SENATOR THE HON GEORGE BRANDIS QC

ATTORNEY-GENERAL
LEADER OF THE GOVERNMENT IN THE SENATE

STATEMENT TO THE SENATE – BELL LITIGATION

28 November 2016

E&OE…….

Between 1991 and 1993 – a quarter of a century ago – members of the Bell Group of companies, a diversified conglomerate based in Western Australia, went into liquidation. That liquidation is still ongoing, and nowhere near being completed. It is the most complicated and costly corporate winding-up in Australian history. So far, it has involved some 30 separate legal proceedings, in four countries. In Australia, it has involved complex proceedings in the High Court, the Federal Court and the Supreme Court of Western Australia. The hearing of the main case alone, in the Supreme Court of Western Australia, lasted for 404 days and resulted in a judgment by Justice Owen running to 2,643-pages. There is no reliable figure as to the costs so far incurred in the winding-up, in professional fees paid to insolvency practitioners, solicitors, barristers and others. However everybody agrees that the costs so far are in the order of hundreds of millions of dollars. And, of course, every dollar spent on professional fees and other costs, is a dollar that the creditors will never see. It is a feature of this winding-up that several of the original creditor companies have long since been taken over by professional litigation funders, whose interest was in prolonging the litigation. Those familiar with corporate insolvency – and this is one of the fields in which I used to specialise when I was in practice – have seen enough examples of administrations in which, after all the costs have been incurred in litigation, there is literally not a cent left over for the creditors.

So, in order to avoid that eventuality, in 2015 that is, at a time when the matter had been going on for more than 20 years, the Parliament of Western Australia passed a special Act of Parliament, the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Act 2015,* which I will refer to in these remarks as the Bell Act. The purpose of the Bell Act was, as was explained in the second reading speech by the Honourable Michael Mischin, the Attorney-General and Minister for Commerce:

> "This litigation threatens to consume more time and resources of the 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 this Bill. It 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."

So Mr Mischin said in introducing the Bill.

The Bell Act is complicated, but its intended purpose, in essence, was to use ssectionss 5F and 5G of the *Corporations Act* to establish a statutory scheme to take control of the winding-up, and to establish a single fund from which creditors' claims might be met, with a view to ensuring that the winding-up was brought to completion sooner, and the dividend available for distribution to creditors was maximised.

One of the features of the Bell Act was a particular sequence for the prioritisation of creditors. The Commonwealth *Corporations Act* makes provision, in an ordinary winding-up, for the priority in which proofs of debt are paid so that, for example, secured creditors rank above unsecured creditors. The Bell Act made provision for the ranking of creditors which was in some respects different from the ordinary ranking under Commonwealth law. In doing so, Western Australia relied upon particular provisions of the Commonwealth *Corporations Act*, that is as I said sections 5F and 5G, which provide, in brief, that a State or Territory law may declare a matter to be excluded from the operation of the *Corporations Act.*

The Bell Act came into force on 26 November 2015. The following day, some of the Bell group creditors commenced proceedings in the original jurisdiction of the High Court challenging its constitutional validity. They did so, primarily, on the ground that insofar as the Act dealt with debts due to the Commonwealth in the form of taxation revenue, its provisions were inconsistent with the *Income Tax Assessment Act* and the *Taxation Administration Act*, and should therefore be struck down under section 109 of the *Constitution.* A further argument was based on the validity of the reliance by the Bell Act on sections 5F and 5G of the *Corporations Act.*

Neither the Commonwealth of Australia, nor the Commissioner of Taxation, were defendants to the High Court proceedings.

It is relevant here to point out that I subsequently learned there had been, discussions between the former Commonwealth Treasurer, Mr Hockey, and the Treasurer of Western Australia, Dr Nahan, with a view to settling the Commonwealth's claim in the Bell winding-up. Since the Commonwealth's proof of debt was for some $167 million (and a total post-liquidation tax assessment of some $298 million), it was plainly in the Commonwealth's interests that the matter be settled or otherwise expeditiously finalised.

Ms Kelly O'Dwyer became the Minister for Small Business and Assistant Treasurer on 21 September 2015, and assumed Ministerial responsibility for the Australian Taxation Office. Neither she nor I were involved in any of the discussions between Mr Hockey and Dr Nahan and had no knowledge of them at the time, although we subsequently became aware of them in circumstances that I will explain. In particular, we have both subsequently become aware of an exchange of letters between Dr Nahan and Mr Hockey dated, respectively 13 April 2015 and 29 April 2015, which I seek leave to table. This, it should be said and that is the

exchange of correspondence between Dr Nahan and Mr Hockey of April 2015, was shortly prior to the introduction into the Western Australian Parliament of the Bell Act.

Mr Hockey's letter provides no basis for the claim that than an agreement or understanding had been arrived at between the Commonwealth and Western Australian Governments, although it is clear that some Ministers of the Western Australian Government had a different view.

The first personal involvement I recall having in the matter was on 3 March this year, although my office had been dealing with the matter prior to that time. On that day I had a visit from the Honourable Christian Porter MP, the Minister for Social Services. Mr Porter had, of course, been the Treasurer and Attorney-General in the Western Australian Government, and was familiar with its attempts to bring the Bell winding-up to a conclusion. He told me that on 2 March 2016 his office had received an email from the Western Australian State Solicitor containing a summary briefing and slide show of the history of the matter, as well as copies of the exchange of letters between Dr Nahan and Mr Hockey. Mr Porter explained to me the background of the Western Australian Government's attempt to end the Bell winding-up. He offered the view that a statutory scheme to bring the winding-up to a swifter conclusion and with a better return to creditors was, in principle, a good thing. However, he noted that he had not been involved in any discussions between Mr Hockey's office and Western Australian ministers and he had not had the time or resources to form a view on the constitutional or revenue aspects of the legislation. He suggested I speak to the Attorney-General of Western Australia, Mr Michael Mischin, which I subsequently did. My first conversation with Mr Mischin, which also involved Dr Nahan, was at about midday Eastern Time the following day, Friday 4 March. They gave me the Western Australian Government's perspective of its dealings with Mr Hockey. Apart from the mention made of the matter by Mr Porter the previous evening, this was the first time I became aware of Mr Hockey's dealings with the Western Australian Government.

Later that day, I spoke to Ms O'Dwyer. I told her about my conversation with Mr Mischin and Dr Nahan. She told me that she had had a similar conversation with Mr Mischin earlier that day. Just as Mr Porter had suggested that I speak to Mr Mischin, he had suggested to Ms O'Dwyer that she speak to Mr Mischin. Ms O'Dwyer told me that her conversation with Mr Mischin was also the first time she had become aware of Mr Hockey's dealings with the Western Australian Government.

I spoke to Ms O'Dwyer again over the weekend. On Monday 7 March, I also spoke, at the suggestion of Ms O'Dwyer, to Mr Andrew Mills, a Second Commissioner of Taxation. The purpose of my conversations with Ms O'Dwyer and Mr Mills was to settle the Commonwealth's position in relation to the High Court proceedings, to which the Commonwealth had not been joined as a defendant, in particular in light of the views that had been expressed to us by the Western Australian ministers. At one stage on Friday 4 March, one of the options I considered, having regard to what Mr Mischin and Dr Nahan had put to me, was that the ATO should not intervene in the proceedings. I should stress that that was never a view I arrived at, it was merely one option among several which I wanted to test with Ms O'Dwyer. In fact, 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 Bill Litigation on 8 March, which was the final date for the ATO to lodge with the High Court its application for leave.

The position, therefore, from the time of the ATO's intervention on 8 March was that, the Commonwealth, through the ATO, was before the Court, and the Commonwealth's interests were represented by the ATO, on whose behalf the 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.

Nevertheless, because a constitutional issue had been raised, a notice under section 78B of the *Judiciary Act* went to the Commonwealth, as well as the states and territories, asking if the Commonwealth wished to intervene in the proceedings. It is important to point out, that although the ATO is an agency of the Commonwealth it is a different legal personality. It nevertheless represents the interests of the Commonwealth in protecting the revenue. It is not automatic that the Commonwealth intervenes in proceedings every time it receives a section 78B notice. Every section 78B notice is assessed according to its own particular facts.

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 intervene, in particular because the issue of sections of 5F and 5G of the *Corporations Act* also arose. 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.

Accordingly, on 30 March, on my instructions, the Commonwealth gave a notice of intervention in the proceedings.

After the Commonwealth's notice of intervention was served, there were several conversations, instigated by Western Australian Ministers, in an attempt to resolve the matter. The option put to the Commonwealth by Western Australia was that the Commonwealth make a regulation, under section 5I of the *Corporations Act*, to provide a carve-out for Western Australia to enable the Bell Act to operate. Those conversations included discussions between the Western Australian Solicitor-General, Grant Donaldson SC, and Mr Gleeson.

I am informed by Ms O'Dwyer that she sought advice from her Department, which was received on Sunday 3 April. The advice, which included AGS advice, made it clear that even if such a regulation were made under section 5I, the Bell Act would nevertheless be inconsistent with the provisions of the *Income Tax Assessment Act*, and would fail under section 109 of the Constitution for that reason.

On Monday 4 April – the day before the High Court hearing commenced – I met with the Solicitor-General. He told me that his discussions with the Western Australian Solicitor-General had not resolved the issues raised by Western Australia. He was of the view that a carve-out under section 5I was not appropriate. Ms O'Dwyer and I then wrote a letter to Mr

Mischin, which I seek leave to table. The letter was prepared by Mr Gleeson's assistant, who was present at the meeting, with his input.

The High Court proceedings were heard over three days on 5 – 7 April. Mr Gleeson represented both the ATO and the Commonwealth of Australia.

In the week following the hearing, I had a meeting in Perth with Dr Nahan and Mr Mischin who expressed in strong terms their disappointment that I had given instructions for the Commonwealth to intervene and that the ATO had intervened.

The High Court delivered its judgment on 16 May. It upheld the constitutional challenge to the validity of the Bell Act e on the basis of the revenue question – that is on the basis that there was an inconsistency between the Bell Act *and* the *Income Tax Assessment Act* and the *Taxation Administration Act* – so the former was struck down under section 109 of the *Constitution.* The Court did not find it necessary to decide the issue concerning sections 5F and 5G of the *Corporations Act*, so the issue was moot. If I may say so, that was what I had anticipated all along – that this was a revenue case and would be decided on the issue of inconsistency with the Commonwealth revenue statutes.

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, do not, in my view, constitute or evidence such an 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. It has also been suggested by some commentators that there is some relationship between this matter and the question of Western Australia's share of the GST. Not so far as I am aware, however, as I have said, 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.

Finally, it has been asserted, absurdly, by Mr Dreyfus and the Opposition that I have somehow failed sufficiently to protect the interests of the Commonwealth. But 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 deciding to accept Mr Gleeson's advice that the Commonwealth of Australia should also intervene in the matter.

In summary, Mr President the position is:

First, so far as the Commonwealth was concerned, it was my view this was, e first and foremost a case about revenue and the operation of taxation laws, which is what in fact it turned out to be. The Commonwealth's interests in that respect were fully and appropriately protected by the decision of the ATO to intervene, which decision I supported.

Secondly, I had not initially considered that there was need for the Commonwealth of Australia to also intervene in the proceedings. However, when subsequent to the ATO intervention, Mr Gleeson told me he thought there were strong reasons for the

Commonwealth to also intervene on the *Corporations Act* point, I accepted his advice, and gave instructions for the Commonwealth to intervene.

Thirdly, I was not involved in, and at the time they took place had no knowledge of, the discussions between Mr Hockey and Western Australian Ministers. Nor did Ms O'Dwyer. Mr Hockey never mentioned them to me. The only Commonwealth Ministers with whom I have had discussions about this matter are Ms O'Dwyer and Mr Porter, as set out in this statement.

Fourth, there was never any agreement between me and Mr Mischin in relation to the High Court proceedings, as Mr Mischin himself has acknowledged.

Fifth, the case was disposed of on the basis of the ATO's submissions, supported by the Commonwealth. Had the Commonwealth not also intervened, the result of the case would have been no different.

Ms O'Dwyer and Mr Porter have seen a copy of this statement, and they have authorised me to say that it entirely accords with their recollection of these events.