



The Hon Christian Porter MP
Attorney-General
Minister for Industrial Relations
Leader of the House

Senator the Hon Eric Abetz
Chair
Senate Foreign Affairs, Defence and Trade Legislation Committee
Parliament House
CANBERRA ACT 2600

Email: fadt.sen@aph.gov.au

Dear ~~Chair~~ *Eric*

I write to you in relation to questions taken on notice by First Assistant Secretary and Chief Legal Officer at the Department of Foreign Affairs and Trade, Mr Simon Newnham, during the Senate Foreign Affairs, Defence and Trade Legislation Committee hearing on the Australia's Foreign Relations (State and Territory Arrangements) Bill 2020 and Australia's Foreign Relations (State and Territory Arrangements)(Consequential Amendments) Bill 2020 hearing on 13 October 2020.

The questions asked by Senator Patrick related to the legal advice obtained in relation to the Australia's Foreign Relations (State and Territory Arrangements) Bill 2020. The Government considers the answers to these questions are covered by public interest immunity.

The Government has received legal advice related to these matters and it would be inappropriate for the contents of such advice to be disclosed to the Committee. It has been the long-standing practice of successive Australian Governments to not disclose privileged legal advice. This practice has previously been outlined by the Hon Gareth Evans QC:

...[n]or is it the practice or has it been the practice over the years for any government to make available legal advice from its legal advisers made in the course of the normal decision making process of government, for good practical reasons associated with good government and also as a matter of fundamental principle... (Senate Hansard, 28 August 1995, page 466)

Then Senator, the Hon Joe Ludwig, put the position as follows:

To the extent that we are now going to go to the content of the advice, can I say that it has been a longstanding practice of both this government and successive governments not to disclose the content of advice. (Senate Legal and Constitutional Affairs Legislation Committee, Hansard of Estimates hearing, 26 May 2011, page 161); and

Similarly, the then Hon Philip Ruddock MP stated:

...It is not the practice of the Attorney to comment on matters of legal advice to the Government. Any advice given, if it is given, is given to the Government... (House of Representatives Hansard, 29 March 2004, page 27405).

The Government maintains that it is not in the public interest to depart from this established position. It is integral that privileged legal advice provided to the Commonwealth remains confidential. Access by Government to such confidential advice is, in practical terms, critical to the development of sound Commonwealth policy and robust law-making.

The specific harm that the doctrine of legal professional privilege seeks to prevent is the harm to the administration of justice that would result from the disclosure of confidential interactions between lawyer and client. Both the High Court of Australia and Federal Court of Australia have confirmed that legal professional privilege promotes the public interest by enhancing the administration of justice, facilitating freedom of consultation and encouraging full and frank disclosure between clients and their legal advisers.

Accordingly, I claim public interest immunity over the content of the legal advice obtained by the Government relating to the development of the Australia's Foreign Relations (State and Territory Arrangements) Bill 2020.

I have copied this letter to the Minister for Foreign Affairs.

Yours sincerely

The Hon Christian Porter MP
Attorney-General
Minister for Industrial Relations
Leader of the House

CC. Minister for Foreign Affairs, Senator the Hon Marise Payne