inconsistent.

6 Mr Andrew Mills, Second Commissioner, Australian Taxation Office (ATO), *Committee Hansard*, 7 December 2016, p. 10.

7 *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).

quote from the Commissioner of Taxation who stated that the drafter of the Bell Act proceeded 'blithely in disregard' of the Commonwealth tax legislation:

> The Commissioner concludes his written submissions with the observation that the basic problem here is that the drafter of the Bell Act either has forgotten the existence of the Tax Acts or has decided to proceed blithely in disregard of their existence. That, indeed, is the basic problem.[8]

2.8 The committee was told by the AGD that, in their view, whether or not the Commonwealth separately intervened in the proceedings was not significant, as the same arguments would be presented in the High Court by the ATO:

> At the heart of what the commissioner wished to argue there was a constitutional argument that was going to be run by the Solicitor-General about the validity under section 109 of the Constitution of the WA Bell litigation…The Commonwealth arguments about the revenue law and the invalidity of the WA litigation would be made by the commissioner even if the Attorney did not intervene.[9]

Consultation between the Attorney-General and Solicitor-General

2.9 According to his statement to the Senate, the Attorney-General, Senator the Hon George Brandis QC, was initially of the view that once the ATO had decided to intervene and be represented by the Solicitor-General in the High Court on 8 March 2016, the Commonwealth's interests were sufficiently represented:

> …the Commonwealth, through the ATO, was before the court and the Commonwealth's interests were represented by the ATO, on whose behalf the then Solicitor-General, Mr Gleeson, appeared. Mr Gleeson's client was the ATO. His instructions were given by the Australian Government Solicitor on its behalf. My view, at that time, was that this was a matter between the Western Australian government and the ATO.[10]

2.10 The Attorney-General has indicated that the Solicitor-General was 'strongly of the view' that the Commonwealth should intervene in the High Court, in addition to the ATO.[11] The Attorney-General subsequently accepted the approach recommended by the Solicitor-General:

> After I indicated that I did not intend to intervene in the proceedings on behalf of the Commonwealth, I was contacted by the Solicitor-General, Mr Gleeson. He gave me certain advice. I do not, by what I am about to say, waive the Commonwealth's privilege in that advice. It is sufficient to say that Mr Gleeson was strongly of the view that the Commonwealth should

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8 *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 [54].

9 Mr Iain Anderson, Deputy Secretary, Attorney-General's Department (AGD), *Committee Hansard*, 17 February 2017, p. 20.

10 Senator the Hon George Brandis QC, Attorney-General of Australia, *Senate Hansard No. 6, 2016*, 28 November 2016, p. 3326.

11 Senator Brandis, *Senate Hansard No. 6, 2016*, 28 November 2016, p. 3326.

> intervene…Although, as I have said, my view of the litigation is that it primarily involved section 109 issues concerning the Income Tax Assessment Act and the Taxation Administration Act and was likely to be disposed of on that basis, I saw the force of what Mr Gleeson put to me and I accepted his advice.[12]

2.11 After the Commonwealth gave notice that it would also intervene in the High Court on 30 March 2016, Western Australian ministers sought a regulation by the Commonwealth under section 5I of the Corporations Act to facilitate the continued operation of the Bell Act. In a letter to the Western Australian Attorney-General dated 4 April 2016, the Attorney-General and the then Assistant Treasurer the Hon Ms Kelly O'Dwyer MP cite the Solicitor-General's advice in forming their view that such an arrangement would be inappropriate. They also indicated their intention to continue with the Commonwealth's intervention in the High Court.[13]

2.12 The Attorney-General stated in the Senate that following the hearing in the High Court, he met with Dr Nahan and the Hon Mr Michael Mischin MLC, Attorney-General of Western Australia, '…who expressed in strong terms their disappointment that I had given instructions for the Commonwealth to intervene and that the ATO had intervened'.[14]

2.13 An issue relevant to the terms of reference was whether the Attorney-General instructed the Solicitor-General not to challenge the Bell Act in the High Court. A senior officer of the Attorney General's Department (AGD) stated that he was present at a meeting attended by the Attorney-General and the Solicitor-General. When asked whether '…the Attorney-General told the Solicitor-General to run dead or not proceed to the High Court' he responded: 'There was no discussion in those terms'.[15] He further stated that:

> …there was a discussion around the fact that the Solicitor-General had put some views to the Attorney…and there was a brief discussion around the case and the reasons for intervention. I think the Attorney said words to the effect of he would look into it further.[16]

2.14 The issue of whether the AGD had drafted a direction to prevent the ATO from intervening in the case was discussed at the first public hearing of the inquiry. AGD was asked: 'Was your Department ever asked to draft a formal direction that the ATO should not intervene?' They replied: 'Not by the Attorney'[17] and took the question on notice when asked if this was ever requested by the Attorney-General's

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12 Senator Brandis, *Senate Hansard No. 6, 2016*, 28 November 2016, p. 3326.

13 Senator Brandis, *Senate Hansard No. 6, 2016*, 28 November 2016, p. 3327.

14 Senator Brandis, *Senate Hansard No. 6, 2016*, 28 November 2016, p. 3327.

15 Mr Anderson, AGD, *Committee Hansard*, 17 February 2017, p. 10.

16 Mr Anderson, AGD, *Committee Hansard*, 17 February 2017, p. 10.

17 Mr Anderson, AGD, *Committee Hansard*, 7 December 2016, p. 43.

office.[18] At the time of reporting, an answer to the question on notice had not been provided to the committee.

2.15 In a public hearing, the AGD was also asked about the proximity of discussions about the Bell matter between the Attorney-General and the Solicitor-General, and an amendment to the Legal Services Directions initiated by the Attorney in May 2016. The Secretary of the AGD provided his view that the two incidents were not related.[19]

2.16 The Secretary of the AGD was also asked whether he witnessed the Attorney-General instructing or requesting the Solicitor-General not to run a particular argument in the High Court in relation to the Bell litigation. He replied: 'No. I have not been involved in any sorts of meetings where that sort of situation could have arisen'.[20]

2.17 During the third public hearing, Senator Watt asked the Attorney-General: '…did your office ask your department to prepare a direction to stop the ATO from intervening in this litigation?'.[21] The Attorney-General also declined to answer this question:

> That is the question which [the Department] objected to answering on public interest immunity grounds, and for reasons that have already been discussed, that is the position that I will maintain.[22]

2.18 Documents obtained by a freedom of information request suggest such a direction did exist. An email exchange about the Bell matter between senior members of the ATO refers to an attachment entitled 'Possible Attorney-General's direction under the Judiciary Act'.[23] This would appear to contradict previous testimony given by the ATO that they were not aware of any direction proposed by the Attorney-General, and requires further explanation.

Dealings of the Commonwealth and Western Australian Governments

2.19 A key question for this inquiry is whether there was a deal between the Western Australian and Commonwealth governments about the distribution of tax revenue expected to result from the Bell Group insolvency process.

2.20 In the lead-up to the introduction of the Bell Act into the Western Australian Parliament, the WA Treasurer at the time, Dr Nahan, had discussions with his then Commonwealth counterpart the Hon Mr Joe Hockey MP, before writing to him formally on 13 April 2015. Dr Nahan informed Mr Hockey that the Western Australian Government planned to introduce legislation to conclude the Bell Group

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18 Mr Anderson, AGD, *Committee Hansard*, 7 December 2016, p. 43.

19 Mr Chris Moraitis, Secretary, AGD, *Committee Hansard*, 7 December 2016, p. 44.

20 Mr Moraitis, AGD, *Committee Hansard*, 7 December 2016, p. 52.

21 Senator Murray Watt, *Committee Hansard*, 8 March 2017, p. 18.

22 Senator Brandis, *Committee Hansard*, 8 March 2017, p. 18.

23 Mr Mills, ATO, email correspondence to Mr Chris Jordan, Commissioner of Taxation, ATO, 29 November 2016.

liquidation. In this correspondence, he clearly indicated that this legislation would use the power of the State to 'displace certain provisions of the [Commonwealth] Corporations Act'.[24] Dr Nahan concluded by stating that:

> 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.[25]

2.21 On 29 April 2015, Mr Hockey replied to Dr Nahan, acknowledging that the proposed state legislation could displace Commonwealth legislation:

> 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.[26]

2.22 However, Mr Hockey also stated that he supported 'fair outcomes' for creditors and his view that there should be 'good faith' engagement in relation to the distribution:

> I acknowledge the desire of the Western Australian Government to see an efficient and timely conclusion to the Bell Group insolvency process. It is important that the ensuing process result in, to as great an extent as possible, fair outcomes for creditors consistent with their legal positions before the legislation takes effect.
>
> I understand that the proposed legislation will require any future determination in relation to creditor distribution to have due regard to the agreements between creditors on distribution issues. I consider that an outcome that mirrors as closes as possible a commercially acceptable agreement, as would have been determined by the parties themselves, is the optimal outcome to be sought. I trust that the Western Australian

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

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

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

> Government will therefore continue to engage in good faith in the forthcoming mediation processes.[27]

2.23 It is unclear what verbal discussions took place between Mr Hockey and Dr Nahan. However, on 25 November 2015, Dr Nahan told the Western Australian Parliament that he did not expect that the ATO would initiate a constitutional challenge to the Bell Act in the High Court:

> 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…[28]

2.24 Prior to 2 March 2016, the Hon Christian Porter MP, currently Minister for Social Services, and former Treasurer and Attorney-General in the Western Australian Government also became involved in the matter. Senator Brandis advised the Senate that Mr Porter received an email from the Western Australian State Solicitor that contained a summary briefing and slides on the historical background to the matter, as well as copies of the correspondence between Dr Nahan and Mr Hockey.[29] The Attorney-General stated that he became involved on 3 March 2016 when he discussed the matter with Mr Porter, who informed him about the email he received from the Western Australian State Solicitor. The Attorney-General advised the Senate that he considers that was when his personal involvement in the matter first occurred, although his '… office had been dealing with the matter prior to that time'.[30]

2.25 The former Western Australian Attorney-General, the Hon Mr Michael Mischin MP, has stated that he spoke to the Commonwealth Attorney-General in early February 2016, apparently contradicting the Attorney-General's position described above.[31]At a Senate Estimates hearing of the Legal and Constitutional Affairs Legislation Committee on 28 February 2017, the Attorney-General addressed the issue:

> 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 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. Of course I do speak to Mr Mischin from time to time. Early last year, I had a

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

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

29 Senator Brandis, *Senate Hansard No. 6, 2016*, 28 November 2016, p. 3325.

30 Senator Brandis, *Senate Hansard No. 6, 2016*, 28 November 2016, p. 3325.

31 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).

> telephone conversation with him, at his request, for the purpose of discussing the appointment of a judge to the Family Court of Western Australia. It may be, though this is only conjecture on my part, that Mr Mischin said something to me about Bell at the end of that conversation—though, as I say, if he did, I do not recall it. In any event, I do not consider Mr Mischin's statement to be a contradiction of what I told the Senate about the time at which my personal involvement in the matter began—that is, as and from my meeting with Mr Christian Porter on 3 March.[32]

2.26 With regard to the Attorney-General's statement to the Senate on 28 November 2016, he claimed that stating 'I recall' once at the beginning of the statement, he qualifies anything he later says.[33] Further, the Attorney-General has repeatedly told the Senate that 3 March 2016 was the first time he became involved in the Bell matter.[34] This is arguably a semantic assertion and reminiscent of the manner in which he approached the committee's 2016 inquiry into his amendment of the legal services direction where he argued that on his definition he had 'consulted' with the Solicitor-General, a statement that was accurate according to his particular definition of 'consultation'.[35] According to the Attorney-General:

> The statement I gave to the Senate was chronological, so of course if the first involvement in the matter I recall was on 3 March then obviously everything subsequent to that is qualified by the words 'I recall'. I have no recollection—.[36]

2.27 The Hon Ms Kelly O'Dwyer MP, who became the Minister for Small Business and Assistant Treasurer with responsibility for the Australian Taxation Office on 21 September 2015, was also involved in the matter. The Attorney-General has strongly refuted the suggestion that he (or Ms O'Dwyer) had any knowledge of a verbal agreement between the Western Australian and Commonwealth Treasurers:

> There has been much mention of an asserted agreement between the Commonwealth and the Western Australian Government. If Western Australian ministers considered their dealings with Mr Hockey to constitute some form of agreement, I can only observe that the only written record of those dealings—the exchange of letters between Dr Nahan and Mr Hockey of April 2015—does not, in my view, constitute or evidence such an

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

33 Senator Brandis, Senate Legal and Constitutional Affairs Legislation Committee, *Senate Estimates Hansard*, 28 February 2017, p. 115.

34 See, for example, Senator Brandis, Senate Legal and Constitutional Affairs Legislation Committee, *Senate Estimates Hansard*, 28 February 2017, pp. 105, 111, 113, 114, 115, 120, 122.

35 Senate 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, p. 12.

36 Senator Brandis, Senate Legal and Constitutional Affairs Legislation Committee, *Senate Estimates Hansard*, 28 February 2017, p. 115.

> agreement. In any event, whatever may have been discussed between Mr Hockey and Dr Nahan, neither I nor Ms O'Dwyer was aware of it at the time; we first became aware of the position asserted by Western Australian ministers after speaking to them on 4 March 2016. Nothing in any of my discussions with Mr Mischin constituted an agreement, as Mr Mischin himself has said.[37]

2.28 Senator Brandis has further stated that '…I have no knowledge of what passed between Mr Hockey and Dr Nahan other than what is revealed by the April 2015 exchange of letters, which lends no credence to that view'.[38] In response to any suggestion that he participated in a deal that preferenced the Western Australian Government over the Commonwealth Government in the distribution of tax revenue from the insolvency process, the Attorney-General stated:

> …every decision I made in this matter did protect the interests of the Commonwealth: by supporting the decision of the ATO to intervene in the matter and by deciding to accept Mr Gleeson's advice that the Commonwealth of Australia should also intervene in the matter.[39]

2.29 The Attorney-General stated that he spoke to Ms O'Dwyer and a senior ATO officer, Mr Andrew Mills, between 5 and 7 March 2016 '…to settle the Commonwealth's position in relation to the High Court proceedings…in particular in light of the views that had been expressed to us by the Western Australian ministers'.[40] Further, he stated that:

> …after my discussions with Ms O'Dwyer and Mr Mills, I arrived at the firm conclusion that it was desirable that the ATO should intervene to protect the interests of the Commonwealth, notwithstanding the views that had been expressed by Mr Mischin and Dr Nahan regarding Dr Nahan's discussions with Mr Hockey and the related exchange of correspondence. I was also of the view, at that stage, that it was not necessary for the Commonwealth to intervene in addition to the ATO. Accordingly, the ATO intervened in the Bell litigation on 8 March, which was the final date for the ATO to lodge with the High Court its application for leave.[41]

2.30 A key question for this inquiry is whether there was a deal between the Western Australian and Commonwealth governments about the distribution of tax revenue from the Bell Group insolvency process. The letters described above appear to indicate that a deal may been struck. Dr Nahan's statements in the Western Australian Parliament that he did not expect that the ATO would initiate a constitutional challenge to the Bell Act in the High Court are significant, particularly

37 Senator Brandis, *Senate Hansard No. 6, 2016*, 28 November 2016, p. 3328.

38 Senator Brandis, *Senate Hansard No. 6, 2016*, 28 November 2016, p. 3328.

39 Senator Brandis, *Senate Hansard No. 6, 2016*, 28 November 2016, p. 3328.

40 Senator Brandis, *Senate Hansard No. 6, 2016*, 28 November 2016, p. 3326.

41 Senator Brandis, *Senate Hansard No. 6, 2016*, 28 November 2016, p. 3326.

given that if a deal was made, hundreds of millions of dollars in taxation revenue would have been jeopardised.[42]

2.31 The Attorney-General asserted that while he has seen no evidence that a deal was made, he did consider possible options in case evidence of such a deal came to hand:

> 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. But this is all hypothetical because, having in particular seen Mr Hockey's letter of 29 April 2015, and without for a moment reflecting on the genuineness of what Mr [Mischin] and Dr Nahan believed, it was perfectly clear to me that Mr Hockey had not tied the Commonwealth's hands in any way, and therefore it was perfectly appropriate—and, indeed, more than appropriate, it was the desirable course—for the Commonwealth's participation, or at least the ATO's participation, in the litigation to proceed.[43]

2.32 It is unclear whether the Attorney-General or staff in his office asked for a direction to be prepared to prevent the ATO intervening. If a direction was prepared and the Attorney-General did consider preventing the ATO from intervening, this would indicate that he considered an option that would have exposed the Commonwealth to foregoing hundreds of millions of dollars in taxation revenue.

Involvement of Commonwealth departments

2.33 The committee has considered the involvement of Commonwealth departments and agencies in relation to the Bell Group litigation. The committee has found that while the Treasury had a limited role, the AGD and ATO had a greater role in the matter.

Treasury

2.34 According to information provided by the Treasury at the first public hearing of the inquiry, this agency had minimal involvement in the matter. In April 2015, Treasury were given a copy of the correspondence from the Western Australia Treasurer to the Commonwealth Treasurer, and provided advice to the then Commonwealth Treasurer's Office.[44] However, Treasury was not involved in negotiations or legal decision-making. Treasury advised the committee that: 'In terms

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

43 Senator Brandis, *Committee Hansard,* 8 March 2017, p. 22.

44 Ms Diane Brown, Chief Adviser, Financial Systems Division, Treasury, *Committee Hansard,* 7 December 2016, p. 25.

of the process of deciding on the intervention, we were not directly involved except as observers'.[45]

2.35 Treasury did however provide some advice with respect to briefings and an exchange of letters that took place. In relation to the letter written by Mr Hockey to Dr Nahan on 29 April 2015, Treasury provided advice on the Treasurer's response: 'The response from the Treasurer [the letter dated 29 April 2015] is on the public record and…that response was consistent with what Treasury recommended'.[46]

Australian Taxation Office

2.36 At the first public hearing of the inquiry, the ATO provided an outline of the their approach to debt recovery in relation to the Bell Group liquidation:

> The object of any action we take in relation to a liquidation, and the related litigation or possible settlement, is to protect the Commonwealth's interests and secure appropriate payment of taxes due. The decision made and actions taken by the ATO in relation to the Bell Group are entirely consistent with our approach to insolvencies, of which there were 12,000 or so in which we were a creditor last financial year, and the almost 7,000 court actions relating to debt matters in which we were involved last financial year. I will note that it is unusual, although not unheard of, to have constitutional challenges in taxation matters.[47]

2.37 The ATO advised the committee that their primary concern was that the Bell Act may reduce the funds available for the Commonwealth and set a precedent for future cases:

> The ATO was concerned about the potential adverse effect on the Commonwealth revenue of the WA Bell act, including the precedential nature of such an act. This was brought to a head when the Bell act was passed and other creditors commenced proceedings in the High Court. Our decision to intervene was a normal and proper exercise of the commissioner's statutory powers to legally pursue tax debts. Joining the proceedings raised the questions of law concerning fundamental collection, recovery provisions and priority applying to tax debts. We obtained independent legal advice about the commissioner seeking the High Court's leave to intervene.[48]

2.38 The ATO clarified the tax debt of the Bell Group, advising the committee that they believe the Commonwealth is owed

> …in excess of $460 million. In addition, recognising that some of the debts arose in the late eighties and early nineties, there is well in excess of $1

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45 Mr Thomas Reid, Division Head, Law Design Practice Division, Treasury, *Committee Hansard*, 7 December 2016, p. 35.

46 The Treasury, Answers to Questions on Notice from Public Hearing 7 December 2016 (received 13 January 2017), p. 3.

47 Mr Mills, ATO, *Committee Hansard*, 7 December 2016, p. 1.

48 Mr Mills, ATO, *Committee Hansard*, 7 December 2016, p. 2.

> billion in accrued general interest charge on top of that...I think it would be in the order of $1.8 billion.[49]

2.39 The ATO told the committee that their approach in this case was consistent with normal procedures, in terms of their processes and liaison with ministers and other agencies:

> Our decision to intervene was a normal and proper exercise of the commissioner's statutory powers to legally pursue tax debts. Joining the proceedings raised the questions of law concerning fundamental collection, recovery provisions and priority applying to tax debts. We obtained independent legal advice about the commissioner seeking the High Court's leave to intervene. [50]
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> 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.[51]

2.40 The ATO briefed the relevant ministers of their approach to the Bell Group matter:

> I would like to note that we provided advice to a handful of ministers over the period from May 2015 to March 2016. I emphasise that point—that this was advice. We were advising ministers of our decisions. 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.[52]

2.41 On 5 June 2015, the ATO provided written advice to the Assistant Treasurer's Chief of Staff regarding the legal advice they had received:

> The ATO has obtained preliminary advice from the Deputy General Counsel in AGS concerning the proposed Western Australian legislation Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill. That advice concentrated on whether the WA Parliament had the power to make such legislation and the possible effects of the legislation upon the Commonwealth's ability to collect certain tax debts. The advice concluded that…there is a potential inconsistency between the Bill and the Taxation Administration Act as the Bill appears to 'impair or

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49 Mr Mills, ATO, *Committee Hansard*, 7 December 2016, p. 13.

50 Mr Mills, ATO, *Committee Hansard*, 7 December 2017, p. 2.

51 Mr Mills, ATO, *Committee Hansard*, 7 December 2017, p. 2.

52 Mr Mills, ATO, *Committee Hansard*, 7 December 2016, p. 2.

> detract from the operation of those Commonwealth statutory provisions which facilitate recovery of assessed liabilities'. AGS has indicated that this is a preliminary view that requires detailed analysis before determining if s109 of the Australian Constitution is enlivened.[53]

2.42 The ATO told the committee that they had previously received an informal offer of tax revenue from the Bell Group matter from the Insurance Commission of Western Australia (ICWA), but had no communication from the Western Australian Treasurer. ATO were concerned that the amount offered by ICWA would not be guaranteed:

> The Western Australian Treasurer did not speak to the commissioner or me at any time. We did receive an offer from the Insurance Commission of Western Australia, in a discussion that included the Western Australian state solicitor, and the number being offered to us was in the order of $402 million.[54]

> There was a refusal to put the offer in writing or give us any guarantee, in relation to that. It was a complete 'trust me'. It was dependent, completely, on whether or not the other creditors would come to the table, in relation to their amounts. Obviously, had the other creditors refused to accept the kind of number that may have been in the head of the Insurance Commission of Western Australia and wanted more, that would have impacted on how much we were chasing. Without a guarantee we had clear indications from the other creditors, or at least one of the other creditors, that they intended to challenge the Bell act if it passed, so any agreement would have been, essentially, ineffective.[55]

2.43 As discussed earlier in this chapter, the Attorney-General called senior ATO officer Mr Andrew Mills, on 7 March 2016 to discuss the Bell Group matter. Mr Mills clarified that the call was to understand what the ATO was doing in relation to the Bell litigation:

> It was a discussion where I outlined what we were doing, where we were at in the process and what our proposal was…he indicated to me that he had not made a decision at that time as to whether or not the Commonwealth should intervene more generally. That was the essence of the conversation.[56]

2.44 Mr Mills noted that it was 'unusual' for him to receive a call from a minister about the approach the ATO would adopt in a particular matter.[57]

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53 ATO, Answers to Questions on Notice from Public Hearing 7 December 2016 (received 22 December 2016), p. 7.

54 Mr Mills, ATO, *Committee Hansard*, 7 December 2016, p. 7.

55 Mr Mills, ATO, *Committee Hansard*, 7 December 2016, p. 8.

56 Mr Mills, ATO, *Committee Hansard*, 7 December 2016, p. 11.

57 Mr Mills, ATO, *Committee Hansard*, 7 December 2016, p. 10.

Attorney-General's Department

2.45 The AGD first became aware of the Bell Act in April 2015, when it was consulted about the by Treasury. The AGD informed the committee that it initially believed the matter was more relevant to Treasury than the AGD:

> At that point [Treasury] asked us whether it was a matter that we had a particular interest in, and, given it involves the corporations law, which is administered by the Treasurer and the Treasury, we thought at that point it was a matter primarily for them.[58]

2.46 The Secretary of the AGD suggested that the AGD's involvement in the matter commenced on 27 November 2015, when '…the first challenge to the WA Bell Act was commenced in the High Court'.[59]

2.47 The AGD provided its first written briefing to the Attorney-General on 28 January 2016, but acknowledged that verbal discussions with the Attorney-General's office occurred prior to that time:

> My understanding is that we briefed the Attorney in January 2016, which was in relation to the litigation, once the litigation had actually commenced and 78B notices had been issued. There was some engagement with the Attorney-General's office prior to that, but I believe that the only time we formally briefed the Attorney was in January 2016.[60]

2.48 The AGD told the committee that they have no knowledge of a deal between the Commonwealth and the Western Australia Government regarding the distribution of the tax revenue that would flow from the Bell Group liquidation:

> We do not have any knowledge of any such deal, and perhaps the explanation is that there was no such deal. That is what the Attorney has also said: he is not aware of any such arrangements. He made that point in his statement to the Senate.[61]

2.49 The committee asked AGD whether they had provided advice to the Attorney-General regarding the High Court proceedings. AGD declined to answer this question and referred to the Attorney-General's statements to the Senate on the matter:

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58 Mr Anderson, AGD, *Committee Hansard*, 7 December 2017, p. 39.

59 Mr Moriatis, AGD, *Committee Hansard*, 7 December 2017, p. 38.

60 Mr Anderson, AGD, *Committee Hansard*, 7 December 2017, p. 41.

The Australian Government can become involved in constitutional litigation as a party in its own right, or the Commonwealth Attorney-General can intervene on behalf of the Australian Government in cases raising constitutional issues. The *Judiciary Act 1903* (Cth) requires parties in these cases to give the Attorney-General notice of the constitutional issues under section 78B of the Act.

Australian Government Solicitor, *Constitutional Litigation*, http://www.ags.gov.au/areasoflaw/case-studies/constitutional-litigation.html (accessed 14 March 2017).

61 Mr Anderson, AGD, *Committee Hansard*, 7 December 2016, p. 40.

> As the Attorney-General indicated in his statement to the Senate, he formed a view initially that it was a matter that the ATO could intervene in, and he subsequently changed that position after engaging with the Solicitor-General. But the intention was always, as I understand it, that the Solicitor-General would appear in the High Court on behalf of a Commonwealth party intervening.[62]

2.50 Senior officers of the Australian Government Solicitor (AGS) also declined to discuss legal advice they provided to the Attorney-General and the AGD, but did comment on whether there was any conflict of interest that arose by having both the Commonwealth and the ATO as clients. AGS advised the committee that '…it did not at any point have a legal conflict of duty in relation to its role as legal adviser to, and legal representative of, the Commissioner of Taxation and the Attorney-General in relation to the Bell Group litigation'.[63]

2.51 It is notable that the ATO states that it first contacted AGS and began requesting legal advice in relation to the Bell matter in May 2015.[64] This is immediately after the Bell Act was introduced in the Western Australian Parliament, which indicates that the significance of the case was known in one of the Attorney-General's portfolio agencies almost a year prior to the time that the Attorney-General considers that he became 'seized' of the matter, in March 2016.[65]

Unanswered questions

2.52 An issue confronted by the committee during its inquiry was the large number of questions taken on notice by the Attorney-General and the AGD, and the fact that some of these questions have not been answered. The AGD deferred answering a number of questions and referred them to the Attorney-General. The committee understands that the Attorney-General is considering making a claim of public interest immunity in relation to some of the questions asked.[66]

2.53 The third public hearing held on 8 March 2017 focused on the public interest immunity claims over legal advice. The committee made it clear that the fact that something is legal advice is not an accepted ground for a public interest immunity claim.[67] However, the Attorney-General did not accept the assertion, maintaining that it is a consistent position of the Commonwealth not to disclose legal advice.

> I have told you what the position of the executive government of the Commonwealth of Australia is and has always been by reference to, among others, two attorneys-general and one shadow Attorney-General—two of

62 Mr Anderson, AGD, *Committee Hansard*, 7 December 2016, p. 43.

63 AGD, Answers to Questions on Notice from Public Hearing 7 December 2016 (received 16 February 2017), p. 9.

64 Mr Mills, ATO, *Committee Hansard*, 8 March 2017, p. 19.

65 Senator Brandis, *Committee Hansard*, 8 March 2017, p. 11.

66 Appendix 1.

67 Senator Louise Pratt, Chair, Senate Legal and Constitutional Affairs References Committee, *Committee Hansard*, 8 March 2017, p. 15.

> whom were from your side of politics. This is not controversial. It may be that maybe the Senate does not accept that rule, but it is not controversial that the executive government of the Commonwealth of Australia has always taken this position.[68]

2.54 The Attorney-General considered that he was:

> …merely being obedient to the practice of successive Australian governments. Were I not to be obedient to the practice of successive Australian governments, I think I would be rightly criticised for prejudicing the legal position of the Commonwealth.[69]

2.55 The Attorney-General was asked what the nature of the public interest immunity claims were, and it was emphasised to him that: 'To make a public interest immunity claim, the harm to the public interest must be specified…'.[70] According to the Attorney-General:

> The public interest immunity claim speaks for itself, and I do not want to expand upon it, but self-evidently the harm to the public is the publication of legal advice to the Commonwealth which is confidential.[71]

2.56 A significant number of questions on notice were taken by the AGD and the Attorney-General over the course of the inquiry, and a significant proportion of these were not answered. Appendix 1 sets out the questions taken on notice that remain unanswered at the time of tabling this report. An example of an answer that was provided is as follows:

> The question goes to the content of legal advice. It is the long standing practice of successive Australian governments that it is against the public interest to disclose confidential legal advice.[72]

2.57 The committee considers this to be unsatisfactory and emphasises that this response does not include or constitute a formal claim of public interest immunity, as outlined in advice provided by the Clerk of the Senate:

> The underlying principle is that the Senate has an overarching right to obtain information, a right supported by the inquiry powers it possesses under section 49 of the Constitution… any refusal to provide a committee with information must be made by a minister and must include a statement by the minister that it would not be in the public interest to disclose the requested information. The minister is required to provide to the committee

68 Senator Brandis, *Committee Hansard,* 8 March 2017, p. 15.

69 Senator Brandis, *Committee Hansard*, 8 March 2017, p. 4.

70 Senator Pratt, *Committee Hansard*, 8 March 2017, p. 2.

71 Senator Brandis, *Committee Hansard*, 8 March 2017, p. 3.

72 AGD, Answers to Questions on Notice from Public Hearing 7 December 2016 (received 16 February 2017), p. 1.

> a statement of the ground for that conclusion, specifying the harm to the public interest that could result from the disclosure.[73]

2.58 The fact that certain information is provided to the Government as legal advice is not sufficient to satisfy a claim of public interest immunity. In relation to claims of legal professional privilege, the fourteenth edition of *Odgers' Australian Senate Practice* 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. [74]

2.59 The committee considers that there are an unusually high number of questions that have been taken on notice by witnesses to this inquiry and which remain outstanding, particularly in relation to whether legal advice was sought and obtained on a particular issue, who provided the advice, and when it was provided. The committee has provided a copy of the Clerk's advice to the AGD to assist with the preparation of answers to outstanding questions on notice.

2.60 According to advice received by the committee, the existence of legal professional privilege:

> …may lend weight to a public interest immunity claim, but any such claim must nonetheless be raised on an accepted ground and accompanied by a statement of the harm to be apprehended from the disclosure of the information sought.[75]

2.61 Order 10 (c) (5) of the procedural orders and resolutions of the Senate of continuing effect provide that if a committee concludes that a response does not sufficiently justify the withholding of the information or document from the committee, the committee shall report the matter to the Senate. On this basis, the committee is reporting to the Senate the failure of the Attorney-General to appropriately respond to the committee's questions.

2.62 Finally, the committee notes that it has become aware of further documents which may shed light on the Commonwealth's actions in the Bell matter.[76] These

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73 Mr Richard Pye, Acting Clerk of the Senate, correspondence to the Chair of the Senate Legal and Constitutional Affairs References Committee, Senator Louise Pratt, 3 March 2017, p. 3.

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

75 Mr Richard Pye, Acting Clerk of the Senate, correspondence to the Chair of the Senate Legal and Constitutional Affairs References Committee, Senator Louise Pratt, 3 March 2017, p. 3.

76 Council Assisting the Solicitor-General, email correspondence to Mr James Lambie and Mr Joshua Faulks, Advisors to the Attorney-General, 15 March 2015; Executive Assistant and Office Manager, email correspondence to Council Assisting the Solicitor-General, 4 April 2016.

documents are referred to in documents that have been obtained through freedom of information requests. The documents referred to include:

- correspondence between the Attorney-General and Ms O'Dwyer in March and April 2016;
- a letter from the former Solicitor-General, Mr Justin Gleeson SC, to the Attorney-General regarding the High Court proceedings in the Bell matter, dated 15 March 2016;
- an 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'[77] dated 6 March and 7 March 2016;
- a submission from the AGD to the Attorney-General's office on the question of intervention in the Bell High Court case, dated 28 January 2016; and,
- a document entitled 'FW: Possible Attorney-General's direction under the Judiciary Act'[78] (which is earlier correspondence), attached to an email between officers of the ATO, dated 29 November 2016.

Committee views and recommendations

2.63 In the course of this inquiry, the committee has gained a more detailed understanding of the dealings of the Commonwealth and Western Australian governments in relation to the liquidation of the Bell Group. The information that has been withheld from the committee is crucial to determining the involvement of various agencies and ministers in the Bell matter. The committee does not accept the Attorney-General's claim that legal professional privilege is valid for the purposes of withholding information from the committee. While the AGD has intimated a claim of public interest immunity may exist, no such claim has formally been made. The Attorney-General has an obligation to both the committee and the Senate to clearly answer questions or make a public interest immunity claim on grounds acceptable to the Senate. The committee's deliberations should not be prejudiced by the Attorney-General's failure to answer questions or make a public interest immunity claim.

2.64 Based on the evidence that has been provided by the ATO, it is clear that the Commonwealth is entitled to significant funds from the liquidation—in the order of at least several hundred million dollars. It is important that the Commonwealth recover the funds to which it is legally entitled so that these funds can be reinvested in the Australian community. The High Court established that there was no legal basis for the Bell Act to prioritise the Western Australian Government or other creditors over the ATO. This is particularly important in the current economic climate.

2.65 The committee has taken seriously its responsibility to report to the Senate on the terms of reference for this inquiry by the date agreed by the Senate. However, the

77 The document also contains the words 'SEC=PROTECTED, DLM=Sensitive: Legal]'.

78 The document also contains the words '[DLM=Sensitive: Legal]'.

committee has been frustrated by a failure of the Government to answer many questions regarding the potential existence of a deal between the Commonwealth and Western Australian governments, to the effect that the Commonwealth would not challenge the Bell Act and that the Western Australian Government would be prioritised in receiving Bell Group liquidation funds. This includes both a failure of departmental officials involved in the matter and the Attorney-General to respond to the committee's questions in a timely manner. This represents a significant failure of ministerial accountability. Despite this, the statements and actions of the Western Australian Government at the time indicate that such a deal did in fact exist.

Recommendation 1

2.66 **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 it's 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

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

Senator Louise Pratt
Chair