



**SOLICITOR-GENERAL**  
**Northern Territory of Australia**

6 March 2014

Dr Chris Burns  
4 Tasman Circuit  
WAGAMAN NT 0810

Dear Sir

**STELLA MARIS INQUIRY – OATHS AND AFFIRMATIONS – CABINET  
DOCUMENTS AND DELIBERATIONS – PUBLIC INTEREST IMMUNITY**

1. You have asked:
  - (a) for confirmation that you will not, in giving evidence before the Stella Maris Inquiry ("the Inquiry"), breach the oaths or affirmations taken under the *Northern Territory (Self-Government) Act 1978*; and
  - (b) for confirmation of the extent to which, in giving evidence before the Inquiry, the doctrine of public interest immunity precludes disclosure and discussion of Cabinet documents and deliberations.
2. I will deal with each issue in turn.

**Oaths and affirmations**

3. Section 38 of the *Northern Territory (Self-Government) Act 1978* (Cth) requires a member of the Executive Council to make and subscribe an oath or affirmation before entering on the duties of office, and also requires a person appointed to Ministerial office to make and subscribe an oath or affirmation before doing so. The *Northern Territory (Self-Government) Act* contains no criminal sanction for the breach of an oath, and so it may be considered that the purpose and significance is largely political in nature.
4. The Executive Council oath, which is prescribed in Schedule 4 to the Act, reads as follows:

I, AB, do swear that, except as may be required by law, I will not divulge any information (including the contents of any document) of which I have become aware by reason of my membership of the Executive Council of the Northern Territory of Australia: So help me God!

5. The Executive Council affirmation, and the Ministerial oath and affirmation, which are also prescribed in Schedules to the Act, are in similar terms.
6. The phrase "except as may be required by law" is a formulation customarily employed in legislation and commercial contracts which contain provision for the protection of confidential information. The formulation is a clear recognition of the fact that the statutory or contractual obligation of confidentiality is necessarily subject to disclosure under compulsion of the law: see generally *Smorgon v Australia and New Zealand Banking Group Ltd* (1976) 134 CLR 475 at 486-490. The term "law" in this context is not limited to "laws of the Commonwealth", and clearly extends to include coercive processes under statute.
7. Under the *Inquiries Act* (NT), a Commissioner has power to send for witnesses and documents, and to require a person appearing before the Inquiry to give evidence on oath. It is an offence to fail to attend or produce documents on summons, and an offence to refuse to answer questions relevant to the Inquiry.
8. Accordingly, a person required to attend to give evidence and/or to produce books, etc in pursuance of the *Inquiries Act* is clearly "required by law" to do so for the purposes of the oaths and affirmations under the *Northern Territory (Self-Government) Act*.
9. It is beyond doubt that appearing to give evidence and/or produce documents before the Inquiry in pursuance of a summons does not and could not amount to a breach of the oaths or affirmations.

#### **Public interest immunity**

10. The doctrine of public interest immunity operates such that documents are immune from disclosure before courts, commissions, boards and tribunals if that disclosure would be prejudicial or injurious to the public or state interest.
11. Generally speaking, claims for public interest immunity may be made on one or other of two bases.
12. First, "class" claims are those where objection to production or other use is made on the basis that the document or other information, regardless of its content, falls within a class where the subsection of such material to disclosure would disrupt the efficient functioning of government and so be injurious to the public interest.

13. Secondly, "content" claims are those where objection is made on the basis that the production or other use of a document or other information would be injurious to the public interest because the particular content that information would have that effect.
14. On the present state of the law, the only documents that will attract public interest immunity on the basis of their class alone are documents that record the actual deliberations within the Cabinet room: see *Egan v Chadwick* (1999) 46 NSWLR 563; *Commonwealth v Northern Land Council* (1993) 176 CLR 604. That privilege would also extend to attempts to adduce oral evidence before a court, commission, board or tribunal in relation to deliberations within the Cabinet room.
15. Any current or former member of Cabinet may claim the privilege in response to any question where the answer would require him or her to disclose the content of deliberations within the Cabinet room. Once the claim is made, it is a matter for the Commissioner to determine whether, on present authority, the material is protected by public interest immunity.
16. Cabinet-related documents other than those which record actual deliberations within the Cabinet room may or may not be subject to the immunity, depending upon whether their content is such that disclosure would be injurious to the public interest.
17. In order to attract a claim for public interest immunity, Cabinet Submissions, Comments, Decisions, additional briefings and related administrative documents (including drafts of those documents) would need to have something specific in their content the disclosure of which would be injurious to the public interest.
18. Although the categories of relevant injury are not closed, the disclosure of government information, including Cabinet-related documents, will generally only be injurious to the public interest in the material sense where it may cause damage to national security, defence, international relations or inter-governmental relations; where it may prejudice the investigation of a possible breach of the law or the enforcement of the law in a particular case; where it may disclose, or enable a person to ascertain the existence or identity of, a confidential source of information in relation to the enforcement or administration of the law; where it may endanger the life or physical safety of any person; where it may prejudice the fair trial of a person; and where it may disclose and therefore undermine the effectiveness of methods of preventing, detecting, investigating or dealing with crimes.
19. The process by which the Cabinet and related documents came into the Inquiry's possession is as follows.
20. The Inquiry served a number of summonses on the Director of the Cabinet Office seeking the production of various categories of Cabinet-

related documents. The Director sought my advice in relation to the summonses, and in particular whether any of the documents falling within the ambit of the summonses attracted a claim for public interest immunity. I provided the Director with advice along the lines detailed in paragraphs 10 to 18 above, and inspected the documents in question.

21. In my opinion, none of the Cabinet and related documents properly attracted a claim for public interest immunity. I advised the Director and the Chief Executive of the Department of the Chief Minister accordingly. On the basis of that advice, the Chief Executive of the Department of the Chief Minister authorised the production of the documents to the Inquiry.
22. This process was conducted in accordance with a procedure put in place in 2007 by the government of which you were a member, and continued under the present government.
23. The present government, in the form of the political executive, had no involvement in that process due to the operation of the convention that Ministers in successive governments do not have access to Cabinet documents created by previous governments. This is a convention which has also been adopted by successive governments. As a result, no member of the current political executive has had any involvement in the determination whether or not a claim for public interest immunity should or should not be made in relation to those documents.
24. This is not to say that a person with a sufficient interest in the proceedings, including yourself, could not claim the immunity in relation to the documents. In the event that such a claim was made it would fall to the Commissioner to determine whether the documents are subject to public interest immunity in accordance with the present state of the law, and to protect the documents from disclosure or any use in the deliberative processes of the Inquiry in the event that he determined they were. In the absence of any determination that the Cabinet-related documents are subject to public interest immunity, there is no preclusion or other restraint on you answering questions in relation to those documents, subject only to the comments made above in relation to the content of deliberations within the Cabinet room.

Yours faithfully



**MICHAEL GRANT QC**