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Bell Group fallout raises questions of ministers' roles

Holes in the time line of the WA Bell case pose serious questions about a position that stood to cost the government $300 million.

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Attorney-General George Brandis. AAP Image / MICK TSIKAS

YOU ARE READING

On Sunday night, the prime minister hosted Christmas drinks for Coalition MPs and senators at his Canberra residence, The Lodge.

Towards the end of the evening, a trio of ministers was seen huddled in conversation in a corner: Attorney-General George Brandis, Revenue and Financial Services Minister Kelly O'Dwyer and Social Services Minister Christian Porter.

Each correctly anticipated they would face questioning in parliament this week on their respective roles in an episode mentioned in this newspaper recently and splashed across the front page of *The West Australian* on Friday last week: the liquidation of the Bell Group of companies and a High Court challenge to Western Australia's attempt to take control of it.

The Saturday Paper understands the three ministers arranged to meet later on Sunday night to continue their conference and presumably co-ordinate their responses.

On Monday, the senate ordered Brandis to explain his handling of the Commonwealth's challenge to the WA government's Bell manoeuvre.

"The PM has got George's back on this. George is not going to be shuffled."

The allegation being made was extremely serious: that he and colleagues had been prepared to help the WA government by keeping the Commonwealth out of the High Court challenge, potentially forgoing almost $300 million in tax the Bell Group owed it.

Brandis denies these allegations and made a detailed statement to parliament outlining his actions. In it, he mentioned both Porter and O'Dwyer.

Not satisfied, the Greens have now moved to set up a senate inquiry into the affair. Some in the government are nervous about what might emerge.

The allegations revolve around the timing and manner of the federal government's decision to join the High Court challenge to the WA Bell act, initiated by the liquidators and other creditors late last year.

The WA legislation would have allowed the state government to take control of the liquidation process and put itself at the head of the creditors' queue, at the potential expense of others, including the Commonwealth.

The High Court's full bench ruled the state government was exceeding its powers. It found the legislation unconstitutional and threw it out.

But questions remain about the process: Who said what to whom? And did anyone behave improperly?

ATO warned of action

The WA government believed the federal government had agreed to stay out of the challenge and avoid running what was ultimately found to be a straightforward, watertight constitutional argument.

WA Treasurer Mike Nahan told his state's parliament about the alleged arrangement with his federal colleagues earlier this year. But on March 8, the state government was apparently blindsided when the Australian Tax Office sought leave to join the challenge to underline its claim to the $300 million.

The tax office operates independently of the executive government and has a statutory obligation to recover monies owed.

Although the move surprised the WA government, it shouldn't have.

The tax office's second commissioner, Andrew Mills, had written to a WA parliamentary committee in October last year in response to a request for "feedback". Mills indicated the tax office's preliminary view was that the act would "constrain the [tax] commissioner's capacity to administer the income tax laws".

But it seems the WA government didn't read between the lines.

In March, following proper procedure at the time, the tax office engaged the Australian government solicitor to act on its behalf. The solicitor-general, Gleeson, was briefed as counsel. This did not please the WA government, which had believed the Commonwealth had agreed to stay right out of it.

It seems it displeased several ministers in the federal government, too, including George Brandis.

After much back and forth – between the WA treasurer, WA Attorney-General Michael Mischin, then assistant treasurer O'Dwyer, Brandis and Porter (who hails from WA and was previously both attorney-general and treasurer in the state parliament) – and some separate and reportedly terse discussions between Brandis and Gleeson, the Commonwealth decided to intervene in the case.

The WA government considered the actions of both the tax office and then the attorney-general to have trashed their deal. Brandis says there is no evidence of an agreement, suggesting Nahan and his government must have misinterpreted some correspondence from the then federal treasurer, Joe Hockey.

Neither Nahan nor Hockey returned *The Saturday Paper*'s calls this week.

Brandis tabled two letters from April last year between Hockey and Nahan, saying they did not "evidence" any agreement.

Labor's senate leader, Penny Wong, accused Brandis of "throwing Joe Hockey under a bus" when he was no longer in parliament to defend himself.

"You are not doing this because you thought it was the right thing to do," Wong said of Brandis's statement. "You are doing this because you were forced to do so, dragged kicking and screaming."

Brandis told the senate he had initially thought the tax office should not intervene but changed his mind. While he believes he had the power to issue a directive overriding the tax office had he so chosen, others insist that as a statutory authority it cannot be directed.

Senior legal sources have told *The Saturday Paper* they believe Brandis's initial reluctance to have either the tax office or the Commonwealth intervene suggest it is likely there was some kind of deal.

Brandis told parliament the first he knew of the suggestion was on March 3.

In piecing together the statements of various ministers to both parliaments, and the time line of the High Court challenge, a picture emerges that warrants further examination.

Time line of events

The story begins in May last year.

Several days before some parties to the Bell Group liquidation were scheduled to meet for mediation in Singapore, the WA government produced its unusual legislation.

To those involved, it seemed like an attempt to try to scare the parties into resolving a case that had already been running for more than 20 years.

But as soon as they saw the bill, the liquidator and some creditors determined it reached well beyond the state's powers and was unconstitutional. The day after it was introduced into the WA parliament, they lodged a challenge with the High Court.

In senior legal circles from Sydney to Perth, there is a strongly held view that it would have been unthinkable for the Commonwealth not to also intervene, so obvious were the constitutional flaws in the WA legislation.

Yet it didn't do so immediately.

In federal parliament this week, Brandis said the first personal involvement he had with the issue was when Christian Porter came to see him on March 3, five days before the ATO joined the case and 10 months after the legislation was introduced.

The previous day, Porter had received an email from the WA state solicitor containing what he described as a summary briefing and slideshow of "the history of the matter", plus copies of the Hockey and Nahan letters. Porter told Brandis the WA government was trying to bring the Bell wind-up to a conclusion. Questions are now being asked about Porter's involvement.

On Monday this week, Brandis told parliament that Porter had backed the WA scheme as a means of concluding the wind-up.

In a Sky News interview following his parliamentary statement, Brandis described Porter as "a facilitator".

Grilled in parliament on Wednesday, Porter revealed the WA government had written to Brandis this week, claiming legal professional privilege and public interest immunity over the documents it sent him in March – a move designed to ensure the senate committee cannot access them.

In his statement, Brandis revealed that after Porter visited him in March, the attorney-general then spoke to his WA counterpart Michael Mischin and the WA treasurer Nahan.

"They gave me the Western Australian government's perspective of its dealings with Mr Hockey," Brandis told parliament. He did not say why he needed it.

He revealed he had spoken the same day with O'Dwyer and she had also spoken to the WA ministers. He suggested that based on their prior dealings with Hockey, the WA ministers believed the tax office should not intervene.

Time was running out for the tax office to make its decision: the court had set a deadline of March 8.

Brandis says he considered suggesting that the tax office not intervene and tested the idea with O'Dwyer. At her instigation, he also spoke to Andrew Mills, the deputy commissioner at the office, on March 7.

While the detail of these conversations has not been disclosed, they appear to have involved the suggestion that the tax office not go ahead.

Brandis says he decided in the end that the ATO should intervene. Others say he didn't support the move but that the tax office went ahead anyway. They believe pressure was applied.

O'Dwyer and Nahan's stories different

The Saturday Paper has been told that the attorney-general instructed the solicitor-general not to run the constitutional argument but, acting on the ATO's behalf, he did.

On Tuesday this week, O'Dwyer told parliament the tax office had given "very clear advice that they needed to ensure that they intervened in the High Court proceedings".

"And I supported them fully in that action," she said.

But on March 24, Mike Nahan told the WA parliament something different.

"Unfortunately for us," Nahan said, the ATO had acted "contrary to the direction or advice of the assistant treasurer, Kelly O'Dwyer".

Nahan did not complete the statement because an opposition member interjected. But his meaning was clear: initially at least, O'Dwyer had not backed the ATO's decision.

The WA legislation not only had implications for federal tax law but corporations law, too. Alarmed at its reach, other states also intervened in the case.

During one of the hearings, an exchange involving Justice Geoffrey Nettle confirmed that if allowed to stand the legislation could potentially give WA the power to wind up other companies in other states, including BHP in Victoria.

But Brandis decided the Commonwealth did not need to intervene in its own right. *The Saturday Paper* understands Solicitor-General Gleeson was furious, believing it was the Commonwealth's obligation to intervene when something so obviously contravened the constitution.

Gleeson went to see his attorney-general and gave what Brandis calls "certain advice" – believed to be that the Commonwealth must intervene in a case with implications for the federation.

On March 30, the court's last deadline for a Commonwealth intervention, the Commonwealth, on Brandis's instruction, joined. Five days later, Brandis and O'Dwyer wrote jointly to Nahan, confirming that although the Commonwealth had "sought to understand and, if possible, to accommodate" the WA government's policy objectives, it was proceeding with the High Court intervention.

The court did not even get to the corporations issue, ruling on the initial constitutional argument led by the liquidator and echoed by the ATO. Few were surprised by the decision.

In his reasons, Justice Stephen Gageler effectively rebuked WA, quoting the tax commissioner, who had argued "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". The judge said: "That, indeed, is the basic problem."

Brandis "a disgrace"

But the issue didn't end there.

Brandis and Gleeson already had a strained relationship, tested by a series of differences on issues including the handling of a case involving Australia spying on East Timor while negotiating access to resources in the Timor Gap.

In early May, Brandis issued the now famous legal directive that no Commonwealth minister or agency may seek legal advice from the solicitor-general without first going through the attorney-general – further indication that Brandis was not happy with the actions of the ATO.

It is now clear that the controversial directive, which Gleeson strenuously opposed and which ultimately led to his resignation, was prompted by the Bell affair.

This affair, and others, has underlined an unhappy relationship between Brandis and senior barristers. Normally confining their criticisms to their own circles, some of the nation's most esteemed lawyers are so enraged that they are starting to talk.

One senior barrister told *The Saturday Paper*: "The view – a pretty universally held one – is he is an embarrassment as an attorney-general. He is a disgrace."

Asked another: "Is there anybody who thinks he's been a good attorney? No, nobody thinks that. Is there anybody who's got a good word to say about him? No. Not a one."

There are senior lawyers, especially in Queensland, who defend Brandis's legal skills.

The Saturday Paper has been told of concerned mutterings among the judges of the Federal Court that there might be a post-politics sinecure for Brandis in their ranks.

Lawyers are also strongly defending Gleeson as "fiercely adherent to the rule of law" and "one of the best lawyers you will ever come across in his generation". Gleeson has now gone to London.

Politically speaking, Brandis has been somewhat accident-prone during his tenure as attorney-general. He has declared "a right to be bigots", to the outrage of some. He has been unable on television to explain his own metadata legislation. He has broken with protocol and proposed to release cabinet documents from the previous Labor government to a royal commission.

But despite this public attention, Prime Minister Malcolm Turnbull is strongly backing his attorney, just as Brandis strongly backed him in his quest to replace Tony Abbott. The prime minister suggests the shadow attorney-general, Mark Dreyfus, is obsessed with Brandis.

"Not since Rumpole spilt claret on Guthrie Featherstone, QC, MP's jabot has there been such a shameful sort of enmity in the bar common room," Turnbull said this week. "It is relentless. You can set your clock on a denunciation of the attorney-general."

Regardless of calls from the opposition and Greens for Brandis to be sacked, a speculated reshuffle of the ministry during the parliamentary break looks likely to leave him in place.

"The PM has got George's back on this," a senior government source told *The Saturday Paper*. "George is not going to be shuffled."

More likely is that Brandis could step down early next year in preparation for a diplomatic post. He has denied being interested but has nevertheless been touted as a likely replacement for Alexander Downer, who will finish up as Australia's high commissioner in London in May.

Before that, Brandis is likely to be called before the senate inquiry into the handling of the Bell case.

He, O'Dwyer and Porter all insist they acted appropriately. But the picture that emerges is of a state government that believed it had a deal with its federal counterparts to run dead in a significant court case and let a piece of unconstitutional legislation stand, effectively handing over $300 million in federal tax revenue.

That picture also suggests a federal attorney-general, a then assistant treasurer and a social services minister thought – at least initially – that it was okay not to mount an argument against it.

Perhaps the senate inquiry will clarify why.

TAGS:

George Brandis Kelly O'Dwyer Christian Porter Bell Group High Court Mike Nahan Australian Tax Office ATO Andrew Mills Michael Mischin Joe Hockey

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