ATTACHMENT ONE

STATEMENT OF AGREED FACTS

ADMINISTRATIVE APPEALS TRIBUNAL
FREEDOM OF INFORMATION DIVISION
ADELAIDE REGISTRY

2020/5875 & 5876

SENATOR REX PATRICK
Applicant

SECRETARY
DEPARTMENT OF THE PRIME MINISTER AND CABINET
Respondent

STATEMENT OF AGREED FACTS

A. ESTABLISHMENT OF NATIONAL CABINET

Initial establishment

1. On 13 March 2020 the Council of Australian Governments (**COAG**) held its 48th general meeting in Sydney. The communique released by COAG ('the **COAG communique**') stated that the "discussion focused on Australia's response to coronavirus (also known as COVID-19) and on recovery from the 2019-20 bushfires".

2. At the press conference that followed the 13 March 2020 COAG meeting, the Prime Minister announced that Commonwealth, state and territory governments had resolved to form the "National Cabinet". The Prime Minister, Minister for Health and Chief Medical Officer also issued a media release, which stated:

> *A new National Cabinet, made up of the Prime Minister, Premiers and Chief Ministers has been set up and will meet at least weekly to address the country's response to the coronavirus, COVID-19.*
>
> *The AHPPC, led by the Commonwealth's Chief Medical Officer and comprising the chief health and medical officers from each jurisdiction, together with the National Coordination Mechanism convened by the Department of Home Affairs, will be the primary bodies that will advise the National Cabinet. The National Coordination Mechanism will work across all jurisdictions, industry and key stakeholders to ensure a consistent approach to managing the impacts of this pandemic beyond immediate health issues.*
>
> ...
>
> *The National Cabinet will meet again on Sunday to finalise implementation arrangements on further advice from the AHPPC.*

3. In May 2020 the Department of Prime Minister and Cabinet made a public statement to the following effect:

   - On 13 March 2020 COAG decided to establish a National Cabinet, comprising the Prime Minister, Premiers and Chief Ministers, to coordinate Australia's response to COVID-19 across state and territory governments and the Commonwealth Government. First ministers of each of the governments are supported at National Cabinet meetings by the heads of their departments. Professor Brendan Murphy also attends as Chair of the Australian Health Protection Principal Committee (**AHPPC**).

- In respect of the Commonwealth, material for National Cabinet consideration is generally first considered by the Federal Cabinet or a committee of the Federal Cabinet prior to submission through the Cabinet Office. Notetakers from the Commonwealth and a notetaker representative of the state and territory governments record decisions, which are formalised by the Cabinet Office and distributed to all members of the National Cabinet.

- By the agreement of all members, the National Cabinet is constituted as a Cabinet Office Policy Committee and operates according to longstanding conventions of Cabinet government, including the guiding principles of collective responsibility and solidarity.

- In his capacity as Chair, where appropriate the Prime Minister provides frequent public updates on National Cabinet decisions. The Commonwealth and state and territory governments individually remain responsible for the implementation of decisions arising from the National Cabinet.

- The primary bodies that advise the National Cabinet are the AHPPC and the National Coordination Mechanism.

- To discuss COVID-19 and assist National Cabinet deliberations, heads of each of the first ministers departments have separately met as a group about weekly since mid-February 2020.

4. In addition, in May 2020 the Secretary of PM&C made public statements to the following effect:

- The way things generally work is the Prime Minister makes announcements first, then state premiers and territory chief ministers quite often follow on and make their own press statements and hold their own press conferences.

- The deliberations of the cabinet and the decisions are protected from disclosure. What premiers and prime ministers say after a meeting is a matter for them. The federation comprises the Commonwealth, six sovereign states and two territories. It is not surprising that there are some differences in the application of a principle, because each is sovereign in its own right.

Expansion of the role of National Cabinet

5. On 29 May 2020 the Prime Minister announced that the Council of Australian Government (COAG) will cease and a new National Federation Reform Council (NFRC) will be formed, with National Cabinet at the centre of the NFRC. The Prime Minister stated:

> *The other thing we agreed today is a major change in terms of how COAG will work in the future. And, if I can move to that chart, COAG is no more. It will be replaced by a completely new system and that new system is focused on the success that has been yielded by the operation of the National Cabinet. What we'll be doing is keeping the National Cabinet operating and particularly during the COVID period, we'll continue to meet on a fortnightly basis. In a normal year it will meet on a monthly basis. Wouldn't meet in person. One of the things we've learned over meeting so regularly is we can work effectively together as we get together using the telepresence facilities which means Premiers, particularly for those in the more remote states have been able to access that engagement on a far more regular basis and it has worked incredibly well. And so we will continue to meet on a monthly basis in an ordinary year and we'll continue to meet on a fortnightly basis as we work through the COVID period.*
>
> *Now, how it will be different to the way COAG worked, is the National Cabinet will be driven by a singular agenda, and that is to create jobs. It will have a job-making agenda. And the National Cabinet will drive the reform process between state and federal cooperation to drive jobs. It will drive a series of Ministerial Cabinet subcommittees, if you like, that will be working in each of the key areas, and this is an initial list of areas and that will be further consulted on with the states. So in rural and regional Australia, on skills as I was talking to the National Press Club just this week; on energy; on housing; transport and infrastructure; population and migration; and recognising the*

important role of health, in terms of having a healthy workforce and a healthy community to support a strong economy.

The National Cabinet will continue to work with a laser-like mission focus on creating jobs as we come out of the COVID crisis and we work into the years into the future. The National Cabinet will work together with what is known as the Council on Federal Financial Relations, that is basically the meeting of Treasurers. They actually met today. Those treasurers will take responsibility for all of the funding agreements between the states and the Commonwealth. They will no longer be the province and domain of individual Ministerial portfolios, the Treasurers will bring ultimately those agreements together, consulting with the portfolio Ministers but being responsible for all of those agreements.

And National Cabinet agreed today that one of the first jobs that the Council of Federal Financial Relations will need to do, is look at all of those agreements and how they can be consolidated and rationalised. Obviously, there are the large foundational agreements like the ones I've announced today, they will obviously continue in the form that they've been set out. Education is another which is already in place. But there are multiple other agreements that will be available to the council to be able to be looked at and consolidated and reviewed by the Treasurers to ensure we can get a more effective federation.

Important task forces will continue, that previously worked to COAG in important national agenda issues. Women's safety and the work that the states and territories have done with the Commonwealth to combat domestic violence. This is an important national issue and an important national agenda. It will remain part of the national agenda, as will Indigenous affairs, in particular, the work that is being done on closing the gap and the closing the gap priorities being worked together with the Indigenous peak groups as part of the closing the gap process.

Once a year, the National Cabinet will meet together with the Treasurers as well as the Australian Local Government Association in a new council which is focused on national federation reform. This agreement, this set of processes, the funding agreements, ensuring that we continue to get expert advisory support, both directly to the National Cabinet and each of those Ministerial areas, which won't be pursuing a shopping list of agenda items, they'll be pursuing the tasks that National Cabinet has set them to create jobs in our economy.

B. CABINET ARRANGEMENTS

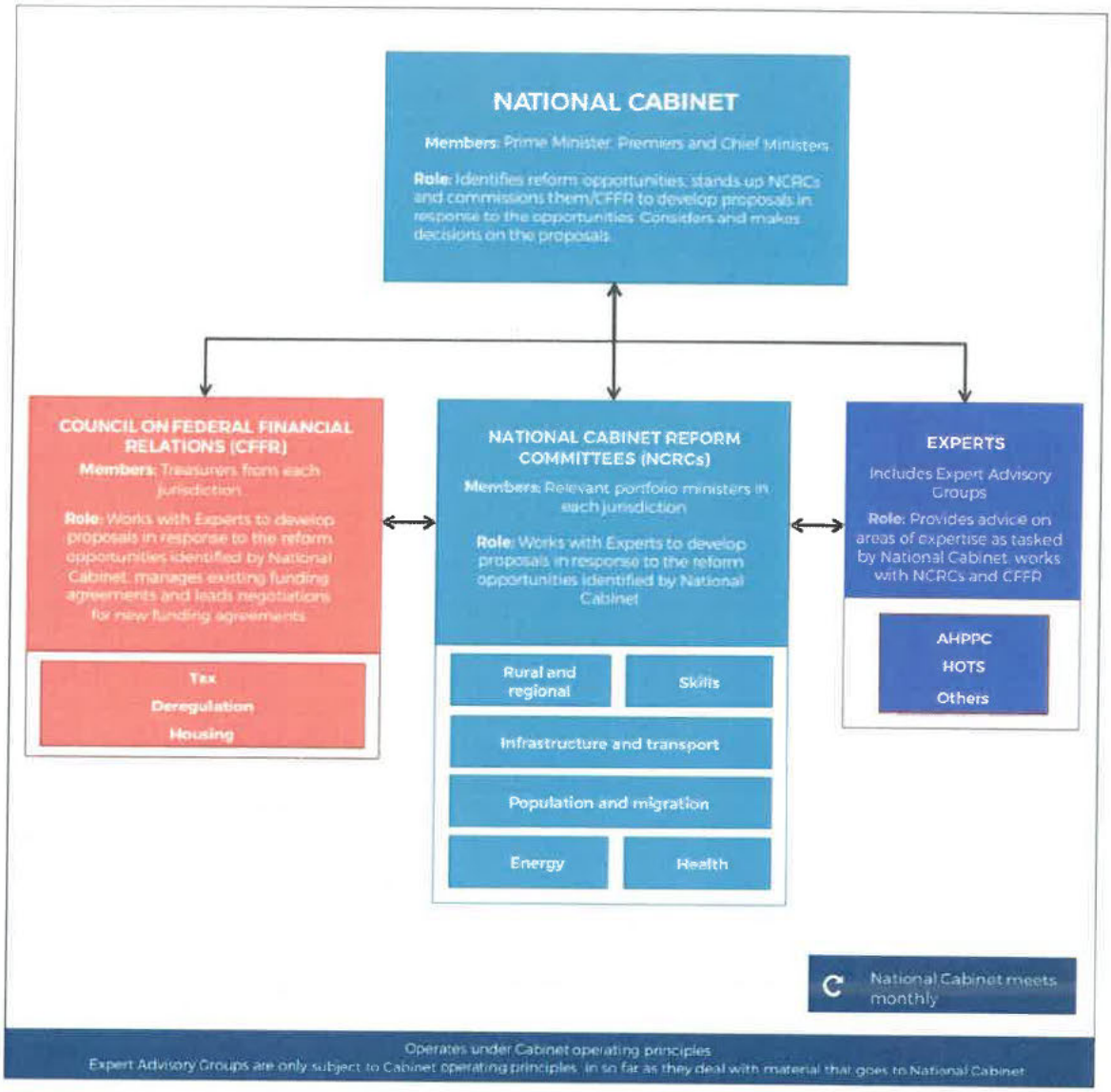
Cabinet Handbook

6. On 19 October 2020 the Department of Prime Minister and Cabinet published the Cabinet Handbook (14th edition) (**Handbook**). A copy of the Handbook is attached to this statement of agreed facts.

7. While it is an agreed fact that the Handbook contains statements concerning the National Cabinet, there remains a dispute as to whether those statements are legally correct. That issue is the central issue before the Tribunal.

The National Cabinet Framework

8. The National Cabinet framework is set out in the diagram below.


NATIONAL CABINET
Members: Prime Minister, Premiers and Chief Ministers
Role: Identifies reform opportunities, stands up NCRCs and commissions them/CFFR to develop proposals in response to the opportunities. Considers and makes decisions on the proposals
COUNCIL ON FEDERAL FINANCIAL RELATIONS (CFFR)
Members: Treasurers from each jurisdiction
Role: Works with Experts to develop proposals in response to the reform opportunities identified by National Cabinet, manages existing funding agreements and leads negotiations for new funding agreements
Tax
Deregulation
Housing
NATIONAL CABINET REFORM COMMITTEES (NCRCs)
Members: Relevant portfolio ministers in each jurisdiction
Role: Works with Experts to develop proposals in response to the reform opportunities identified by National Cabinet
Rural and regional
Skills
Infrastructure and transport
Population and migration
Energy
Health
EXPERTS
Includes Expert Advisory Groups
Role: Provides advice on areas of expertise as tasked by National Cabinet, works with NCRCs and CFFR
AHPPC
HOTS
Others
National Cabinet meets monthly
Operates under Cabinet operating principles
Expert Advisory Groups are only subject to Cabinet operating principles, in so far as they deal with material that goes to National Cabinet

ATTACHMENT TWO

SENATOR PATRICK'S OUTLINE OF SUBMISSIONS & AFFADAVIT

ADMINISTRATIVE APPEALS TRIBUNAL **No 2020/5875**
FREEDOM OF INFORMATION DIVISION **No 2020/5876**
ADELAIDE REGISTRY

SENATOR REX PATRICK
Applicant

SECRETARY
DEPARTMENT OF PRIME MINISTER AND CABINET
Respondent

APPLICANT'S OUTLINE OF SUBMISSIONS

A. OVERVIEW

1. The Tribunal should set aside the decisions of the Secretary and allow Senator Patrick access to the documents.

2. In broad terms, Senator Patrick's argument is as follows:

   (a) The Secretary's decisions rely upon an assertion that deliberations and records of the National Cabinet attract the same privilege which attaches in respect of the federal Cabinet or a Committee of the federal Cabinet. That assertion is wrong.

   (b) The National Cabinet is not a "Cabinet" at all. It bears few similarities with a federal Cabinet, and many characteristics which conflict with the essential features of a federal Cabinet.

   (c) And to make it clear, the basal reason for making federal Cabinet deliberations subject to privilege -- ie collective responsibility – does not even apply to the National Cabinet.

B. THE DECISIONS UNDER REVIEW

The decision in 2020/5875

3. The decision under review is dated 6 August 2020 {T2, pp7-10}.

4. Senator Patrick had sought "*all meetings notes/minutes taken from the meeting of the National Cabinet on 29 May 2020*". The *only* ground relied upon in refusing access is s34(1)(b) of the FOI Act, relying upon the assertion that "[t]*he National Cabinet is a committee of the federal Cabinet*" {T2, p10}. The Secretary has identified five documents as falling within the request {T2, p7}.

The decision in 2020/5876

5. The decision under review is dated 10 August 2020 {T2, pp7-12}.

6. Senator Patrick sought two quite different types of documents:

   (a) The first part requested documents evidencing formal notification to the Governor-General of the formation of the National Cabinet. Senator Patrick accepts that there are no documents falling within that request;

   (b) The second part requested documents which might, broadly, be described as setting out the rules under which National Cabinet is conducted. Two documents were identified as responding to this request. The first was the Cabinet Handbook (13th Edition) and that was produced. There is no remaining dispute regarding that. The second were the "*minutes of the relevant National Cabinet meeting*". The request in this respect was refused upon the basis of s34(1)(b) of the FOI Act. The assertion that "[t]*he National Cabinet is a committee of the Cabinet*" was repeated {T2, p11}.

C. THE LEGISLATION

7. The *only* ground relied upon in relation to both decisions is that the documents sought were "*an official record of the Cabinet*": s34(1)(b). That single provision will need to be placed in context so, for convenience, the full text of s34 of the FOI Act is contained in Annexure A.

8. The terms of s34 of the FOI Act closely follow the general law recognising Cabinet-in-Confidence privilege. The wording of s34 might be seen as designed to reflect the scope and purpose for the privilege which had developed under the general law. For that reason it will be necessary to turn to the leading cases on this issue.

9. It should be noted that any reference to the "*Cabinet*" in s34 is defined to include a "*committee of Cabinet*": s4 of the FOI Act. In these submissions we use the shorthand "*Cabinet*" acknowledging that it applies to a committee of the federal Cabinet.

D. SENATOR PATRICK'S SUBMISSIONS

10. There are two assumptions or precepts essential to federal government in Australia which are presently relevant: the first is the concept of *responsible government*; the other is that Australia has a *Cabinet system of government*. These two principles involve different ideas, but they are necessarily intertwined for the purpose of the issues here.

Responsible government

11. A clear explanation of these features of responsible government in the context of the Australian Cabinet system of government is given by Deane and Toohey JJ in

Nationwide News Pty Ltd v Wills (1992) 177 CLR 1 at 71[1]. Under responsible government the Cabinet is responsible to the legislature, and the legislature and the Cabinet are ultimately responsible to the people.

12. The critical role of political parties in forming the government and making governmental decisions is at the centre of the concept of responsible government. To form government a particular party (or coalition) must command the confidence of the lower house; it is not necessary that the party of government holds a majority in the upper house. In a bicameral legislature where the Ministry includes members of the upper house, their position in the Ministry still depends upon the maintenance of the confidence of the lower house in the political party from which the Ministry was drawn: *Egan v Willis* (1998) 195 CLR 424 per Gaudron, Gummow and Hayne JJ at [45]. If that party falls, then the whole Ministry falls with it.

The Cabinet system of government

13. The origins of that body now known as the "*Cabinet*" are ancient and now obscure: *Commonwealth of Australia v Northern Land Council* (1991) 30 FCR 1 per Black CJ, Gummow and French JJ at 16[2]; although it is clear that the British have had a Cabinet system of government since George II.

14. A federal Cabinet is not mentioned in the Constitution, but a Cabinet system of government was an assumption contained in the drafting of the Constitution; it functions according to convention: *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274 per Bowen CJ at 279.

15. Federal Cabinet was intended to be, and it remains, the body making the highest policy decisions affecting Australia: *Peko-Wallsend* per Bowen CJ at 279. Put in other ways, it is "*the repository of de facto decision-making power*": *NLC Full Court Decision* at 20; or "*the body responsible for the creation of state policy at the highest level*": *NLC High Court Decision* at 615. The body known as the National Cabinet hardly fits that bill – it has *no* role in the federal government or in formulating policies which would bind the federal Cabinet.

16. It is a feature of responsible government that the members of Cabinet are Ministers of State: *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 per Murphy J at 373. The Cabinet Handbook describes them as "*senior ministers*". This has been so in the United Kingdom from the late 18th century till now, but it has always been the case in Australia;

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[1] See also *Australian Capital Television Pty Ltd v Commonwealth (No 2)* (1992) 177 CLR 106 per McHugh J at 228-230; *Williams v Commonwealth* (2012) 248 CLR 156 per French CJ at [57]-[58]; *McCloy v New South Wales* (2015) 257 CLR 178 per Gageler J at [106]-[109]; *Comcare v Banerji* (2019) 267 CLR 373 per Gordon J at [148].

[2] This decision went on appeal to the High Court and it will be necessary to refer to both decisions – we will call this the "*NLC Full Court Decision*" and the other, *Commonwealth of Australia v Northern Land Council* (1993) 176 CLR 604, the "*NLC High Court Decision*". The judgment in the *NLC High Court Decision* to which we will refer is a joint judgment of Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ.

it is entrenched in Australia by Part II of the Constitution – s61 and s62 "*grafted into the Constitution the principle of responsible government*": *NLC Full Court Decision* at 19-20. It is by these means that those members of Cabinet, and Cabinet itself, is made responsible to the legislature: *Egan v Chadwick* (1999) 46 NSWLR 563 per Spigelman CJ at [43]-[45].

What is a "Cabinet"

17. The creation and conduct of a body as a Cabinet in the context of a Cabinet system of government is obviously a question of substance, not form – it is plainly insufficient merely to label a body as a "*Cabinet*" and then to claim the body attracts the rights and privileges of a real Cabinet.

18. In *Whitlam v Australian Consolidated Press Ltd* (1985) 73 FLR 414 at 421-422, Blackburn CJ described federal Cabinet in this way:

> *Cabinet is a group of persons who have in common certain political aims. It has to make decisions which must command support in Parliament and, it is hoped, will command substantial support in the electorate. ... Each Member of Cabinet has a personal responsibility to his conscience and also a responsibility to the Government.*

19. Senator Patrick relies upon the whole of Sir Richard's description – which is too lengthy to incorporate fully into these submissions. It has been cited with approval many times since.

20. The leading cases demonstrate that each of the following seven features is an essential feature of that body known as Cabinet – indeed, a body would not be capable of being described as a "*Cabinet*" unless it exhibited each of these seven features:

    (a) In a Cabinet system of government, the Cabinet stands at the apex of policy formulation: *NLC High Court Decision* at 615; *NLC Full Court Decision* at 20; *Peko-Wallsend* at 279.

    (b) The Cabinet is comprised only by Ministers drawn from the government in which the Cabinet operates: *FAI v Winneke* per Murphy J at 373. This is a necessary requirement reflecting the concept of responsible government: *Egan v Chadwick* at [45].

    (c) The selection and appointment of a Minister to the federal Cabinet is at the sole discretion of the Prime Minister. Members of Cabinet can be removed or added as the Prime Minister sees fit. The Prime Minister determines the size of Cabinet – in contemporary arrangements, only a select number of Ministers are appointed to Cabinet[3].

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[3] This has been so in coalition governments since 1956 and in Labor governments since 1983.

(d) The members of Cabinet are drawn from the political party forming the government – "*the Cabinet, which has no formal place in the Constitution, is a committee of Ministers of the ruling party or parties*": *FAI v Winneke* per Murphy J at 373; party political aspect of Cabinet government has been confirmed in other cases: see also, *Whitlam v ACP* where Blackburn CJ referred to the members of Cabinet sharing "*political aims*".

(e) All members of Cabinet share responsibility for a decision of Cabinet – "*collective responsibility*". The "*collective Cabinet responsibility*" of the members of Cabinet is an essential feature of Cabinet and of responsible government: *NLC Full Court Decision* at 16-17.

(f) The members of Cabinet are bound to observe "*Cabinet solidarity*" – meaning all members of the Cabinet must publicly support a decision, even if they disagree with it. This is a concomitant of the requirement that the Cabinet comprise members of a single political party and share similar political objectives[4].

(g) Despite its plenary power to determine policy, Cabinet has no power to implement the policy. A decision of Cabinet can only be implemented by the legislature to which it is responsible. If the legislature declines to do so, then this is a basis for the government to fall and for the Cabinet to fall with it.

Cabinet-in-confidence privilege

21. The confidentiality of Cabinet deliberations recognised under the general law is now embodied in statute – s34 of the FOI Act defines and limits those circumstances which would entitle resistance to a request for the production of certain Cabinet documents. The terms of the FOI Act, especially s34(1)(b), closely conform to the general law. The caselaw remains relevant.

22. The leading cases have now explained the true basis for the privilege which can attach to certain Cabinet documents – the basis for the privilege is the protection of the principle of collective Cabinet responsibility: *Sankey v Whitlam* (1978) 142 CLR 1 per Mason J at 97-98; *NLC High Court Decision* at 615-616.

23. The same cases have explained the rationale for protecting the confidentiality of Cabinet deliberations. Cabinet deliberations are confidential to protect collective responsibility and Cabinet solidarity. Individual members of Cabinet may have differences of opinion relating to policy issues, even sharp differences. It is essential that they be permitted to debate those differences in formulating the final policy and still be able to emerge from

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[4] Cabinet solidarity has consequences: it has led to the resignation of Cabinet Ministers unable publicly to support a Cabinet decision upon grounds of conscience; it has led to the dismissal of Cabinet Ministers who have departed from solidarity. There have been several instances of this since Federation.

the Cabinet room apparently observing Cabinet solidarity. In *NLC High Court Decision* at 615 the High Court described it this way:

> *... it has never been doubted that it is in the public interest that the deliberations of Cabinet should remain confidential in order that the members of Cabinet may exchange differing views and at the same time maintain the principle of collective responsibility for any decision which may be made.*

See also *Sankey v Whitlam* per Mason J at 98; *NLC Full Court Decision* at 21.

24. There is a corollary to all of this – in the absence of a collective Cabinet responsibility for a decision, and in the absence of a bond of Cabinet solidarity, there is no basis for applying a Cabinet-in-confidence privilege.

The limits of Cabinet confidentiality

25. It also needs to be noted that even where Cabinet-in-confidence privilege attaches, the privilege is not absolute: *Sankey v Whitlam* per Gibbs J at 43; *NLC High Court Decision* at 616. The privilege is always subject to a balancing of interests and must yield where a public interest in disclosure outweighs the need for continuing confidentiality.

26. This has led Courts to follow a practice permitting the examination of documents over which claims for Cabinet-in-confidence privilege are asserted. A famous example of this is in *Sankey v Whitlam* itself, where the High Court examined the documents and issued a statement as to how they should be treated: *Sankey v Whitlam* at 110-111.

27. There are other limits to the privileges. Under the general law before the FOI Act, it was recognised that there were only certain kinds or types of documents subject to the privilege. It is clear that the privilege extends to records of the actual deliberations of Cabinet: *NLC High Court Decision* at 614-5, 617; but that leaves open arguments that documents bearing a different character are not so privileged. In the *NLC High Court Decision* it was observed (at 614) that the immunity from disclosure which it was discussing was one which attached to the record of "*the actual deliberations of Cabinet*" and that (at 619) the documents which it ordered to be produced "*were not even Cabinet documents, let alone documents disclosing Cabinet deliberations*".

28. Of course, the need for any confidentiality evaporates the moment a decision is announced or the deliberations surrounding the making of a decision (or, for that matter, *not* making a decision) are revealed. So much is reflected in s34(3) of the FOI Act. As the evidence discloses, there are numerous instances where the discussions of National Cabinet have been revealed to the press and public.

The National Cabinet is *not* a "*Cabinet*", and is not a committee of Cabinet

29. The National Cabinet is plainly not a Cabinet and, equally plainly, is not a committee of federal Cabinet.

30. The National Cabinet has many features which are not only inconsistent with the constituents of a Cabinet, but are inimical to it. These seven matters are important, but probably not comprehensive:

    (a) Except for the Prime Minister, the members of the National Cabinet are not responsible to the federal legislature or, for that matter, to any single legislature. The members of the National Cabinet are responsible to their own separate legislatures. Perhaps more to the point, except for the Prime Minister, the members of the National Cabinet are not responsible to federal voters. In other words, the members of the National Cabinet are not subject to the demands of responsible Cabinet government.

    (b) The Prime Minister has no control or say over who might be the members of the National Cabinet. A Premier or Chief Minister could, of course, be removed as leader by his or her own parliamentary party. The Prime Minister has no say in the identity of the replacement and no say in who is a member of the National Cabinet – and is unable to dismiss a member of the National Cabinet, or to a appoint a new member.

    (c) The National Cabinet is not made up of members of a single political party: the members are from different, even opposing, political parties. This defies the usual description linking the functions of Cabinet to promoting the political objectives of the governing party of the day. Unlike the description of a Cabinet by Blackburn CJ, the members do not share a commonality of political objectives.

    (d) Collective responsibility cannot be imposed upon the individual members of the National Cabinet. It is a consultative group, not a body which arrives at one governing policy. An agreement between all of the other members of the National Cabinet cannot, does not, and should not bind an individual member who does not agree. In fact, a unanimous agreement of the National Cabinet cannot bind individual members because it remains a question for their home legislature. Indeed, experience has demonstrated that to be so.

    (e) For obvious reasons, the concept of "*Cabinet solidarity*" cannot apply. The individual members of the National Cabinet owe no political loyalty to any other member, even if they broadly share political sympathies. The members of the National Cabinet are not only free to announce their disagreement with a decision in National Cabinet, they are obliged to do so in accordance with their own responsibilities to their own parliaments and to their own voters. The evidence shows that the members of National Cabinet often come to no single view on an

issue. The evidence also shows a willingness by some members of National Cabinet to criticise decisions taken by other members relevant to their home states. The Prime Minister has been particularly outspoken in his criticism of some State Premiers.

(f) The deliberations of National Cabinet are not regarded as confidential or secret by its members. The evidence shows that the nature of discussions, including the extent of disagreements, are widely and openly discussed immediately or soon after a National Cabinet meeting concludes – often by the Prime Minister himself. This is not the same thing as a Cabinet "*leak*": it is a reflection that the same requirements of confidentiality do not apply and cannot bind the members of the National Cabinet – who, if nothing else, may have to explain their position to those to whom they are truly responsible.

(g) The only similarity between the National Cabinet and the federal Cabinet is that they share the characteristic that each, of itself, has no power to implement a decision. But even that similarity demonstrates an inconsistency; whereas the Prime Minister must go to the federal Cabinet to implement his preferred policy, the other members of National Cabinet would need to go to their own separate legislative bodies.

National Cabinet is not a "committee of Cabinet"

31. The National Cabinet is *not* a committee of the federal Cabinet, and merely applying that label to the National Cabinet does not make it so. One of the features of a committee of Cabinet is that it has no power in its own right, and each of its decisions must be approved, or can be overridden, by the Cabinet.

32. As a matter of convention it is open to the federal Cabinet to appoint committees, but the creation of those committees and their membership is also subject to conventions and rules. One of the key conventions is expressed in the Cabinet Handbook (at [6]):

> *6. The Prime Minister is responsible for the membership of the Cabinet and Cabinet committees, determines and regulates all Cabinet arrangements for the government and is the final arbiter of Cabinet procedures.*

33. That is hardly consistent with the creation, conduct and composition of the National Cabinet. For reasons early explained, the membership of that body known as the National Cabinet can vary for reasons over which the Prime Minister can exert no control whatsoever.

34. Undoubtedly because of this, there has been some difficulty in the explanations given, even at the highest level, as to the nature of the body known as the National Cabinet. It was originally described as a "*Cabinet Office Policy Committee*", but its only listed member was the Prime Minister. It has also been asserted that the body known as the

National Cabinet operates as a Cabinet in its own right, but does so under federal Cabinet guiding principles.

35. In truth, the National Cabinet is really a successor to the Council of Australian Governments (COAG) – a consultative inter-governmental body which had been operating from 1992. No-one ever suggested that COAG was operating as some kind of National Cabinet.

The status of the Cabinet Handbook

36. We understand from the content of the decision of the Secretary that he places heavy reliance upon the content of the federal Cabinet Handbook. An argument based upon the Cabinet Handbook is misplaced.

37. The Cabinet Handbook restates the principles and conventions of the conduct of a Cabinet and the Cabinet system of government which we have set out above. The problem is that the thing known as "*The National Cabinet*" does not conform to those principles or conventions.

38. In any event, the Cabinet Handbook carries no weight: it is not a legislative instrument, and cannot alter the long-standing conventions upon which Federation depends.

E. DAMAGE TO RELATIONS BETWEEN THE COMMONWEALTH AND A STATE

39. Only recently the Secretary has indicated he might also rely upon s47B(a) of the FOI Act upon the basis that the disclosure could cause damage to relations between the Commonwealth and a State.

40. Because this has never previously been foreshadowed, and because the factual and legal basis for such a claim has never been expressed, Senator Patrick would prefer to reply once the basis for this argument has been developed.

41. We do offer one general observation: if a claim like this is to be made, it cannot apply generally to a class of documents; it would need to be claimed and explained document by document.

Dated: 26 April 2021

Geoffrey Watson

Diana Tang

Annexure A

Cabinet documents

General rules

(1) A document is an exempt document if:

(a) both of the following are satisfied:

(i) it has been submitted to the Cabinet for its consideration, or is or was proposed by a Minister to be so submitted;

(ii) it was brought into existence for the dominant purpose of submission for consideration by the Cabinet; or

(b) it is an official record of the Cabinet; or

(c) it was brought into existence for the dominant purpose of briefing a Minister on a document to which paragraph (a) applies; or

(d) it is a draft of a document to which paragraph (a), (b) or (c) applies.

(2) A document is an exempt document to the extent that it is a copy or part of, or contains an extract from, a document to which subsection (1) applies.

(3) A document is an exempt document to the extent that it contains information the disclosure of which would reveal a Cabinet deliberation or decision, unless the existence of the deliberation or decision has been officially disclosed.

Exceptions

(4) A document is not an exempt document only because it is attached to a document to which subsection (1), (2) or (3) applies.

Note: However, the attachment itself may be an exempt document.

(5) A document by which a decision of the Cabinet is officially published is not an exempt document.

(6) Information in a document to which subsection (1), (2) or (3) applies is not exempt matter because of this section if the information consists of purely factual material, unless:

(a) the disclosure of the information would reveal a Cabinet deliberation or decision; and

(b) the existence of the deliberation or decision has not been officially disclosed.

Affidavit

ADMINISTRATIVE APPEALS TRIBUNAL
FREEDOM OF INFORMATION DIVISION
ADELAIDE REGISTRY

No 2020/5875
No 2020/5876

SENATOR REX PATRICK
Applicant

SECRETARY
DEPARTMENT OF PRIME MINISTER AND CABINET
Respondent

Affidavit of: **Philip Warren Dorling**

Address:

Occupation: Adviser

Date: 16 April 2021

I, Philip Warren Dorling, of 1 affirm:

1. I am a political adviser to the Applicant, Senator Rex Patrick. I make this affidavit in support of Senator Patrick's applications in this Tribunal.

2. The facts stated in this affidavit are within my own knowledge, except where otherwise stated, in which case they are based on information and belief. Where I make statements based on information provided to me by another person, I believe that information to be true and correct.

My background

3. I have a doctorate in Politics from the Flinders University of South Australia in 1996.

4. In my professional career, I have worked for a number of government departments, including the Department of Foreign Affairs and Trade, 1992 to 1996 the Tasmanian Department of Premier and Cabinet, 2003; and the Australian Capital Territory Chief Minister's Department, 2003 to 2008. I have also served as a political adviser with the

Federal Labor Opposition from 1996 to 2003, and as a political adviser to South Australian Senators Nick Xenophon and Rex Patrick from 2015 to the present.

5. Between 2003 to 2008, I served as Senior Manager and then Director of the Cabinet Office in the ACT Chief Minister's Department. In these roles I was responsible for managing the ACT Government's intergovernmental relations including involvement in the Council of Australian Governments (COAG). I further managed the ACT Cabinet Secretariat, served as ACT Cabinet notetaker and as acting Cabinet Secretary.

6. In preparing this affidavit, I have in mind a number of documents that I have read. I have identified the documents in the table below and set out an extract from those documents in the body of this affidavit:

	Date	Document
1.	13 March 2020	Media release following the 48th COAG general meeting
2.	13 March 2020	Transcript of press conference of the Prime Minister following the 48th general meeting of COAG
3.	13 March 2020	Media release issued by the Prime Minister
4.	15 March 2020	Transcript of press conference of the Prime Minister following the first National Cabinet meeting
5.	16 March 2020	Media statement issued by the Prime Minister
6.	18 March 2020	Transcript of press conference of the Prime Minister
7.	18 March 2020	Media statement issued by the Prime Minister
8.	20 March 2020	Media statement issued by the Prime Minister
9.	22 March 2020	Media statement issued by the Premier of Victoria
10.	22 March 2020	Media statement issued by the Prime Minister
11.	24 March 2020	Transcript of press conference of the Prime Minister
12.	29 April 2020	Transcript of press conference of the Prime Minister
13.	5 May 2020	Transcript of press conference of the Prime Minister
14.	29 May 2020	Transcript of press conference of the Prime Minister
15.	4 September 2020	Media statement issued by the Prime Minister
16.	5 September 2020	Article by K Burgess published in the Canberra Times, titled "States split on hotspot border plan"
17.	23 October 2020	Media statement issued by the Prime Minister

Media releases by COAG

7. I have carried out internet searches for media releases by the Council of Australian Governments) issued in March 2020.

8. Based on these searches, I have found a media release from 13 March 2020 following the 48th COAG general meeting. It makes no mention of a National Cabinet.

Statements by the Prime Minister, Scott Morrison, regarding National Cabinet

9. I have carried out internet searches for public statements made by the Prime Minister, Scott Morrison, in the period March 2020 to May 2020.

10. I set out below the parts of these statements that I consider to be relevant.

11. On 13 March 2020, the Prime Minister held a press conference following the 48th general meeting of COAG. At that press conference, Prime Minister Morrison stated:

> "As a result of the advice which was pulled together today by the HPPC, what we have resolved to do is to form a national cabinet to deal with the national response to the coronavirus. The national cabinets will be made up of the premiers, chief Ministers and myself. We will be meeting on a weekly basis to ensure that we get coordinated response across the country to the many issues that relate to the management of the coronavirus.
>
> ... we have agreed today to join together in a national cabinet. A national cabinet for an emergency response to these issues that enables us to manage this on a day to day, week to week basis. ... And the national cabinet working together with each of the constituent governments, their cabinets will continue to do all of their jobs."

12. Separately, the Prime Minister issued a media release on 13 March 2020. The media release stated:

> "A new National Cabinet, made up of the Prime Minister, Premiers and Chief Ministers has been set up and will meet at least weekly to address the country's response to the coronavirus, COVID-19."

13. On 15 March 2020, the Prime Minister held a press conference following the first National Cabinet meeting. At that press conference, Prime Minister Morrison stated:

> "And again, I want to thank the premiers and the chief ministers for their support in bringing together this national cabinet. It has now been established formally under the Commonwealth government's cabinet guidelines. And it has the status of a meeting of Cabinet that would exist at a federal level, as does the meetings of the AHPPC and the national coordinating mechanism, which is feeding up into those arrangements.
> ...
> The National Cabinet ensures that we have some coordination, but ultimately states and territories will make their own decisions."

14. On 18 March 2020, the Prime Minister held a press conference following a further National Cabinet meeting. At that press conference, Prime Minister Morrison stated:

> "... And again, the National Cabinet is so important in a coordinated national response to these events. I hope, and it is certainly all of our hopes, as members of that National Cabinet, that Australians would take confidence from that. That all issues of politics, and

doesn't matter, what party you're in in that National Cabinet - there are five Labor members and there are four Liberals - and we are working together as one united team to do with the issues that are, that we have been sworn in to deal with. You know, when you go down to the Governor General, or you go to your State Governor and you take an oath to say you're going to do the right thing by the people of your state or the people of your nation, that's what we're doing, and you're seeing that exhibited in the way that this National Cabinet working together."

15. On 24 March 2020, the Prime Minister held a press conference following a further National Cabinet meeting. At that press conference, Prime Minister Morrison stated:

> "And so in taking these decisions, states and territories are very aware of their responsibilities of how they need to take actions to enforce these measures. So I'll refer you to them about how they will achieve that. But they haven't taken these decisions - and I want to stress, these are decisions that are being taken by the State and Territory Premiers and Chief Ministers with myself as the Prime Minister who convenes the National Cabinet, these are not decisions being made by the Federal Cabinet and instructed to the States and Territories. That's not how the National Cabinet works. These are decisions being taken together, heads of governments, to form these views. And in these areas in particular, it is the states and territories that have the lead and the primacy and so they are coming together and setting these in place."

16. On 29 April 2020, the Prime Minister held a press conference following a National Cabinet meeting. At that press conference, Prime Minister Morrison stated:

> "So we are looking at what the bigger picture success is when it comes to COVID-19 and we are working to all of that together as a National Cabinet, our own Cabinet here at a Commonwealth level will be meeting again today as we do every week, to ensure we're focused on all elements of the recovery and the road back."

17. On 5 May 2020, the Prime Minister held a press conference following a National Cabinet meeting. At that press conference, Prime Minister Morrison stated:

> "Well I can't pre-empt decisions of Friday. The National Cabinet, particularly on these issues where the Commonwealth has no direct authority at all, our job here is to try and ensure as much consistency across state and territory jurisdictions as possible. And it has been one of the more effective tools that we've had when we compare ourselves to other countries that exist in federations - Australia really has operated as a federation remarkably well, but as we've seen already and as has been the case, states and territories have operated on different timetables, there have been different nuances. They've reflected the case characteristics in each of those states and territories. In some cases, they've just reflected the sheer geography of the different states and territories, and that's to be expected. And so what you can expect on Friday is that, again, will seek to have as consistent a national position as possible. But ultimately, each state and territory are the arbiters of their own position. But I have no doubt they will seek to do that in as consistent a way as possible".

18. On 29 May 2020, the Prime Minister held a press conference following a National Cabinet meeting. At that press conference, Prime Minister Morrison stated:

> "Prime Minister: ... The other thing we agreed today is a major change in terms of how COAG will work in the future. And, if I can move to that chart, COAG is no more. It will be replaced by a completely new system and that new system is focused on the success that has been yielded by the operation of the National Cabinet. What we'll be doing is keeping the National Cabinet operating and particularly during the COVID period, we'll continue to meet on a fortnightly basis. In a normal year it will meet on a monthly basis. Wouldn't meet in person. One of the things we've learned over meeting so regularly is we can work effectively together as we get together using the telepresence facilities which means Premiers,

particularly for those in the more remote states have been able to access that engagement on a far more regular basis and it has worked incredibly well. And so we will continue to meet on a monthly basis in an ordinary year and we'll continue to meet on a fortnightly basis as we work through the COVID period.

Now, how it will be different to the way COAG worked, is the National Cabinet will be driven by a singular agenda, and that is to create jobs. It will have a job-making agenda. And the National Cabinet will drive the reform process between state and federal cooperation to drive jobs. It will drive a series of Ministerial Cabinet subcommittees, if you like, that will be working in each of the key areas, and this is an initial list of areas and that will be further consulted on with the states. So in rural and regional Australia, on skills as I was talking to the National Press Club just this week; on energy; on housing; transport and infrastructure; population and migration; and recognising the important role of health, in terms of having a healthy workforce and a healthy community to support a strong economy."

...

Journalist: Prime Minister, just on the new National Cabinet structure, do you envisage that once this crisis has passed the Premiers will fly to Canberra for face-to-face meetings like they used to with COAG? How can you assure us over time it doesn't grow into a bureaucracy like COAG which critics said is a place where good ideas went to die?

Prime Minister: "Yeah, I used to say that too, and it was true. One of the reasons why the National Cabinet has worked is it has actually operated as a Cabinet. And that means it operates within Cabinet rules and it operates under the Federal Cabinet's rules and that relates to the security of documents, process, procedure and all of those - if I could have that chart back, please, that's it - all of these committees also will operate on that basis as well. When these groups get together, there's a lot of theatre, a lot of people in the room. And that can really, I think, restrict the genuine reform discussions that you have to have. Having these groups operate like a fair-dinkum Cabinet, I think, has been really important. We're all members of Cabinet so we all understand what those rules are and I don't think that has been the MO for how COAG has operated and I think that's a really big change.

...So it's a much more flexible way of working, Phil. It gets rid of so much of the formalities and staging that is around these events and it enables treasurers, as well, I have got to say, and prime ministers and premiers to have these sorts of discussions. Without sort of lifting the veil, I mean, on the night before every treasurers and leaders' meeting I have been to, there is usually a get-together and that is the best conversation you ever have because you're genuinely talking about the issues you need to and that's how National Cabinet has operated. We've been able to find that candour and collegiality in that new format. We will put it all the way through these others and we're not going to have the myriad of these agendas which are going on all the time, bubbling up and distracting often the core focus that the leaders need to create jobs.

...

Journalist: "Why should cabinet secrecy apply to ordinary policy discussions between the federal and state governments? Won't the public need greater transparency about why decisions are being made on, you know, basic things like transport and skills that, after all, aren't part of a national emergency any more?

Prime Minister: "Well, in the same reason that in state Cabinets and federal Cabinets they work together under Cabinet rules to come to conclusions and have debates, which produces good decisions that supports essential services and this is just the same process. I mean, it's not a spectator sport. It's a serious policy deliberation which needs to be done between governments and by Cabinet members within Cabinets and it's applying the same disciplines and the same opportunities. What matters is the outcome. What matters is the services. What matters is the hospital beds and the schools and the funding and support and the targeting and the performance measurement and the accountability and that's what all of this is designed to do and that's what this system will do."

Announcements concerning National Cabinet decisions about school closures

19. I have carried out internet searches of announcements by the Prime Minister following National Cabinet meetings concerning school closures and COVID-19, as well as statements by the Premiers of the States and Chief Ministers of the Territories.

20. I set out below the parts of those statements that I consider to be relevant.

21. On 16 March 2020, the Prime Minister issued a media statement where it was stated:

> The National Cabinet also endorsed the advice of the AHPPC to further introduce social distancing measures. This includes the requirement that non-essential, organised public gatherings of more than 500 people should not occur.
>
> At this stage, these measures do not include schools, universities and workplaces, or prevent the operation of public transport. However, the principle of social distancing should still apply in these settings. For example, assemblies and lectures housing more than 500 students in schools and universities should be avoided.
>
> Specifically the National Cabinet agreed that there is no requirement for schools to close at this time.

22. On 18 March 2020, the Prime Minister issued a media statement following the second meeting of the National Cabinet, where it was stated:

> Leaders met last night for the second National Cabinet meeting and agreed to further actions to protect the Australian community from the spread of coronavirus (COVID-19).
>
> ...
>
> The National Cabinet has accepted the advice of the AHPPC that schools should remain open at this time.
>
> Specifically the National Cabinet has agreed that "pre-emptive closures are not proportionate or effective as a public health intervention to prevent community transmission of COVID-19 at this time."

23. On 20 March 2020, the Prime Minister issued a media statement following a National Cabinet meeting, where it was stated:

> The Prime Minister, state and territory Premiers and Chief Ministers met today for the National Cabinet and agreed to further actions to protect the Australian community from the spread of coronavirus (COVID-19).
>
> ...
>
> Arrangements for schools have not changed.

24. On 22 March 2020, the Victorian Premier, Daniel Andrews, issued a media statement, prior to the National Cabinet meeting that was to be held later that day, where it was stated:

> I will inform National Cabinet tonight that Victoria will proceed over the next 48 hours to implement a shutdown of all non-essential activity across our state to combat the spread of Coronavirus.
>
> This is not something that we do lightly, but it's clear that if we don't take this step, more Victorians will contract coronavirus, our hospitals will be overwhelmed and more Victorians will die.

> Victorians will still be able to go to the supermarket, the bank, the pharmacy and other essential stores, like petrol stations and convenience stores. Freight, logisitics and home delivery are also considered essential and will remain open.
>
> I will also inform National Cabinet that school holidays will be brought forward in Victoria, starting on Tuesday 24 March.
>
> All measures to be implemented by Victoria are consistent with the health advice provided by the Victorian Chief Health Officer.
>
> The decision whether to re-open schools after the Term 1 holidays will likewise be determined following advice from the Chief Health Officer.
>
> I will have more to say on these measures tomorrow morning.

25. On 22 March 2020, the Prime Minister issued a media statement following the National Cabinet meeting held that day, where it was stated:

> All leaders agreed that children should go to school tomorrow. Leaders agreed that we cannot see children lose an entire year of their education as a result of school closures caused by COVID-19.
>
> Leaders committed to the Australian Health Protection Principal Committee (AHPPC) advice that says that it is safe to keep schools open.
>
> Leaders also thanked all teachers and school staff for their support.
>
> State Premiers and Chief Ministers agreed that schools will remain open through to the end of the current school terms to support students whose parents choose to send their children to school. Victoria's school break will commence on Tuesday 24 March 2020.
>
> All Leaders have committed to re-open schools at the end of the school break, subject to the advice of the Australian Health Principal Protection Committee.

Announcements concerning National Cabinet decisions about border closures

26. I have carried out internet searches of announcements by the Prime Minister following National Cabinet meetings concerning internal border closures and COVID-19, as well as statements by the Premiers of the States and Chief Ministers of the Territories.

27. I set out below the parts of those statements that I consider to be relevant.

28. On 4 September 2020, the Prime Minister issued a media statement following a National Cabinet meeting where it was stated:

> [W]e've decided that this notion of 100 percent, absolute consensus on any issue is not a way that the National Cabinet can indeed work. And so what we will do is we will set out areas where we can come together, and get as many states and territories as possible to come around that agreement. Not everyone has to get on the bus for the bus to leave the station.

29. On 5 September 2020, an article by K Burgess was published in the Canberra Times, titled "states split on hotspot border plan", where it was reported:

> Queensland and Western Australia had indicated they would reject any attempts to interfere with the management of the borders, as the Prime Minister was attempting to institute a shared definition of what constitutes a coronavirus hotspot. ... Western Australia Premier Mark McGowan said in a statement he would only open his state's border when their health advice recommended it. ... Queensland premier Annastacia Palaszczuk later revealed she had sided with Western Australia in rejecting the proposal too.

"Queensland has not agreed to the Federal Government's hotspot definition. I agree with WA - our borders protect our health and our economy," she tweeted.

30. On 23 October 2020, the Prime Minister issued a media statement following a meeting of National Cabinet, where it was stated:

> The Commonwealth, New South Wales, Victoria, Queensland, South Australia, Tasmania, the Australian Capital Territory and the Northern Territory agreed in-principle to a new 'Framework for National Reopening Australia by Christmas' ... Western Australia did not agree to the National Framework for Reopening, specifically the domestic border and international arrival proposals. ... The Commonwealth and seven states and territories agreed to finalise the Framework by the next National Cabinet meeting on 13 November 2020 and ensure that a new Common Operating Picture is publicly available by 1 December 2020.

Affirmed by the deponent)
at GUNGAHLIN ACT)
in)
on 16 APR 2021) Signature of deponent
Before me:)

Philip Warren Darling

LORIS MANNS
ACT Justice of the Peace # 2290

Signature of witness

AFP
Gungahlin Police Station
Anthony Rolfe Ave
Gungahlin ACT 2912
Phone (02) 6256 7777

..... Name and qualification of witness

ATTACHMENT THREE

GOVERNMENT OUTLINE OF SUBMISSIONS

& AFFADAVIT

ADMINISTRATIVE APPEALS TRIBUNAL
FREEDOM OF INFORMATION DIVISION
ADELAIDE REGISTRY

2020/5875 & 5876

SENATOR REX PATRICK
Applicant

SECRETARY
DEPARTMENT OF THE PRIME MINISTER AND CABINET
Respondent

RESPONDENT'S OUTLINE OF SUBMISSIONS

INTRODUCTION

Official records of a committee of the Cabinet

1. The 6 and 10 August 2020 decisions of an officer of the Department of Prime Minister and Cabinet (**PM&C**) to refuse access to a total of six documents identified as National Cabinet minutes (**exempt documents**), on the basis that each is an official record of the Cabinet[1] within the meaning of s 34(1)(b) of the *Freedom of Information Act 1982* (**FOI Act**), ought to be affirmed.

2. The exempt documents are each official records of Cabinet because:
   a. each of the exempt documents comprise formal minutes of meetings of the National Cabinet,
   b. the Prime Minister has established the National Cabinet as a committee of the Cabinet,
   c. the National Cabinet is supported by the usual PM&C apparatus of support for Cabinet and its committees, and
   d. consistent with the Cabinet and all committees of Cabinet, the deliberations of National Cabinet are and remain strictly confidential.

Damage to Commonwealth-State relations, contrary to the public interest

3. In addition, the exempt documents are exempt from release under the FOI Act because their disclosure 'would, or could reasonably be expected to, cause damage to

[1] For the purposes of the FOI Act, Cabinet includes a committee of Cabinet (s 4(1)).

Lodged on behalf of the Respondent
Contact: Justin Hyland

Prepared by: Justin Hyland
AGS lawyer within the meaning of s 55I of the *Judiciary Act 1903*

Address for Service:
The Australian Government Solicitor
4 National Circuit, Barton ACT 2600

relations between the Commonwealth and a State' (s 47B(a)) and would, on balance, be contrary to the public interest (s 11A(5)) because their disclosure would:

a. damage relations between the Commonwealth and the States and Territories, by significantly undermining the strict confidentiality the members of the National Cabinet have agreed are to be applied to National Cabinet records, and

b. thereby undermine the National Cabinet's ability to work cohesively and effectively in advancing the public interest.

The Respondent's evidence

4. Two affidavits are relied on by the Respondent:

   a. the affidavit of the Secretary of PM&C, Mr Philip Gaetjens, affirmed 16 April 2021 (**Gaetjens affidavit**), and

   b. the affidavit of the First Assistant Secretary, Cabinet Division of PM&C, Ms Leonie McGregor, sworn 16 April 2021 (**McGregor affidavit**).

5. The experience of Mr Gaetjens and Ms McGregor, referred to in their respective affidavits, places them in a special position to inform the Tribunal as to:

   a. the operations of Cabinet, and

   b. the damage to Commonwealth-State relations that would arise if the relevant documents were released.

   It is hard to imagine deponents who might be better placed to give evidence on these matters. In light of their background and experience and in accordance with established principle,[2] the Tribunal should therefore place significant weight on their evidence, including the opinions they express.

6. A Statement of Agreed Facts was also filed by the Respondent on 1 April 2021 (**Statement of Agreed Facts**).

SECTION 34 – THE CABINET DOCUMENT EXEMPTION

7. Section 34(1)(b) of the FOI Act relevantly provides that a document is an exempt document if 'it is an official record of the Cabinet'. Section 4(1) defines 'Cabinet' to include 'a committee of the Cabinet'. The same protection is extended under s 34(2), to the extent a document is 'a copy or part of, or contains an extract from, a document to which subsection (1) applies'.

8. For the reasons explained below at [16]-[17], the limitation in s 34(6) of the Act regarding 'purely factual' material is not relevant in the present circumstances (nor is the limitation regarding 'official disclosure' in 34(3) – see paragraph [30] below).

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2 See, for example, *Rogers v Home Secretary* [1973] AC 388 at 406C (Lord Pearson); *Burmah Oil Co Ltd v Bank of England* [1980] AC 1090 at 1143 (Lord Scarman); *Sankey v Whitlam* (1978) 142 CLR 1 at 43-44 (Gibbs ACJ), 59-60 (Stephen J); *Alister v the Queen.*(1984) 154 CLR 404 at 435.9 (Wilson and Dawson JJ), 455.5 (Brennan J); *Church of Scientology v Woodward* (1982) 154 CLR 25 at 59.9 (Mason J); *A v Hayden* (1984) 156 CLR 532 at 560.2 (Mason J), 576.7 (Wilson and Dawson JJ); *Commonwealth v Northern Land Council* (1991) 30 FCR 1 at 38 (Black CJ, Gummow and French JJ).

Section 34 of the Act is not a conditional exemption. There is no additional public interest test to be satisfied in its application. A document coming within the description in s 34 is therefore exempt from release.[3]

Cabinet and Cabinet committees

9. In determining whether a body is a committee of the Cabinet, the public statements of the Prime Minister, the intention of the parties, and the practices and conventions applied to the body are relevant.[4]

10. The National Cabinet is a 'committee of the Cabinet' within the meaning of s 4 of the FOI Act for four simple reasons.

11. First, Cabinet is not mentioned in the Australian constitution and its establishment and procedures are not the subject of any legislation. The operations of Cabinet are therefore governed by convention (*McGregor affidavit, [18],* see also *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274 at 279 (Bowen CJ). As Sheppard J noted in *Peko-Wallsend* (at 281):

> the Cabinet being essentially a political organisation not specifically referred to in the Constitution and not usually referred to in any statute, there is much to be said for the view that the sanctions which bind it to act in accordance with the law and in a rational manner are political ones...

12. Second, convention dictates that it is the Prime Minister of the day who determines the size, subject-matter and membership of Cabinet and its committees. This includes the chair and deputy chair and terms of reference for each Cabinet committee and how the Prime Minister wants them to operate (*McGregor affidavit, [18]-[24], Gaetjens affidavit, [10]*). Convention also dictates that the Prime Minister of the day sets out how Cabinet and its committees operates in the Cabinet Handbook (*McGregor affidavit, [20]-[21]*).

The establishment of the National Cabinet

13. Third, the Prime Minister established the National Cabinet as a Cabinet committee. On 15 March 2020 he announced that it had 'been established formally under the Commonwealth government's cabinet guidelines' and it would have 'the status of a meeting of Cabinet that would exist at a federal level' (*McGregor affidavit, [25]-[32]*). Further, the current edition of the Cabinet Handbook (14th edition), published on 19 October 2020 under the authority of the Prime Minister, specifically refers to the National Cabinet and provides guidance for its operations (*McGregor affidavit, [21], attachment to the Statement of Agreed Facts*).

14. Fourth, the National Cabinet's collaboration on issues of national importance (*McGregor affidavit, [28]-[29]*), its reliance on support from PM&C, which also supports the Cabinet and other Cabinet committees (*McGregor affidavit, [48]-[51]*) and the strict

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3 Office of the Australian Information Commissioner, *FOI Guidelines: Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* (Cth), combined June 2020 (**FOI Guidelines**) at [5.55]. The Tribunal must determine the application on its merits informed, but not bound, by the Guidelines: see *Re Francis and Department of Defence* (2012) 59 AAR 35 at [18].

4 *Telstra Corporation Ltd v Department of Broadband, Communications and the Digital Economy* [2010] AATA 118 [137].

confidentiality of its proceedings and documentation (*McGregor affidavit, [41]-[47]*) reinforce its status as a Cabinet committee.

The relevant documents are official records of Cabinet

15. A document is an 'official record of the Cabinet' if it records matters related to Cabinet and its functions, and not matters extraneous to those functions.[5] The relevant documents are official minutes of National Cabinet meetings and as such, constitute official records of Cabinet.

The s 34(6) exception is not engaged

16. The deliberations/decisions recorded in the exempt documents do not comprise 'purely factual material'. The exempt documents each comprise a record of the decisions of the National Cabinet with respect to the matters canvassed in those minutes. Conclusions involving opinion or judgement are not purely factual material, nor does 'purely factual material' extend to factual material that is an integral part of the deliberative content and purpose of the document, or is embedded in or intertwined with the deliberative content.[6]

17. Even if it could be said that parts of the exempt documents comprise purely factual material, s 34(6) of the FOI Act should be understood as applying *only to the extent* that the existence of a deliberation or decision has been officially disclosed and not to the entirety of the affected documents.[7] Any other interpretation of s 34(6) would substantially undermine the work that s 34 is intended to do in preserving the confidentiality of Cabinet and Cabinet committee proceedings. Given the well-recognised and long standing public interest in preserving confidentiality as the foundation stone of Westminster government, Parliament should not readily be assumed to have intended such a dramatic consequence.

Reply to the Applicant's submissions

18. In the Applicant's Outline of Submissions dated 26 April 2021 (**AOS**) he contends the National Cabinet is not a Cabinet committee because (i) it bears few similarities with a federal Cabinet and many characteristics which conflict with the essential features of a federal Cabinet and (ii) collective responsibility does not apply to the National Cabinet.

19. This argument should be rejected because:

    a. the one and only essential feature of a federal Cabinet committee is that it has been established as such a Cabinet committee by the Australian Prime Minister and this is how the National Cabinet was established, and

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5 *Re Toomer and Department of Agriculture, Fisheries and Forestry and Ors* [2003] AATA 1301 [74].

6 FOI Guidelines at [6.71]; [6.73].

7 Deputy President Forgie took a different view (albeit in relation to s 34(3)) in *Secretary, Department of Prime Minister and Cabinet and Secretary, Department of Infrastructure and Regional Development and Sanderson (Party Joined)* [2015] AATA 361. The Respondent respectfully submits that the Deputy President's approach in that decision was not correct.

b. there is nothing about the creation of the National Cabinet as a federal Cabinet committee that is inconsistent with the Constitution, nor any other aspect of the Australian federal system of government it established.

20. In *Egan v Willis & Cahill (*1996) 40 NSWLR 650 at 660 Gleeson CJ noted that responsible government is:

> a concept based on a combination of law, convention and political practice. The way in which that concept manifests itself is not immutable.

21. As Ms McGregor explains (at [19] and [22]-[24] of her affidavit) this has certainly been the case in relation to the federal committees of Cabinet as, depending on the Prime Minister of the day's preferences, their size, membership and terms of references have varied considerably (see also *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274 at 279, per Bowen CJ). Whilst Cabinet committees have usually consisted of federal Ministers, this has not always been the case (*McGregor affidavit, [19]).*

22. The Respondent's evidence clearly demonstrates (i) the Prime Minister established the National Cabinet and (ii) the Prime Minister could, if he wished to do so, change its membership by, for example, deciding that one or more Premiers or Chief Ministers would no longer belong to it *(McGregor affidavit, [22]-[32])*.[8] Contrary to the Applicant's submissions (at AOS [30(b)] and [33]) the Prime Minister therefore has the ability to exert complete control over the membership of the National Cabinet.

23. As is acknowledged in AOS [20(g)] and [30(g)], the federal Cabinet does not have the power to implement its decisions. The decisions it reaches need to be implemented by the exercise of legislative, executive or prerogative powers.

24. The Prime Minister having the discretion to decide who he wishes to formally consult with in reaching decisions that need to be implemented by the legislature or executive and appointing them to a committee of Cabinet is not inconsistent with the principle of responsible government (cf AOS [11]-[12], [16], [20(b)]. Nor is it inconsistent with any other aspect of the Australian federal system of government. Indeed, situations can readily be imagined where it would be entirely appropriate, or even necessary, for the Prime Minister to appoint someone other than a federal Minister to a Cabinet committee, for example where:

a. the specialised nature of a particular subject matter, such as a war or a significant biosecurity threat, warranted the appointment of one or more members with particular subject matter expertise, or

b. there was a strong need to ensure bi-partisan support or the support of an independent in a potentially hung parliament.

25. Further, the *Constitution* establishes a federal system of government, distributing power between the federal and state governments (see ss 51 and 52). Section 122 of the *Constitution* provides for the federal Parliament to make laws for the government of territories. It is therefore clearly envisaged that decisions reached by the federal

---

8 In AOS [20(c)] the Applicant acknowledges that 'Members of Cabinet can be removed or added as the Prime Minister sees fit.'

Cabinet could have ramifications for Australia's States and Territories. On that basis, it is not unusual that decisions of the federal Cabinet have broad implications for national issues, not limited to matters within the Commonwealth's powers to legislate, and cooperation across States and Territories often follows federal Cabinet decisions.

26. Chapter V of the Constitution contains a number of indicators that close consultation between the Commonwealth and States and Territories is expected, including s 96 (allowing the Commonwealth to make conditional grants of money to the States for any purpose), and s 114 (States cannot raise defence forces without the consent of the Commonwealth Parliament). The appointment of State Premiers and Territories Chief Ministers to a committee of Cabinet is therefore entirely consistent with Australia's federal system of government.

27. The Applicant seeks to draw support for his argument from a range of judicial observations about Cabinet, relating to such things as collective responsibility and the appointment of Ministers to Cabinet. However, these provide no real support for the Applicant's argument because they:

    a. are general observations, by way of obiter, made in cases concerning specific issues that are very different to the issues raised in present matter and do not seek to consider the outer reaches of Cabinet, much less what can constitute a Cabinet committee,

    b. relate to perceived general features of Cabinet, rather than the essential feature or features of Cabinet,

    c. relate to Cabinet rather than Cabinet committees, and

    d. are not evidence, that can be tested, assessed, placed in its proper context and applied to the specific circumstances of this case.

28. The limited assistance such observations can provide in a case such as the present was neatly encapsulated by Blackburn CJ, who introduced his comments about Cabinet in *Whitlam v Australian Consolidated Press* (1985) 73 FLR 414 in the following way (at 421):

> With no pretensions to qualification as a political theorist, I believe I can propound that aspect of the principle in words which are sufficient for the present purpose.

29. The Tribunal should attach greater weight to the expert evidence before it relating to the specific issues raised by this case than such generalised, judicial observations made in very different contexts.

30. Further, the AOS contends (at [28]) that the limitation in s 34(3) is relevant in that instances of discussions of the National Cabinet have been disclosed. This is a misconception of the exemption that is relied upon. Documents that are exempt under s 34(1) are not subject to an 'official disclosure' qualification, except in the limited circumstance where information is 'purely factual' under s 34(6).

31. Further, as Mr Gaetjens explains at [28]-[29] of his affidavit, the confidentiality of National Cabinet deliberations has not prevented the appropriate disclosure of the outcomes of these deliberations. Those public announcements by the Prime Minister and members of the National Cabinet concerning the outcomes of National Cabinet

meetings have been critical to building public confidence in the decisions of the National Cabinet, and cannot undermine the confidentiality of its deliberations and decisions, which are exempt under s 34(1).

SECTION 47B – COMMONWEALTH-STATE RELATIONS

32. Section 47B of the FOI Act provides:

> A document is conditionally exempt if disclosure of the document under this Act:
>
> (a) would, or could reasonably be expected to, cause damage to relations between the Commonwealth and a State; or
>
> ...

Access must be given to a conditionally exempt document unless its disclosure at this time would, on balance, be contrary to the public interest (s 11A(5)).

33. The 'relations' to which s 47B refers encompass all Commonwealth/state interactions, from formal process such as the predecessor to National Cabinet, the Council of Australian Governments (**COAG**), to less formal working arrangements between agencies.[9] The phrase embraces the 'total relationship' between the Commonwealth and a state.[10]

34. The 'damage' to which s 47B refers carries a broader meaning than in ordinary usage. This is because damage in the context of s 47B is recognised as being intangible and potentially difficult to define or quantify.[11] This provision does not require the establishment of a reasonable expectation of generalised damage to relationships between the Commonwealth and a State, but rather that there be damage to relations in a relevant respect.[12]

35. In considering whether damage 'would, or could reasonably be expected' the question is whether, viewed reasonably, there exists a real and non-remote possibility/risk of damage of the kind stipulated. A bare possibility of a damage is unlikely to satisfy the test. However s 47B(a) is intended to protect against particular risks to relations between the Commonwealth and the States, and the *chance* of damage occurring as well as the *gravity* of any such damage are relevant. As Burchett J said in *Commonwealth of Australia v HREOC* (1998) FCA 3; 76 FCR 513 (at 523):

> ...the proposition that the seriousness of the threatened consequence is relevant to whether the risk is in a practical sense to be regarded as real could hardly be denied.[13]

36. A decision-maker may need to consider whether disclosure could reasonably be expected to cause damage by, for example, interrupting or creating difficulty in negotiations or discussions that are underway, adversely affecting the continued level of trust or co-operation in existing inter-office relationships, or impairing or prejudicing

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9 FOI Guidelines at [6.32].

10 *Diamond and Chief Executive Officer of the Australian Curriculum, Assessment and Reporting Authority* (***Diamond***) [2014] AATA 707 [102].

11 *Diamond* [2014] AATA 707 [103]-[104].

12 *Re Guy and Department of Transport* (1987) 12 ALD 358.

13 These observations were made in the course of construing a very different statutory provision, but his Honour was intending to articulate a general principle concerning risk assessments.

the flow of information to and from the Commonwealth.[14] Importantly, a decision-maker may also need to consider potential impacts of disclosure on future relations such as impairment of or prejudice to the future flow of information.[15]

37. In this case, the evidence of Mr Gaetjens clearly establishes the source and extent of damage to Commonwealth-State relations, should documents such as National Cabinet meeting minutes be disclosed.

38. Since its establishment, National Cabinet has been operating on the clear understanding that National Cabinet meetings were conducted in accordance with Cabinet conventions – namely that the convention of confidentiality applied to discussions, submissions and the records of the meetings (*Gaetjens affidavit, [24]*). This understanding of confidentiality has been invaluable in facilitating members' cooperation in sharing sensitive information such as health data, projections and judgments, and has facilitated the best possible decision-making process for the Australian people (*Gaetjens affidavit, [27]*). This is borne out by Australia's relative success in managing the recent COVID health crisis.

39. Disclosure of National Cabinet documents, such as National Cabinet minutes, would severely undermine Commonwealth-State relations by:

    a. creating difficulty by exposing negotiations or discussions that are underway, including in the development of parallel policies,

    b. adversely affecting the continued level of trust or co-operation between the Commonwealth and the States and Territories, and

    c. impairing or prejudicing the open flow of information between the National Cabinet members, which would significantly hinder the participants' willingness to participate in National Cabinet meetings with the same deliberative candour (*Gaetjens affidavit, [25]*).

Public interest

40. For the s 47B exemption to be made out, the Respondent must also establish that the public interest test under s 11A(5) of the FOI Act is satisfied. Section 11A(5) provides:

> The agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

41. The concept of 'public interest' refers to something that is of serious concern or benefit to the public, not merely of individual interest, or interesting in the sense of being a curiosity.[16] Section 11A(5) imports a balancing exercise between public interest considerations in favour of and against disclosure.

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14 FOI Guidelines at [6.33].

15 FOI Guidelines at [6.34].

16 FOI Guidelines at [6.5]; *British Steel Corporation v Granada Television Ltd* (1980) 3 WLR 780.

42. The Respondent acknowledges the general public interest factors in favour of disclosure of promoting the objects of the FOI Act and informing debate on matters of public importance (s 11B(3)(a) & (b)).

43. However, the factors militating against disclosure are significant. These include that disclosure could reasonably be expected to:

    a. prejudice the ability of National Cabinet members to work cohesively together in the national interest (*Gaetjens affidavit, [26]*),

    b. prejudice implementation of a consistent and coordinated COVID-19 response across jurisdictions (*Gaetjens affidavit, [30]*),

    c. detrimentally impact the Australian public's trust and confidence in Australia's response to COVID-19 (*Gaetjens affidavit, [33]*), and

    d. inhibit the sharing of essential information, thereby detrimentally affecting time sensitive issues such as quarantine practices and the vaccine roll-out (*Gaetjens affidavit, [34]*).

44. Mr Gaetjens' clear evidence is that disclosure of any of the documents sought by the Applicant would undermine trust or co-operation and impair or prejudice the open flow of information between the National Cabinet members, and would significantly hinder their willingness to participate candidly in National Cabinet meetings. There are compelling reasons why this would be contrary to the public interest, particularly at this time when the public interest strongly favours a consistent and coordinated COVID-19 response across jurisdictions in which public confidence - including in quarantine practices and the vaccine roll-out - is maintained.

45. In *Dreyfus and Secretary, Attorney-General's Department (Freedom of information)* [2015] AATA 962 (14 December 2015) Bennett J considered a request for access to an incoming government brief (**IGB**). In addressing the public interest test her Honour concluded that a combination of factors outweighed the public interest in access and therefore tipped the balance against access being granted. Those factors included:

    a. evidence explaining the importance of the maintenance of confidentiality on not only the content of the relevant IGB but also on the preparation of future IGBs,

    b. the need for continuity of frankness, candour and completeness in the advice and commentary contained in IGBs,

    c. the extent of deliberative matter contained in such a document,

    d. the impact on the preparation of future IGBs if access were granted,

    e. the fact that the IGB was not a document of a nature that is prepared just once, and

    f. the context in which an IGB is prepared requires preparation of the document unhindered by apprehension that the IGB, prepared as a confidential document, will be released.

46. Many of these factors apply with equal if not greater vigour to each and every National Cabinet minute sought by the Applicant. The combination of factors outlined in [38]-

[39] above outweigh the public interest in access and therefore tip the balance against access being granted to National Cabinet minutes.

OTHER MATTERS

Irrelevant Matter (FOI Act s 22)

47. When determining whether a particular document is relevant to an applicant's FOI request, the Tribunal needs to consider:

    a. the words of the request,

    b. the context in which the request is made,

    c. the fact that those persons making requests do not have an intimate knowledge of the subject matter of the documents they seek or the workings of government, and

    d. what the applicant intended to cover by the request (*Russell Island Development Association Inc and Department of Primary Industries and Energy* (1994) 33 ALD 683 at 692).

48. Parts of the National Cabinet minute of 15 March 2020 do not come within the Applicant's FOI request, which is relevantly for 'documents that outline/describe the rules that National Cabinet is bound by'.

Request for stay

49. If the Tribunal does not uphold any of the Respondent's exemption claims, the Respondent seeks a stay of the decision for a period of 28 days to avoid the operation of subsection 44A(1) of the *Administrative Appeals Act 1975*. The time within which an appeal may be made to the Federal Court is 28 days.[17]

Date: 7 May 2021

.....
Andrew Berger
Counsel for the Respondent

[17] An automatic stay only comes into effect on filing of an application to the Federal Court – see s 67 of the FOI Act.

ADMINISTRATIVE APPEALS TRIBUNAL
FREEDOM OF INFORMATION DIVISION
ADELAIDE REGISTRY

2020/5875 & 5876

SENATOR REX PATRICK
Applicant

SECRETARY
DEPARTMENT OF THE PRIME MINISTER AND CABINET
Respondent

AFFIDAVIT

On 16 April 2021 I, Philip Gaetjens of 1 National Circuit, Barton in the Australian Capital Territory, Public Servant, affirm:

1. I hold the position of Secretary of the Department of Prime Minister and Cabinet (**PM&C**).

2. I make this affidavit based on my own knowledge and, where stated, information provided to me which I believe to be true. Where I express an opinion, it is based on my background and experience set out below.

MY BACKGROUND AND EXPERIENCE

3. I am the Secretary of PM&C, and have been in this role since 2 September 2019. I have over 40 years' experience in Commonwealth and State public sectors, and have developed a depth of knowledge across Commonwealth and State government Departments, including in the economic policy, cabinet and governance areas of public policy and administration. Other senior roles I have had in Commonwealth and State government are:

   3.1. Secretary of the Department of the Treasury from August 2018 to August 2019,

   3.2. Chief of Staff to the Hon Scott Morrison MP from October 2015 to June 2018, and

   3.3. Secretary of the New South Wales Department of Treasury from August 2011 to July 2015.

Lodged on behalf of the Respondent

Contact: Jodi Moore

Prepared by: Jodi Moore
AGS lawyer within the meaning of s 55I of the *Judiciary Act 1903*

Address for Service:
The Australian Government Solicitor
Level 42 MLC Centre
19 Martin Place
Sydney NSW 2000

4. In my role as Secretary of PM&C, I am responsible for providing advice and support to the Prime Minister, the Cabinet, Portfolio Ministers and Assistant Ministers to achieve a coordinated and innovative approach to the development and implementation of Government policies. PM&C is the Commonwealth Department with responsibility for Cabinet matters, and maintains the records of Cabinet for the current government, and preserves the Cabinet records of previous governments. As the Secretary of PM&C, I am also the formal custodian of Cabinet records.

5. As a central agency in the Australian public service, PM&C has a critical role in promoting the whole-of-government perspective that comes from our need to advise the Prime Minister as Chair of Cabinet and National Cabinet and to ensure policy coordination in our advice and on policy development and implementation. We provide a nationwide perspective that comes from our central advising role. Among other responsibilities, I chair the APS Secretaries Board, I attend all Cabinet meetings, and along with my State and Territory counterparts, and Commonwealth and state note takers, all National Cabinet meetings.

6. I provide this statement in response to the Administrative Appeals Tribunal's timetable for providing affidavit evidence in this matter.

7. I make this statement based on matters within my own knowledge and having made enquiries of officers and employees of PM&C. Where I express an opinion it is based on my experience outlined above.

THE NATIONAL CABINET IS A CABINET COMMITTEE

8. I am aware that the applicant, Senator Rex Patrick, seeks review of decisions made by a PM&C officer, Mr Hupalo, to refuse access under the *Freedom of Information Act 1982* (Cth) (**FOI Act**) to the minutes of two meetings of the National Cabinet, which took place on 13 March and 29 May 2020 (**the National Cabinet minutes**). Mr Hupalo decided these documents were exempt from release under the FOI Act on the basis they are each official records of a Cabinet committee and therefore Cabinet documents, within the meaning of section 34(1)(b) of the FOI Act.

9. I have examined each of the National Cabinet minutes and agree that they are each official records of a Cabinet committee. The First Assistant Secretary, Cabinet Division in PM&C, Ms Leonie McGregor has sworn an affidavit in support of the applicability of the Cabinet documents exemption to the National Cabinet minutes. I have read Ms McGregor's affidavit and agree with the views she expresses.

10. In particular, I agree with the statements made by Ms McGregor that the Prime Minister determines the membership, chair, deputy chair, and terms of reference of each Cabinet committee, and that Cabinet committees are usually established either around a subject area or around a general function of government.

COMMONWEALTH-STATE RELATIONS

11. In addition to having administrative responsibility for Cabinet matters, PM&C is the Commonwealth Department with administrative responsibility for intergovernmental relations and communications with State and Territory Governments.

12. I consider that disclosure of any of the National Cabinet minutes would undermine the operation of National Cabinet, damage relations between the Commonwealth and the States, and be contrary to the public interest.

13. In my view, effective working relationships between the States and Territories and the Commonwealth are central to Australia's public interest. The Commonwealth and State and Territory Governments share responsibility and must cooperate to achieve optimal outcomes for the Australian people.

14. The Prime Minister, with the agreement of State and Territory leaders, established National Cabinet to best enable effective working relationships to respond to the COVID-19 pandemic. I have no doubt that the National Cabinet has strengthened the relationships between the Commonwealth, State and Territory leaders. The effectiveness of Australia's cooperation between Commonwealth and State and Territory leaders on this issue has led to health outcomes which have been the envy of the world. Working together through the mechanism of National Cabinet, Australia has achieved a coordinated and positive outcome across States and Territories, and is now able to turn its collective attention to other emerging and related issues such as skills, education, and Australia's ongoing economic recovery.

NATIONAL CABINET AND THE COUNCIL OF AUSTRALIAN GOVERNMENTS

15. National Cabinet agreed on 29 May 2020 that it would replace the Council of Australian Governments (**COAG**) as the peak intergovernmental body. It comprises the Prime Minister, State and Territory Premiers and Chief Ministers. It operates differently to the previous COAG structure in many respects, including operating procedures, frequency of meetings, and the roles of officials. In my view, the success and effectiveness of National Cabinet since its inception has in no small part resulted from these differences.

16. For example, COAG generally met twice a year, often to announce or sign off on policies worked up through other groups of ministers or officials. National Cabinet has been meeting far more frequently and has been directly involved in commissioning, reviewing and finalising policy responses to address the pandemic and other issues.

17. Former Commonwealth Cabinet Secretary and former Director-General of the Western Australian Department of the Premier and Cabinet Mr Peter Conran AM found in his Review of COAG Councils and Ministerial Forums of October 2020, that Australia's federal structure, built upon reciprocal financial, legislative and policy responsibilities, requires intelligent cooperation on issues of strategic national significance. I agree with this assessment, and his observation that National Cabinet has the ability to deal with issues quickly, based on advice from experts, with leaders dictating the priorities and parameters for their governments to implement.

18. The Prime Minister, Premiers and Chief Ministers have made numerous public references to the positive difference National Cabinet has made.

19. Following the National Cabinet meeting on 29 May 2020, the Prime Minister made the following comments on the success of National Cabinet:

> One of the reasons why the National Cabinet has worked is it has actually operated as a Cabinet. And that means it operates within Cabinet rules and it operates under the Federal Cabinet's rules and that relates to the security of documents, process, procedure and all of those... Having these groups operate like a fair-dinkum Cabinet, I think, has been really important. We're all members of Cabinet so we all understand what those rules are, and I don't think that has been the MO for how COAG has operated and I think that's a really big change ... We've been able to find that candour and collegiality in that new format.

20. Again on 11 December 2020, in a joint press conference following a meeting of National Cabinet, the Prime Minister thanked each member of the National Cabinet 'for their tremendous support working together with each other but also with ourselves as part of the Commonwealth as part of this innovation of the National Cabinet.' The Prime Minister confirmed that National Cabinet performed as 'a very important leadership group for this country, bringing together our Federation, seeing it work in a way that this country I don't believe has ever seen.'

21. On 11 December 2020, following the Prime Minister, the Hon Gladys Berejiklian MP, Premier of New South Wales made the following comments:

> I just wanted to echo the PM's comments. I think we do have a great opportunity to keep the momentum going in reducing red tape and streamlining, improving, modernising state-federal relations around a whole range of things. And I was pleased the PM's putting as a standing item that agenda item, so that if there's anything we want to put on there, we can actually resolve it. And I think National Cabinet has demonstrated our ability to get things done more quickly. And what COVID has taught all of us, the state jurisdictions [b]ut I think also as a national government, is that you can do things better and differently and let's use this opportunity to keep improving the quality of life of our citizens and streamlining our processes.

22. At the same press conference on 11 December 2020, the Hon Annastacia Palaszcauk MP, Premier of Queensland made the following comments:

> I think we shouldn't gloss over the fact too that this National Cabinet has worked in the best interest of all Australians. That, you know, we haven't met face to face for nine months but during that time, we've had 30 National Cabinet meetings. We have been provided at all times with expert advice on health and at all times expert advice on the economy. So that has been absolutely critical to the way the National Cabinet has worked and how I think it's going to work into the future and as long as there's that goodwill amongst everyone, you will see substantial change that's happening with the cohesiveness of this group working together.

23. I agree with the comments referred to in paragraphs 20-22 above.

HARM FROM DISCLOSING NATIONAL CABINET MINUTES

24. Since its establishment on 13 March 2020, all members of National Cabinet have attended and participated in National Cabinet meetings on the clear understanding that

these meetings were conducted in accordance with Cabinet conventions – namely that the convention of confidentiality applied to discussions, submissions and the records of the meeting. This understanding is set out in Section 8 of the Cabinet Handbook, 14th Edition. Additionally, the Prime Minister, as Chair of National Cabinet, has publicly stated that National Cabinet meetings would be held in accordance with Cabinet rules. An undermining of confidentiality which is central to those rules and conventions would be a serious shift to the basis on which the National Cabinet has been operating, and would have a significantly deleterious effect, for the reasons I outline below.

25. In my view, the disclosure of National Cabinet minutes as a result of a request under the FOI Act would severely undermine the basis of the National Cabinet and its effectiveness. National Cabinet was founded on the clear understanding and expectation of confidentiality. If the members of National Cabinet are not assured of the ongoing confidentiality of records of the deliberations of the National Cabinet, this would undermine its effectiveness by:

- creating difficulty through exposing negotiations or discussions that are underway, including in the development of parallel policies,
- adversely affecting the continued level of trust or co-operation between the Commonwealth and the States and Territories, and
- impairing or prejudicing the open flow of information to and from the members of the National Cabinet, which would significantly hinder the participants willingness to participate in National Cabinet meetings with the same deliberative candour.

26. In my view, there is a real prospect of damage to relations between the members of National Cabinet if official records of National Cabinet, such as the National Cabinet minutes, are disclosed. Such an outcome would be directly contrary to that shared understanding of confidentiality. In my view, such an intrusion into the confidentiality of the National Cabinet process would affect the full and frank nature of discussions held by members of the National Cabinet and thus neuter its effectiveness. In turn, and based on my earlier evidence that National Cabinet arrangements are superior to the former COAG arrangements, this will impact on the ability of the members of National Cabinet to work cohesively together and gain further benefits in the national interest compared to previous governance arrangements.

27. The confidentiality of shared information as a decision-making platform between members of National Cabinet has been invaluable. Cooperation and sharing sensitive health data, projections and judgements, allowed for the best decisions to be made for the Australian people. Disclosure of National Cabinet documents and deliberations would likely impede and undermine that exchange of accurate and candid information and ideas between members by inviting caution about the possible implications if this information were publicly disclosed.

28. The confidentiality of National Cabinet deliberations has not prevented disclosure of the outcomes of these deliberations. National Cabinet meetings are followed, by agreement of National Cabinet members, with public announcements and media

releases by the Prime Minister and other State / Territory leaders. Those public announcements, by the Prime Minister and members of the National Cabinet, of its decisions have been critical to building public confidence in this body. Those announcements allow decisions which have been agreed by participants to be clearly articulated and responsibility for that implementation to be transparently acknowledged. This ongoing transparency has been critical to maintaining public confidence in the National Cabinet.

29. I consider the release of National Cabinet deliberations and documents, other than by those formal decisions and announcements by the Prime Minister and members of the National Cabinet, would lead to an apprehension on the part of National Cabinet members and caution in their contribution to discussions. Such an outcome would in my view prejudice and weaken the ability of the National Cabinet to make decisions to achieve the best outcomes in the national interest.

30. On 5 February 2021, the Prime Minister announced National Cabinet had agreed that all States and Territories would establish a Taskforce to work together to provide recommendations to the National Cabinet about consistent and coordinated COVID-19 responses across jurisdictions in the new risk environment, in order to bring together economic and health considerations and to provide increased certainty and confidence to the Australian community.

31. As Secretary of PM&C, I chair that Taskforce, which comprises myself and my State and Territory counterparts. I chair regular videoconferences with other Taskforce members and we prepare monthly reports, with recommendations, to the National Cabinet on consistent and coordinated COVID-19 responses across jurisdictions. As the Taskforce is developing proposals to directly inform the National Cabinet, it is considering cabinet information, and it is appropriate to conduct the Taskforce according to the Cabinet conventions, maintaining confidentiality and encouraging candour, and frank advice and views to be shared.

32. In my view, maintaining the confidentiality of Taskforce material for National Cabinet has been critical to the Taskforce being able to share sensitive data across jurisdictions, consider health and other advice and assess alternative policy options in a confidential setting. Setting the precedent of disclosing National Cabinet minutes would potentially divulge whether the National Cabinet agrees or disagrees with the recommendations of the Taskforce, and reveal sensitive, confidential information provided by the States and Territories. Such a revelation would be highly likely to damage the relationship of trust between the Commonwealth and the States and Territories.

33. Further, making public the National Cabinet's deliberations of recommendations and alternative approaches would diminish the Australian community's certainty and confidence in Australia's response to COVID-19.

34. Disclosure of such National Cabinet material would also harm Commonwealth-State relations by inhibiting the sharing of essential information across jurisdictions relating to time sensitive issues such as quarantine practices and the vaccine roll-out. The impairment of a consistent and coordinated COVID-19 response across jurisdictions

would have a material impact on the safety of the Australian public, and would clearly be contrary to the public interest.

35. While the work of the Taskforce is a specific example, in my view it is clear that for the preservation of the Commonwealth-State relationships the confidentiality of National Cabinet documents, including records of decisions, should be maintained. This applies to those which are in issue in this proceedings. That is because the public disclosure of any of these records would lead the participants in the National Cabinet and those who advise and support them in relation to their participation in the National Cabinet to apprehend that their views, information and advice could be released notwithstanding the confidential basis on which it was prepared.

36. There is therefore a real risk that those views, information and advice would be prepared on a guarded basis. This would impact the effectiveness of the cooperation of the parties, and increase the prospects that issues and decisions would be considered on incomplete or qualified information, which is clearly contrary to the national interest.

37. In conclusion, it is my view that the undermining and breakdown of the confidentiality of National Cabinet material would be very damaging to Commonwealth-State relationships and would be contrary to the public interest.

AFFIRMED at Canberra in the Australian Capital Territory

Before me:

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.....

.....

Lauren Lai

AGS lawyer within the meaning of s55I of the Judiciary Act 1903

16 April 2021

ADMINISTRATIVE APPEALS TRIBUNAL
FREEDOM OF INFORMATION DIVISION
ADELAIDE REGISTRY **2020/5875 & 5876**

SENATOR REX PATRICK
Applicant

SECRETARY
DEPARTMENT OF THE PRIME MINISTER AND CABINET
Respondent

AFFIDAVIT

On 16 April 2021 I, Leonie McGregor of 1 National Circuit, Barton in the Australian Capital Territory, Public Servant, swear:

1. I am currently employed by the Department of Prime Minister and Cabinet (**PM&C**) as First Assistant Secretary, Cabinet Division (**the Cabinet Division**).

2. I am authorised to make this affidavit on behalf of PM&C.

3. I make this affidavit based my own knowledge and, where stated, information provided to me which I believe to be true. Where I express an opinion, it is based on my background and experience set out below.

BACKGROUND

My background and experience

4. I have held the role of First Assistant Secretary of the Cabinet Division, PM&C since May 2019. I previously held the role of Assistant Secretary of the Cabinet Division, PM&C from May to October 2013.

5. In my role of First Assistant Secretary of the Cabinet Division, and in my former role of Assistant Secretary of the Cabinet Division, I have been responsible for managing the work of the Cabinet Division which is made up of several teams of people totalling about 50 staff responsible for organising all facets of Cabinet and Cabinet committee meetings. The Cabinet Division is staffed and managed by officers of PM&C. The Cabinet Division exists to support the Prime Minister, the Cabinet Secretary and the chairs of Cabinet committees in ensuring that government business is conducted in an effective and timely way and that proper collective consideration takes place. This

Lodged on behalf of the Respondent Contact: Jodi Moore

Prepared by: Jodi Moore
AGS lawyer within the meaning of s 55I of the *Judiciary Act 1903*

Address for Service:
The Australian Government Solicitor
Level 42 MLC Centre
19 Martin Place
Sydney NSW 2000

includes overseeing the preparation and finalisation of Cabinet documents, including Cabinet submissions, minutes, attachments, papers and presentations. My role also involves attending as note-taker, coordinating and recording all decisions of the Cabinet and its Cabinet committees.

6. Immediately prior to joining PM&C in May 2019, I was the Deputy Director-General of ACT Health from July 2018. Prior to that appointment, I was a First Assistant Secretary in the Department of Finance from 2015 to 2018, during which time I also held an appointment as interim Chief Executive Officer for the Independent Parliamentary Expenses Authority. Save for the period I worked at ACT Health as Deputy Director General, I have been employed in the Australian Public Service since 1992 and have worked in multiple Departments including the Department of Health, Department of Finance, the Independent Parliamentary Expenses Authority and PM&C.

7. Throughout my 29 year career in the public sector I have had extensive exposure to Cabinet processes and the core principles that underpin Australia's Cabinet system.

8. Since May 2019 I have had direct responsibility for the operations of the Cabinet including attending Cabinet meetings and preparing minutes (or decisions) of Cabinet meetings. Between May 2019 and 6 March 2021, for example, I have personally attended 81 Cabinet or Cabinet committee meetings as a note-taker for the meetings and I have overseen the lodgement of 2,667 documents to Cabinet and its committees, including National Cabinet. I have also had personal involvement in the development, review and compliance checking of 2,881 Cabinet minutes, including National Cabinet minutes.

Freedom of Information Applications

9. I am aware that these proceedings relate to two separate freedom of information (**FOI**) requests made by Senator Rex Patrick (**Applicant**) to PM&C for access to documents under the *Freedom of Information Act 1982* (Cth) (**FOI Act**).

10. On 10 July 2020 the Applicant made a FOI request (**First FOI Request**) seeking access to:

> 'All meeting notes/minutes taken from the meeting of National Cabinet on 29 May 2020'.

11. On 10 August 2020, a PM&C officer refused the Applicant access in full to 5 documents identified as relevant to the First FOI Request, on the basis all 5 documents were exempt from release under section 34(1)(b) of the FOI Act. These 5 documents are the subject of proceeding **AAT 2020/5875**.

12. Also on 10 July 2020 the Applicant made a further FOI request (**Second FOI Request**) seeking access to:

> 1. Any documents (including correspondence) that provide the formal notification to the Governor-General that the National Cabinet was/was being formed in March 2020.
> 2. The documents that outline/describe the rules that the National Cabinet is bound by. To clarify further, the documents might include rules or guidance on the following issues:

a. How decisions of the National Cabinet are arrived at (e.g. majority, consensus etc.)

b. Whether any jurisdiction has a right of veto over decisions of the National Cabinet.

c. Whether decisions of the National Cabinet are binding on the Commonwealth and the States/Territories.

d. Whether the National Cabinet operates within the conventions, policies and guidance set out in the Cabinet Handbook.

e. Whether Premiers and Chief Ministers are bound by conventions of Cabinet solidarity and confidentiality.

f. Who is to serve as the Secretary of the National Cabinet and how the National Cabinet's decisions are recorded and disseminated.

g. What Federal, State and Territory officials are permitted to listen to and participate in National Cabinet discussions.

h. Whether Cabinet note-takers take note of National Cabinet deliberations.

i. Whether deliberations of the National Cabinet (including via teleconference and videoconference) are recorded and/or transcribed, and if not, what measures are in place to ensure that National Cabinet discussions are not recorded and/or transcribed.

13. On 6 August 2020, a PM&C officer made a decision in response as follows:

13.1. the Applicant was granted access to 1 document, being the Cabinet Handbook (13th Edition), and

13.2. access was refused in full to another document on the basis it was exempt from release under section 34(1)(b) of the FOI Act. This document is the subject of proceeding **AAT 2020/5876**.

14. PM&C is the Commonwealth Department with administrative responsibility for Cabinet matters. As set out in the Cabinet Handbook, the Cabinet Division of PM&C maintains the collection of Cabinet documents for the current government and preserves the Cabinet records of previous governments. PM&C is also the Commonwealth Department with administrative responsibility for intergovernmental relations and communications with State and Territory Governments.

THE CABINET PROCESS

The Cabinet system of government

15. In accordance with the Westminster system which operates in Australia, decisions in relation to matters that have the potential to have a significant impact on Australia's national interests are made by either Cabinet, the Prime Minister or an individual Minister.

16. The Constitution of Australia states that the executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative. In practice the executive power is possessed by the Prime Minister and Cabinet (senior Ministers).

17. The Prime Minister is the head of the government, chairs Cabinet, and is in practice the Head of the Executive Government. The Prime Minister also has responsibility for appointing Ministers to Cabinet positions, Parliamentary Secretaries to assist Ministers, and has responsibility for the shape and agenda of the Government of the day.

18. Cabinet is not mentioned in the Australian Constitution, and its establishment and procedures are not the subject of any legislation. The operations of Cabinet are governed by longstanding conventions, including that it remains at the Prime Minister of the day's discretion the size, subject-matter and membership of Cabinet and its committees.

19. Over time, Cabinet committees have taken on many forms. For example, during times of National crisis, such as during World War II, special purpose Cabinet committees were established. Prime Ministers Menzies and Curtin each established a War Cabinet consisting of a limited selection of Commonwealth Ministers. On 4 February 1942 the State Premiers were invited to and attended a Curtin Government War Cabinet meeting. On 27 August 1942, Prime Minister Curtin announced that 'a leading member of the Opposition' Sir Earle Page would be appointed a member of the War Cabinet, due to his experience. In the 1950s, a wide variety of Cabinet committees were formed and officials regularly participated.

The Cabinet Handbook

20. The Prime Minister of the day determines Cabinet procedures and policies. Successive Prime Ministers have considered how they wish Cabinet and Cabinet committees to operate and issued a Cabinet Handbook that sets those matters out.

21. The current edition of the Cabinet Handbook is the 14th edition. I am informed and believe it is annexed to a Statement of Agreed Facts which has been filed in these proceedings (**the Cabinet Handbook**). It was published on 19 October 2020 under the authority of the Prime Minister the Hon Scott Morrison MP and describes the components of the Cabinet process, the various roles and responsibilities of key people and how documents are to be circulated and handled. The Cabinet Handbook provides that 'It is for the Prime Minister of the day to determine the shape, structure and operation of the Cabinet.' The 14th edition of the Cabinet Handbook also includes specific references to the National Cabinet and provides guidance for its operations.

Cabinet committees

22. The Prime Minister determines the membership, chair, deputy chair, and terms of reference of each Cabinet committee. Cabinet committees are usually established either around a subject area, such as national security, or around a general function of government, such as expenditure. Temporary or ad-hoc Cabinet committees may also be established by the Prime Minister to carry out particular tasks.

23. Historically, in Australia there have been both (i) ad hoc committees of Cabinet, which were established at the direction of the Prime Minister to handle a specific question and ceased to exist when conclusions were reached on this question and submitted to the Cabinet and (ii) more permanent, standing committees of Cabinet. For instance,

even going back to the 1976 Cabinet Handbook, there was clear guidance that ad hoc committees of Cabinet would be 'established from time to time and the Prime Minister will indicate the membership of each committee'.

24. This establishment of Cabinet committees has sought to assist successive governments to efficiently and effectively respond to government priorities. Whilst some Cabinet committees, such as the National Security Committee and Expenditure Review Committee are regularly established by Prime Ministers, other Cabinet committees have been established to respond to particular issues or priorities that emerge from time to time. Examples include:

24.1. the Productivity Committee, which provided strategic direction on the Government's microeconomic reform and productivity agenda and coordination of the development of policy and delivery of programs across the following broad areas: Sectoral issues including interactions between the resources sector and other industry sectors; Productivity; Innovation policy; Workforce skills development; Trade; Industrial relations; Agriculture/rural industry policy; Tourism; and Infrastructure.

24.2. the Regional Australia and Regional Development Committee, which provided strategic direction and advice on the identification of local and community priorities, the consultation and decision making structures needed to enable regional development and regional delivery of services, development of policies that enable regional economic development, investment in physical and social infrastructure and the delivery of services to ensure Government adequately meets the needs of Australia's regions, both in urban areas and regional Australia.

24.3. the Social Policy and Social Inclusion Committee, which provided strategic direction and coordination of the development of policy and delivery of programs across the following broad areas: Indigenous affairs; Social inclusion agenda; Health; Ageing; Education and life skills; Early Childhood and youth; Employment participation; and Social housing and homelessness.

24.4. the Naval Shipbuilding Enterprise Governance Committee, which ensures the naval shipbuilding enterprise and each component of it is on track to deliver against Commonwealth agreed outcomes, and emergent or forecast risks are identified that may impact or prevent achieving delivery of milestones. Agreed outcomes and actions are identified to address these risks National Security Investment Committee considers in detail major National Security investments and procurements to ensure investments remain aligned with Australia's strategic priorities, achieve best value and are implemented on schedule.

25. As detailed further below, I consider the decision of the Prime Minister to establish the National Cabinet to respond to the COVID-19 pandemic and its consequences, is consistent with these principles.

National Cabinet

Establishment

26. The establishment of the National Cabinet was agreed to by the Prime Minister and State and Territory Premiers/Chief Ministers at a meeting held after the Council of Australian Governments (**COAG**) meeting on 13 March 2020.

27. Terms of Reference for the National Cabinet were agreed to by the National Cabinet on 15 March 2020 and set out the working arrangements, including that the committee would be established as a committee of the Commonwealth Cabinet, specifically as a Cabinet Office Policy Committee and that its deliberations would remain confidential.

28. Cabinet Office Policy Committees consider major policy issues on an as needed basis, including early stage consideration of strategic issues, specialist advice on nationally significant issues and rapidly evolving situations.

29. The National Cabinet is responsible for coordinating national actions in Australia in response to Australia's coronavirus pandemic, including coordination of Australia's health response and the ongoing recovery from both economic and broader societal impacts of the pandemic.

30. In establishing the National Cabinet, consideration was given to the importance of the sovereignty of States and Territories, and the Commonwealth, and it was agreed that both the Commonwealth and States and Territories would utilise their existing Cabinet processes as and when appropriate. In practice this means that leaders are able to determine which of the matters before National Cabinet may require endorsement or agreement in their own jurisdiction, prior to any final decisions being agreed.

31. The National Cabinet held its first meeting on 15 March 2020 when it formally agreed that for the purposes of decision making in relation to the pandemic, Australian Health Protection Principal Committee (**AHPPC**) and the National Coordination Mechanism (**NCM**) would be the National Cabinet's primary advisory bodies.

32. On 15 March 2020, the Prime Minister announced that National Cabinet 'has now been established formally under the Commonwealth government's cabinet guidelines'. The Prime Minister stated that National Cabinet 'has the status of a meeting of Cabinet that would exist at a federal level'. A copy of the Press Conference transcript of 15 March 2020 is annexed to this affidavit at '**LM-1**'.

33. National Cabinet comprises the Prime Minister (Chair), the State Premiers and the Territory Chief Ministers, described as National Cabinet members. The precise structure, shape and operation of the National Cabinet are matters for its members.

34. At the first meeting on 15 March 2020 the Prime Minister noted that the National Cabinet would meet as often as needed.

Continuation of National Cabinet and cessation of COAG

35. Following a meeting of National Cabinet on 29 May 2020, the Prime Minister announced that the National Cabinet members had agreed to:[1]

    35.1. continue the National Cabinet established to coordinate Australia's response to COVID-19,

    35.2. form a new National Federation Reform Council (**NFRC**), and

    35.3. formally cease the COAG model.

36. A copy of the Press Conference transcript of 29 May 2020 is annexed to this affidavit at '**LM-2**'.

37. The NFRC is listed to meet annually, providing a joint forum for the First Ministers and Treasurers of all Australian jurisdictions and the President of the Australian Local Government Association to consider priority national federation issues.

38. In a Media Release dated 29 May 2020, the Prime Minister made following comments in respect of National Cabinet:

> National Cabinet has worked effectively to respond to COVID-19. The new National Federation Reform Council agreed to by Premiers, Chief Ministers and the Prime Minister, will change the way the Commonwealth and states and territories effectively and productively work together to address new areas of reform.
>
> The National Cabinet will be driven by an initial single agenda - to create jobs. A job making agenda.
>
> By any measure, National Cabinet has proven to be a much more effective body for taking decisions in the national interest than the COAG structure.
>
> At the centre of the National Federation Reform Council will be National Cabinet.
>
> National Cabinet will continue to meet regularly and will be briefed directly by experts such as the Australian Health Protection Principal Committee.

39. On 4 September 2020, the Prime Minister announced at a Press Conference that National Cabinet 'needed to evolve' and that the National Cabinet members had:

> decided that this notion of 100 percent, absolute consensus on any issue is not a way that the National Cabinet can indeed work. And so ... we will set out areas where we can come together, and get as many states and territories as possible to come around that agreement.

40. A copy of the Press Conference transcript of 4 September 2020 is annexed to this affidavit at '**LM-3**'.

Cabinet deliberations and the need for confidentiality

41. It is a long established principle that deliberations of the Cabinet are confidential and should be protected. This is supported by the legal frameworks, including the FOI Act,

the *Archives Act 1983*, and section 130 of the *Evidence Act 1995* (Cth), all of which protect Cabinet and Cabinet related information to a greater degree than some other Commonwealth records.

42. The principle of collective responsibility requires strict confidentiality of all Cabinet and Cabinet committee proceedings and documentation. The Cabinet Handbook elaborates further as follows:

> 28. Effective Cabinet confidentiality requires the protection of Cabinet deliberations not only at the time an issue was current but also in the future. Ministers in successive Governments have relied on the convention that their views, either written or spoken will remain confidential well into the future. It is only with the confidence in this convention that ministers can enjoy freedom to explore all policy options without the need to temper their comments or views.
>
> 29. This convention provides the Executive of Government with the opportunity to contest policy ideas in a highly confidential manner in order to ensure that the collective decision that ultimately arises from the Cabinet's deliberations is the best possible policy decision for the administration of the Government.

43. In relation to National Cabinet, the Cabinet Handbook states:

> 155. All proceedings and documentation of the National Cabinet remain strictly confidential.

44. It is my strong view that confidentiality underpins the successful operation of the National Cabinet. This is even more paramount in a Cabinet committee whose members are drawn from differing political parties across Australia. The agreement by all members that the National Cabinet operates in this way means that members are free to have wide ranging and without prejudice discussions where multiple perspectives on important matters can be brought to bear on an issue without the inevitable constraint that full public scrutiny and transparency would bring. While implementation of National Cabinet decisions remains a matter for States and Territories, the robust and confidential discussions which underpin those decisions have consistently remained confidential. As I set out earlier [at 39] there is an appreciation that absolute consensus is not required in the National Cabinet, but it remains the case that collective responsibility and solidarity are features of the National Cabinet that are adhered to by all its members, regardless of their political ideology.

45. To maintain confidentiality, the Cabinet Handbook emphasises the importance of securing Cabinet documents. Specifically in relation to National Cabinet, the Cabinet Handbook stresses that maintaining the confidentiality of National Cabinet documents is essential to enable full and frank discussions, and requires all such documents to be classified OFFICIAL: SENSITIVE and carry the dissemination limiting marker of NATIONAL CABINET.

46. Confidentiality concerning Cabinet proceedings and documentation is followed by all governments in Australia, both State and Federal, and in most democracies with a system of successful Cabinet Government. The importance of confidentiality has been reiterated by multiple Prime Ministers and Ministers during my career.

47. All National Cabinet member jurisdictions need to have established clear protocols for ensuring confidentiality, and the information security of documents that are to be considered by the National Cabinet and/or its committees, as well as agendas and minutes. By way of example, annexed to this affidavit at '**LM-4**' is guidance from the Department of Premier and Cabinet, Tasmania.

Notebooks and Systems

48. The Cabinet Division within PM&C supports the National Cabinet as it does the Cabinet and other Cabinet committees, by providing continuity and impartial support for its operations. Further details of the support the Cabinet Division provides the National Cabinet is set out on pages 30-32 of the Cabinet Handbook.

49. The Secretary of PM&C is the formal custodian of National Cabinet records. The Cabinet Handbook dictates that members may nominate a senior official to be note takers at National Cabinet meetings, however the notebooks remain the property of the Respondent and are protected from early public release under the *Archives Act 1983* and cannot be sought under the FOI Act.

50. National Cabinet meetings and material are stored in the PM&C maintained document system CabNet. This ensures that authoritative documents are maintained as a record of the National Cabinet.

51. CabNet is a whole-of-government IT system that facilitates the flow of protected Cabinet information in a secure manner, and supports the running of Cabinet and committee meetings. The minutes for National Cabinet are finalised in CabNet, the same as they are for other Cabinet committees. National Cabinet minutes are circulated outside of CabNet to the States and Territories First Ministers and First Ministers' Departments with relevant protective markings.

DOCUMENTS IN ISSUE

52. I am informed and believe a schedule of documents, providing a brief description of each of the 6 documents in issue in the AAT proceedings identified at paragraphs [9] to [13] above will be filed with the AAT.

53. I have examined each of these documents. The 5 documents relevant to the First FOI Request are National Cabinet Minutes of the National Cabinet meeting which took place on 29 May 2020. In my view, each of these minutes is exempt from disclosure under section 34(1)(b) of the FOI Act as an official record of the Cabinet.

54. The document relevant to the Second FOI Request is a National Cabinet Minute of the National Cabinet meeting which occurred on 15 March 2020. In my view, this minute is similarly wholly exempt from disclosure under section 34(1)(b) of the FOI Act as an official record of the Cabinet. I note however that the paragraphs of the minute after paragraph 1 do not comprise material of the kind sought by the Applicant in the Second FOI Request.

SWORN at Canberra in the Australian Capital Territory

Before me:

16 April 2021

Mary Parker

.....

AGS Lawyer within the meaning of s 55I of the Judiciary Act 1903

16/04/2021

ADMINISTRATIVE APPEALS TRIBUNAL
FREEDOM OF INFORMATION DIVISION
ADELAIDE REGISTRY

2020/5875 & 5876

SENATOR REX PATRICK
Applicant

SECRETARY
DEPARTMENT OF THE PRIME MINISTER AND CABINET
Respondent

ANNEXURE LM-1

The following 14 pages is the annexure marked **LM-1** referred to in the affidavit of Leonie McGregor made 16 April 2021 before me:

....
Mary Parker

AGS Lawyer within the meaning of
s 55I of the *Judiciary Act 1903*

TRANSCRIPT - PRESS CONFERENCE

TRANSCRIPT

15 Mar 2020
Prime Minister
E&OE

PRIME MINISTER: Good afternoon everyone, today was an historic gathering and I welcome Dr Kelly as well to be with us here today, the Deputy Chief Medical Officer.

An historic gathering of the first ever National Cabinet, bringing together the Premiers and Chief Ministers of our States and Territories concurrently, together with myself as a part of the national response, the coordinated national response to the spread of the coronavirus here in Australia. The many things that we have to do to continue to contain the spread of the virus here in Australia, it goes across both federal and state governments. And so ensuring that we're working incredibly closely together, that we are highly aligned both in the information we're receiving, it's understanding the actions that we need to take is incredibly important as we implement the measures that will keep Australians safe into the future, and ensure that we come through this together.

It's always important to be extremely clear and up front with Australians, and that's certainly what we've sought to do as a government. I commend Dr Kelly and Dr Murphy, who have been doing an outstanding job in providing regular briefings to the Australian people about the issues in relation to the coronavirus and indeed their state and territory colleagues as well. They've been providing that information. As you know, the National Campaign, Public Information Campaign is out in newspapers and televisions and things today and social media has already been in place now for several days and we initiated. Several weeks ago, I announced that we were putting in place and activating the Australian health sector emergency response plan for the novel coronavirus COVID-19. We've commenced that plan with the initial phase and today the National Security Committee met before the National Cabinet, and we've moved now to the next phase, which is the target action stage. And there are major decisions that were taken today that reflect changing where we are heading. The facts and the science, the medical advice will continue to drive and support the decisions that we are making as a National Cabinet, as indeed as a federal Cabinet at the Commonwealth level. But the truth is that while many people will contract this virus that it's clear, just as people get the flu each year, it is a more severe condition than the flu, but for the vast majority, as

I said last week, for the majority, around 8 in 10 is our advice, it will be a mild illness and it will pass. However, for older Australians and those that are more vulnerable, particularly those in remote communities and those with pre-existing health conditions, it is a far more serious virus, and that is our concern. Our aim in all of this is to protect the most vulnerable. The most at risk. And I want to take you through again the decisions we're taking today and we have been taking.

We know that the virus cannot be absolutely stopped. Of course not. No one can do that. But we can slow the spread and we anticipate that will be what our task will be over about the next six months. No one can know for certain how long this will run. It could be shorter than that. It could be longer than that. But the measures that we're putting in place as a government is making those types of assumptions. But that is being updated on a daily basis.

Now what I have here, this is, there are a range of different scenarios that are pulled together by modellers around the country and none of them is a prediction, all of them just simply show the possible spread of the virus and what that could mean ultimately, when we work through things like ICU beds and ED presentations, and GP's and so on. If you don't take measures that seek to contain the spread, and mitigate the spread, then you have scenarios that look like this. You have scenarios where you get a very severe effect on the spread of the virus. You may move through it much more quickly, but what happens is the virus reaches more people, and that puts maximum pressure on your health system. And that obviously has far more drastic implications for the most vulnerable in our community.

Now the extent of that peak depends on the rate of transmission you might see in some countries where there's a much higher rate of transmission by any one person then the peak would be higher. And the impact will be more severe, but in other scenarios like this, it is still significant, but it can be less in terms of how many people it reaches. The job of our plan, the job of working together is what we call a flattening the peak, and to get this result as opposed to that result, what we're looking to do is manage the flow so we suppress the demand on our health systems and ensure that we can continue to provide the care that Australians need.

In this sort of scenario, which is what we're working to achieve, this means with some changes to the way that ICU departments are managed and things of that nature. The advice we've had to date and the excellent work that's being done by the chief medical officer working with the states and territories, means that that can be dealt with. That doesn't mean there won't be busy times in our hospitals. It doesn't mean there won't be stresses on the system and there won't be days where patience will be required, and there won't be frustrations. It's not what it means. What it means is, if we continue to manage the spread of how the virus impacts in Australia, then we will be able to ensure that we can continue to provide the services and support, particularly to the most vulnerable Australians who are most at risk from the Coronavirus. So slowing

the spread, you free up the beds. That's what happens when you get this right and we've seen other countries going down this path. Australia has also been going down this path and the way we've been managing everything from travel bans to the way we've had quarantine arrangements in place and self-isolation, these arrangements have been ensuring that the number of cases we've had in Australia up until now, and they are growing now, they have been kept well below what we've been seeing in many other countries.

We have a first class health system here in Australia, but no hospital system on its own can deal with this at its most extreme position, whether that's in the United Kingdom or anywhere else. And last night, I had the opportunity to talk to Prime Minister Boris Johnson and we were talking through these very types of scenarios and and it was important for us to be swapping notes on those issues as I was with Prime inister Arden yesterday, as we discussed the arrangements that she put in place yesterday in New Zealand. And indeed, we've been considering ourselves.

We're going to have to get used to some more changes in the way we live our lives over the next six months or so, there will be further intrusions. There will be further restrictions on people's movement and their behaviour. But the point is, you do it in a timely way. You do it in a managed way. You do it in a careful way. Just because something is not necessary today doesn't mean it won't be necessary in 3 weeks from now or 3 months from now, just as something we're announcing today wasn't necessary 2 months ago.

Today, as the rate of community transmission starts to pick up, then new measures are put in place. And what you simply do as I'm explaining, as you put these new measures in, as you see these curves unfolding, then you can flatten the curve as you move forward. Some places, schools, workplaces, others will make various decisions along the way. And they can work off the best advice that they have available. Australians are smart people, they're commonsense people. Occasionally, in recent weeks and months, we've seen some examples, not of that behaviour, and that's regrettable. But for the vast majority of Australians, they're commonsense people and we have to rely on their judgment as well. The government can't manage every hour of your life and tell you what to do every hour of the day, but we can't ask you to listen to the information and make your best judgments as you care for yourself and your family and those around you. We're relying on that Australian spirit of looking after each other, as we get through the difficult months that are ahead.

Today, I now want to move to the decisions that we have taken that were consistent with the plan that I've outlined to you. First of all, the National Security Committee met before the National Cabinet today and we resolved to do the following things; to help stay ahead of this curve we will impose a universal precautionary self-isolation requirement on all international arrivals to Australia, and that is effective from midnight tonight. Further, the Australian government will also ban cruise ships from foreign ports from arriving at Australian ports after an initial 30 days and that will go forward on a voluntary

basis. The National Cabinet also endorsed the advice of the AHPPC today to further introduce social distancing measures. Before I moved to those, I just wanted to be clear about those travel restrictions that I've just announced. All people coming to Australia will be required, will be required I stress, to self isolate for 14 days. This is very important. What we've seen in recent, in the recent weeks is more countries having issues with the virus. And that means that the source of some of those transmissions are coming from more and more countries. Bans have been very effective to date. And what this measure will do is ensure that particularly Australians who are the majority of people coming to Australia now on these flights, when they come back to Australia, they're self-isolation for 14 days will do an effective job in flattening this curve as we go forward. Similarly, the arrangements for cruise ships will have the same effect in specific cases where we have Australians on cruise ships. Then there will be some bespoke arrangements that we put in place directly under the command of the Australian Border Force to ensure that the relevant protections are put in place. We're seeking to assist Australians to come home by ensuring that the flights continue to run, but when they come home, they'll be spending another 14 days in self isolation. And so I've covered also the issue of the cruises.

When it comes to social distancing I want to read to you the key sections of the advice that we've provided today to the National Cabinet. The AHPPC believes that social distancing measures are now required and will need to be introduced progressively to reduce disruption. This has the most benefit in delaying transmission. The AHPPC advises, as we flagged last Friday, that in general non-essential gatherings of more than 500 people should not occur. They also advise that at this early stage, not to prevent the operation of essential functions, including schools, universities and workplaces, or prevent the operation of public transport. However, the principle of social distancing should still apply in these settings. The AHPPC advises, is for static non-essential gatherings of persons that they should not go ahead, if there are more than 500 people you'll be in such a gathering. Now what do I mean by that? A static gathering is when you're sitting as you are here in this room for prolonged periods. That would occur at a stadium, it would occur in a theatre, that would occur in events such as those where people are together in close proximity for a sustained period of time. The advice is that those gatherings should not continue at that scale. The AHPPC advises and Dr Kelly may wish to touch on this, but that includes how you can mitigate those events, when they are in much larger rooms that obviously reduces the risk. If the gathering is outdoors in much more open gatherings, well, obviously that reduces the risk.

There are a lot of common sense principles which should be fairly obvious, I think. And the way people respond to those I think will be very helpful. So what the National Cabinet has agreed today is that we will adopt that recommendation and we will be preventing non-essential static gatherings of more than 500 people occurring across the states and territories. The states and territories will be moving to put in place the appropriate arrangements

under their state based legislation to ensure that is supported. They'll be doing the same thing in relation to the self-isolation requirements of Australians and others coming to this country by air to support the decision of the National Security Committee. Now that legislation is a matter for the states and territories. They'll be working on that promptly. But from here on in, from Monday, it's important that people act in accordance with that advice. Now, the obvious question is, how would that be enforced? Well, the states and territories wisely are not going to create event police or social distancing police or things of that nature. That would not be a wise use of police resources around the country. But the legislation impact would mean that if a person did fail to observe the 14 day self-isolation or if an event was organised, that would be contrary, once those provisions are put in place to state law, and there'd be nothing preventing I'm sure the states from ensuring that that was dated from Monday. But they will be specific details that the states will naturally work together on and ensure as much consistency as possible across their jurisdictions.

A few other things that were decided today, was about the priorities of what we must be addressing as a National Cabinet in the days and the weeks ahead, having addressed the issue of mass gatherings of 500 persons or more And let me be clear. That obviously doesn't mean, as I said on Friday, it doesn't mean train stations, it doesn't mean shopping centres. It doesn't even necessarily mean markets like Salamanca down in Hobart or things of that nature. These are static mass gatherings where people are together for long periods of time. For large events, very large events like the Royal Easter Show, which has already been here in New South Wales, cancelled, I mean that is an event which was cancelled, as the Premier reminded us this morning, to prevent people coming from all around the state into t Sydney and potentially being exposed to the virus through that type of an interaction and within the Easter Show you are together with large groups of people for long periods of time. So there will still need to be a lot of judgement exercised at a state and territory level in relation to specific events. That will include Anzac Day. We will be putting out specific guidelines working together with the RSL about those gatherings and particularly regarding the participation of more vulnerable Australians out of our more elderly veterans community. We had a long discussion about what the most important priority is now having made that decision about mass gatherings, the first of those is putting in arrangements and restrictions around the visiting of aged care facilities and the AHPPC is working on that today and they'll be providing us with further advice about how that will work. They are also doing work on remote communities, particularly that is going to affect the parts of South Australia, Western Australia, Northern Territory, Queensland especially. And so they're doing some important work there about the arrangements and protocols that would need to be in place. They are also doing work on further restrictions on gatherings in enclosed spaces. And the National Cabinet will meet on Tuesday night and consider that advice so I can

stand here before you on Wednesday and provide you with further announcements in terms of the further decisions that are made in relation to aged care and gatherings involving enclosed areas.

We also had some wide discussions today about schools, and I can totally understand, as a parent of two daughters in school here in Sydney, that people are naturally anxious about the issue of schools. As the British chief medical officer observed just over the last couple of days, the issue of wide-scale closure of schools, it might be anti-intuitive, but the advice is this could actually be a very negative thing in terms of impacting on how these curves operate. That happens for two reasons. When you take children out of schools and put them back in the broader community, the ability for them to potentially engage with others increases that risk. And that's the understanding we have. There's also issues of herd immunity that relate to children as well. And Dr. Kelly, might want to touch on those issues. The other issue is the disruption impact that can have and put at great risk the availability of critical workers such as nurses and doctors and others who are essential in the community because they would have to remain home and look after their children. And so while it may seem counter-intuitive, there is very good reason why you would not be moving to broad scale closures of schools that could actually make the situation worse, not better. And so the states and territories are not moving in that direction. We will consider this again further on Friday at our meeting, after Tuesday night, to consider further advice on those issues. So for now, the continuing practice, which is especially being put in place in New South Wales and Victoria, where they've had the most experience of this, individual decisions are made on particular schools based on the cases that are presented there and the circumstances that exist in those communities. And that is done in conjunction with their state health officers to make the right decisions in those very specific locations.

So with all of those matters, I think I've touched on all the decisions that we've made today as a National Cabinet and as a meeting of the National Security Committee, and we will continue to meet regularly. There was a very strong spirit of unity and cooperation. And again, I want to thank the premiers and the chief ministers for their support in bringing together this national cabinet. It has now been established formally under the Commonwealth government's cabinet guidelines. And it has the status of a meeting of Cabinet that would exist at a federal level, as does the meetings of the AHPPC and the national coordinating mechanism, which is feeding up into those arrangements.

So some important changes today. There will be more changes in the future. We'll be seeking to forecast those for you as much as possible. Remember, when we're taking these decisions, we're taking them to allow time for people to adopt them. These are not absolute measures that if they are introduced today then, if I were introduced the day before, that Australia was put at risk that's not the case. What we're doing is implementing the measures well in advance of where they might have otherwise been done. What we've seen

overseas with some of the restrictions that you've seen in many of those other countries, they were introduced when the number of cases and the amount of spread in their communities was far more advanced than where we are in Australia today. And so what we're introducing today means we're getting well ahead of where those other countries have been when they've had far greater numbers of cases. So we'll continue to stay ahead of this. We'll continue to keep our heads when it comes to this. And we will continue to take the medical advice which will guide what is first and foremost a health crisis in this country.

One last point I should have made, is the states will also be considering moving their movement to public health emergency status under their various state arrangements. in some places like Queensland they've already moved to that some time ago. Now, the other states are now working over the next few days to make their own decisions on that. That is entirely a matter for those states and territories. And they'd be seeking to align how they do that over the next few days. And I think that's a productive thing they can do and ensure we're getting on a consistent footing. But with that, I'm gonna hand over to Dr. Kelly.

DR. PAUL KELLY, DEPUTY CHIEF MEDICAL OFFICER: Thank you, Prime Minister. So that's a lot of information there. I won't give too much more, just to reiterate the Prime Minister's statement that what we are doing and as we've always been doing throughout this, as we've learnt more about the virus, how it spreads, the effect it has on people's health, and particularly the issues that are pertinent to Australia as distinct from other countries in the world. This is a proportionate response. And so what we are doing is the proportionate response, staged and informed by the information as it progresses. So things are changing on a daily basis. And as the Prime Minister has said, that doesn't mean that it was wrong yesterday. It was right for yesterday, today is a new day. And the next day will be another new day. We'll have more information and we'll be able to go forward. The Prime Minister has mentioned the modelling that is being done. It is continuing to be redefined and and be more accurate as it goes forward. But it is not, it's not the definite future it is to guide the decisions that are being made, that the graph that we see on the right hand side, your left, is the graph we see when there is a new virus entering our community where no one has immunity against that virus. That is the issue with this coronavirus. It's not like flu. It's not like any other viruses and diseases where we have vaccination. And that important issue of herd immunity that we talk about a lot in vaccination is exactly the challenge that we have at the moment. There is no herd immunity. Everyone is susceptible to this virus in Australia. And so that's why these unusual and proportionate measures that we are taking now to prevent the worst case scenario, which is that very high peak, is really important. And as we go through, there will be other measures that may need to be introduced depending on how things work out in the coming weeks or months.

What is different about Australia, of course, is that we're not yet in winter. All of the places where we're seeing this virus really escalate very quickly now through other parts of the world, are in the northern hemisphere. They're in the in the in the later part of the winter months, they have flu seasons as well. And all of the environmental elements that allow viruses to spread quickly are actually there in North America, in China, in other parts of northern Asia and across to Europe. We've seen exactly what has happened there, and in particular, not taking enough action, probably early enough in most of those countries. And we can see the effects on the healthcare system and the unfortunate death rates that we're seeing around the world. In Australia, we now have almost 250 cases. That doesn't sound like a lot. But if you think back just a week, that's quite a few more than we had last week. Next week we'll have more. At the moment it's mostly in relation to travel. And so those new restrictions and new measures that have been put at the border in terms of 14 days quarantine for everyone coming back from overseas, from whatever country is the next proportionate step to take to decrease those travel related illnesses. But we are also starting to see, particularly here in Sydney, but also in other other cities and into our regional areas, some human to human transmission in Australia, not necessarily related to travel. That will be the next step, more proportionate measures will need to be taken as that develops. So these are difficult times and the disruption to society is very much felt by us in the health side of government. But we are continuing to give our measured advice to government and we're very happy that that's being listened to and put it into account with the other measures in terms of social, economic and other considerations. So Prime Minister I might leave it there.

PRIME MINISTER: Thank you Dr. Kelly. And just on social distancing also, that means that the social distancing practices that we're encouraging are being expanded. So there's no more handshakes. That is a new move we've moved to, and that's something that I'll be practicing, my Cabinet members, that you expect to see leaders and others now practicing. This was not something that was necessarily a key requirement weeks ago, but it's just another step up now. It's a precautionary step. And we'll be practising that. The Cabinet itself will now be meeting more regularly by video, by video conferencing, rather than all Cabinet members being in one place that will apply to the national security committee, and National Cabinet, as it did today, met through video conferencing, similarly leaders and other politicians you can expect to see not travelling as much as they were before. Not engaging as many public events. I've cancelled a number of events for next week. That is just simply to try and manage the normal process- as you'd expect, too, as we move into this next phase which we've agreed to do today. I'll be working particularly with the Speaker and the President of the Senate to look at the, they've already been working on that for some time, actually, about the arrangements we'll put in place, obviously consulting with the Leader of the opposition on those issues.

We have important work to do when Parliament resumes on Monday week. We can focus on that and get that done in very practical arrangements to achieve that. Questions?

JOURNALIST: Prime Minister, how long will this travel, new travel arrangement last this ban?

PRIME MINISTER: It's indefinite. It's reviewed every week.

JOURNALIST: Explain to us how does it work? How do people self isolate? They come off, out of the airport. They get in a taxi they stay in a hotel room for two weeks? And an Australian goes home and stays in their bedroom for 2 weeks?

PRIME MINISTER: That's it. And Australian Border Force will be moving over the course of this weekend to ensure that people statutorily declare that if they're entering the country, that they understand that that is the requirement. What will happen, Chris, and this is what we've seen in other countries that have done this, is that the visitor traffic will dry up very, very, very quickly. And it's important that the flights keep going because they bring Australians home. I should also note that Pacific Islanders who are on their way home, to their home country, will be allowed to transit through Australia. They won't be allowed to remain in Australia, they're allowed to travel. Otherwise, they have no way of getting home and that's us being part of the Pacific family and helping them. New Zealand put exactly the same set of arrangements in place for Pacific Islanders coming home by New Zealand. The arrangements I've announced today are those that were put in place by New Zealand yesterday, and they in fact will come into effect at the same time.

JOURNALIST: Will there be a central database Prime Minister, that state authorities can access so they know who's been overseas. And if they should be self isolating, I just don't understand how it's going to be policed?

PRIME MINISTER: Well, again, I mean, this has been in place now for many months, for over a month now in terms of travellers coming from China and other places. And the truth is, the self-isolation has worked out in practice quite well because Australians have followed the instructions. And up until now, that has been a voluntary arrangement. There has been no potential sanction that might apply against a person for not following that requirement. Once state authorities are in a position to give that its legal enforcement then that will be a change. I mean, so if your mate has been Bali and they come back and they turn up at work, and they're sitting next to you, well, they'll be committing an offence. And so I think it's up to all of us to ensure that, we are ensuring this is put in place.

I mean, Australians will exercise common sense. They have been to date, and this provides the backstop of a legal enforcement but the the idea that there'd be significant resources dedicated to that task would not be practical, because remember, when you get an overwhelming number of people following that advice, then you're getting the effect which you want, which is that.

JOURNALIST: What's the penalty for committing the offence of not self-isolating?

PRIME MINISTER: That will be a matter for the states and territories under their own public health [inaudible].

JOURNALIST: [inaudible] What would would look like though? Would that mean fines or is it jail time?

PRIME MINISTER: Yes. Again, it's a matter for state authorities as to what penalties they place on that. The National Cabinet ensures that we have some coordination, but ultimately states and territories will make their own decisions.

JOURNALIST: Sorry, will there be any screening at borders of temperatures or anything like that? Or just all be self-isolation?

PRIME MINISTER: Yes. No no there will be. And there has been already. And for those for those, for those persons who come back and present with symptoms, they will be directed through the Australian Border Force to be given protective equipment. This group that we're now applying this requirement to is low risk. And we also do think, and the health advice is, is this that to provide the PPE equipment to everyone who comes through our airports would be an unnecessary depletion of that resource. We know those resources from our stockpile for health workers, those working in aged care facilities and so on. And so they will be able to return home. They are at a low risk, is the assessment. But for those who may be presenting with some concern or symptoms then they'll be provided with that equipment at the airports, as we already are for those who are coming from Iran or those who are coming from China, from South Korea and Italy.

JOURNALIST: What measures will the government be taking to prevent the spread by public transport?

PRIME MINISTER: Well, already the state governments have been doing a fair bit of that. And that is a matter that I know will be sort of worked on through the national coordinator messages which feeds up to the National Cabinet about what experience and best practice can be shared. The National Cabinet, yes, it's making decisions on things like I've talked about today to support with legislation, self-isolation arrangements and things of that nature. But the other thing that the National Cabinet is doing is sharing this practice information about how state governments are just practically dealing with; whether it's transport or indeed the very helpful discussion we had with both the New South Wales and the Victorian Premier sharing their experience about how they're dealing with schools. The Northern Territory Chief Minister, Michael Gunner, has some very specific issues that he has to deal with about access of essential services and workers going into remote communities in the Northern Territory. And he's already working with us. And so the Northern Territory and the arrangements that are there will become the model for what is done in

remote indigenous communities in many other states and territories. So this is a highly collaborative process and we're all learning from each other and all supporting each other.

JOURNALIST: How will social distancing be instructed to schools and kids in schools. Will schools be given specific advice to tell their kids or will it be up to schools. How this health, social distancing, as you mentioned, is going to work?

PRIME MINISTER: The national information campaign is already running with information that will be available to all Australians, but it's pretty straightforward. A metre and a half. We're about a metre and a half away. Ensuring that, you know, you refrain from that sort of physical contact, which might be the handshake or even something a bit more intimate unless you're with your close family and friends. It's all common sense. You know, we don't need to tell Australians how to get out of bed in the morning and how to put their shoes and socks on and things like that. Australians understand. And I'm not making light of this, I'm not. These are important, normal, common-sense social interaction measures that people can take. And they are very intuitive. And it's all about reducing the amount of direct physical contact that you have with others. That's a clear principle, which I think Australians can understand. And I would expect teachers, or those at preschool, or in churches or wherever. I know I got a message from my church during the course of the week after Friday and they were putting measures in place and good for the. School clubs and others are doing the same thing. It's just Australians getting together, working out how they're going to adjust. See, I really want Australians to get on with their lives as commonly as possible. But there will be disruptions and they will adjust. Australians, of course, can adjust. But what I hope won't happen, and I'm sure it won't, is that we won't lose our sense of Australian-ness in all of this, we will support each other. If you've got someone who's in self isolation particularly, there might be an elderly person who might live in your apartment or down the road, and they would be wisely exercising even greater precautions about their social interactions. So make them a casserole and leave it on the door or things like this. I think just Australia's helping each other out over the next few months. You know in the shopping centre aisle, you know, make sure someone who might be a bit more vulnerable than you can get what they're looking to get as well and I think just being good to each other is the right thing to do.

JOURNALIST: PM on the new travel arrangements, have you had a chat to, I know you said you spoke to Boris Johnson last night, but have you spoken to any other world leaders and specifically the White House? Because we're seeing a lot of cases coming from the US?

PRIME MINISTER: Yeah well it's our major source now coming out of the United States. And yes, we have had a lot of interaction with the United States and we will continue to, the Foreign Minister was only there this week. She returned yesterday. And so we've had a lot of interaction with the United States

with the UK. The Five Eyes groups, and New Zealand I speak to the Prime Minister almost every other day. And one of the things I should mention that I spoke to Prime Minister Johnson about is when it comes to the G20, I'm also aware that Prime Minister Modi is keen to organise a link up between all the G20 leaders. I think that's, I think that's a commendable initiative. Australia obviously supports that. I've communicated that. That's a matter for the Saudi government who's the President of the G20 this year. But the Prime Minister and I agreed last night that an even more urgent meeting that could be needed would be a further meeting of the G20 finance ministers and central bank governors. This is a health crisis, but it has very serious economic impacts. Those economic impacts have been clearly affecting financial markets. To date, that has been managed, but we've seen some highly volatile and quite disruptive activity on our financial markets. We want to be assured through our cooperation, as occurred through the GFC amongst that very G20 group, that we can make sure that there is no further damage or undermining of financial markets and the Central Bank Governors and Finance Ministers are the best place to do that. Truth is that they only had a meeting a few weeks ago and at that meeting, things were at a very different stage as they are today. And I think that demonstrates I mean, there's a lot of wisdom in hindsight at the moment. But what we have to realise is this has been a very fast moving event. And so far, the decisions we've taken has put us in a good position. But you've got to stay in that position by constantly making additional decisions. And that's what the National Cabinet was set up to do.

JOURNALIST: When it comes to shopping and gathering supplies, what's the advice there? Because Victoria's Chief Medical Officer said 14 days of supplies are required. The federal chief medical officer said this morning, two to three days. What is the official advice?

PRIME MINISTER: I refer you, I understand, to the comments of Premier Andrews, made this morning that the medical officer in Victoria, I understand, has been misrepresented in what he said about that. And what you've heard from Dr. Murphy this morning is consistent with what the view is around the states and territories. But I'd refer you to, I understand Premier Andrews brought this to my attention today. What was said has been misrepresented about that 14 day arrangement. And I mean, people should exercise common-sense. See, the thing is, the shops are going to remain open. You know, the electricity companies will still be selling the power. The phones are still going to work. The lights are going to continue to come on. The schools will continue to come together. The trains will continue to run. The airports will continue to function. This is not a cyclone or a physical event like that that shuts down parts of our cities in terms of a physical sense. It is something quite different. This is a biological virus that is affecting human to human transmission. And so I think we just need to get that into some sort of perspective in terms of how we moderate our response.

JOURNALIST: The NRL, though, says that it is actually not in that category that is in danger of being closed down. And they're now asking for potentially hundreds of million in support from your your package. But is that something you'd entertain?

PRIME MINISTER: Oh, we'll look at all of all of those issues. I understand that already today, I think over half a million they've put into the clubs, and there'll obviously be a lot of disruption, whether it's the NRL or the AFL or any of the large sporting competitions, but equally in the cultural community as well. They'll be there'll be events that won't be able to go ahead, there'll be cultural events that won't be able to go ahead. And it's important that what we're saying on the banning of gatherings of more than 500 persons, that is going to be supported by state legislation. So it's it's not an advisory. It's not, there's no discretion. There'll be requirements. And that has obvious implications for things like insurances, things of that nature. But we'll deal with those issues one after the other. Right now, though my real focus is on the further mitigations we have to put in place. The most important, having made this decision about further isolation of people coming to Australia. That does ensure that we have the strongest borders anywhere in the world when it comes to these sorts of issues. Australia has always been well known for its border protection on all matters and it's certainly the case when it comes to managing this issue. But in addition to that, it's also about ensuring that as a government, we keep taking decisions which keep us ahead of the curve.

JOURNALIST: What happens to, people who are going on domestic life, reconsidering that travel is a domestic flight, one of these static locations that you're talking about?

PRIME MINISTER: That's not our advice. Dr Kelly you might want to talk about flights?

DR. KELLY: Yes. So that wouldn't be the advice at the moment, but as I said before, we'd be looking at all measures as they go forward. There are both, domestic flights and generally short although there are some further destinations which are longer. But at the moment, there is no advice about restricting domestic travel.

JOURNALIST: When you have a look at those graphs, and the feeling in the community at the moment is, is one of anxiety, should Australians be afraid?

PRIME MINISTER: Australians should be careful. Australians should be listening to the advice that is provided, Australians should be exercising their common sense. But the thing I'm counting on more than anything else to achieve that outcome rather than that outcome, is that Australians be Australian. Now Australians can deal with this, we can deal with some change to our daily lives. We can deal with the surprises that may come as we get further information. We can deal with making common sense judgments every day. We can deal with looking after each other. We can deal with having to

show a bit of patience from time to time. And the odd frustration or disappointment Australians can deal with all of that. So long as Australians keep being Australian we'll get through this together.

Thank you all very much. Ta.

PRIME MINISTER OF AUSTRALIA

The Hon Scott Morrison MP

ADMINISTRATIVE APPEALS TRIBUNAL
FREEDOM OF INFORMATION DIVISION
ADELAIDE REGISTRY

2020/5875 & 5876

SENATOR REX PATRICK
Applicant

SECRETARY
DEPARTMENT OF THE PRIME MINISTER AND CABINET
Respondent

ANNEXURE LM-2

The following 14 pages is the annexure marked **LM-2** referred to in the affidavit of Leonie McGregor made 16 April 2021 before me:

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Mary Parker

AGS Lawyer within the meaning of
s 55I of the *Judiciary Act 1903*

PRESS CONFERENCE - AUSTRALIAN PARLIAMENT HOUSE, ACT

TRANSCRIPT

29 May 2020
Prime Minister
E&OE

PRIME MINISTER: Good afternoon, everyone.

National Cabinet has met again today for the first time in a fortnight and if I could have the first slide, please, we're on track, and we're making progress, far sooner than we could have ever imagined several months ago when National Cabinet was first formed back in mid-March.

The three-step plan that I outlined several weeks ago is now very much in implementation as you can see from the chart, which we reviewed today, that step one is done in all states and territories. Moving to step two in most in a few weeks' time in June. But steps two and three implemented and on the way to, in states like Western Australia and the Northern Territory. I want to thank, again, all the Premiers and Chief Ministers, sure, from time to time there are points of difference and there are frustrations and there are things that I have no doubt that Australians would like to be moving faster than they are. But we outlined a plan and we're implementing that plan.

The Premiers are getting on with that plan and we still have an enormous amount of work to do in the months that are ahead. And that is to both manage, as always, and suppress, the virus, and to ensure that we can reopen our economy. And our economy is reopening. We continue to receive the information and the data that is showing an improvement and an economy that, while it has been severely impacted when compared to economies overseas, which have been subject to far more onerous restrictions than Australia, not just on the health front but on the economic front, is fairing much better.

So, when we assessed where the plan was at today, we also took advice from the AHPPC, the medical expert panel and from Professor Murphy, and the full health impacts of the first step of that plan, it is still too early to make a judgement about what the health results of that are, and it will be a week or two yet before all the results can be in as we've seen Australians move back out of their homes, go back into work places, slowly being and going back into playgrounds and into schools and all of these things they have been looking forward to doing for so long. But the impact of that on the health results, it will still take several weeks before we have a full assessment of what that follow-

through impact has been, and that will help guide further the Premiers and Chief Ministers in the further decisions that they will take in the months ahead. And so we look forward to them doing that.

On their behalf, I want to make two points today: And the first of those is what are the expectations? Are our expectations of zero cases? No. That has never been our expectation, nor our goal. Eradication? Elimination? These are not the goals that we have. If it's achieved as a by-product then well and good. But the fact that a case or a group of cases may present is not something that should restrict moving ahead and getting progress on implementing the three-step plan and bringing Australia's economy back to a COVID-safe environment in which jobs can be restored and livelihoods can be restored.

The second point I'd make is this: And that is the risk remains great and always has been. Australia's success can lead some to think that perhaps the risk was never there in the first place. But that is not true. We only need to look at countries as sophisticated as ours, as developed as ours, with health systems as strong as ours, who have death rates 100 times what has occurred in Australia. So, we would be foolish to think that we were immune or that we are immune. And as a result, the three-step plan, keeping the balance between the health management of the crisis and the economic management of the crisis in balance, continues to be the balance that the National Cabinet seeks to achieve and I believe is achieving.

What we've also agreed today, and I'm pleased to announce, that we're not just working together on the immediate impacts of COVID-19. But we have been working together on developing a new five-year hospital agreement between the states and territories. All states and territories have now signed on to that agreement as of today. Guaranteeing the essentials that Australians rely on. Hospital services, there can be no greater essential than that. And today, an agreement that will see an investment by the Commonwealth of an estimated $131.4 billion dollars be made in a demand-driven public-hospital funding model to improve health outcomes for all Australians, to ensure the sustainability of our health system now and into the future. The new 2020-2025 national health reform agreement provides for an estimated additional $34.4 billion in funding to public hospitals over the five years from July 1 this year. This is in addition to the over $8 billion in health investment made by the Commonwealth during the COVID-19 response.

There is also as part of our agreement, a funding guarantee to all states and territories to ensure no jurisdiction is left worse off as a result of the COVID-19 pandemic and guarantees the Commonwealth's funding contribution for public hospitals over the next five years. Now, this agreement, importantly, includes funding to provide life-saving immuno therapies to Australians suffering with conditions, in particular cancer, the CAR T-cell therapies. These can cost half a million dollars per treatment. They will now be provided under these agreements to Australians who need them without that level of cost. That's what you can do when you can guarantee the essentials that Australians rely

on, and the economy is what enables us to provide that support. And that's why it's so essential that we continue to work together to strengthen our economy to support such critical agreements like the one we've been able to come to today.

The other thing we agreed today is a major change in terms of how COAG will work in the future. And, if I can move to that chart, COAG is no more. It will be replaced by a completely new system and that new system is focused on the success that has been yielded by the operation of the National Cabinet. What we'll be doing is keeping the National Cabinet operating and particularly during the COVID period, we'll continue to meet on a fortnightly basis. In a normal year it will meet on a monthly basis. Wouldn't meet in person. One of the things we've learned over meeting so regularly is we can work effectively together as we get together using the telepresence facilities which means Premiers, particularly for those in the more remote states have been able to access that engagement on a far more regular basis and it has worked incredibly well. And so we will continue to meet on a monthly basis in an ordinary year and we'll continue to meet on a fortnightly basis as we work through the COVID period. Now, how it will be different to the way COAG worked, is the National Cabinet will be driven by a singular agenda, and that is to create jobs. It will have a job-making agenda. And the National Cabinet will drive the reform process between state and federal cooperation to drive jobs. It will drive a series of Ministerial Cabinet subcommittees, if you like, that will be working in each of the key areas, and this is an initial list of areas and that will be further consulted on with the states. So in rural and regional Australia, on skills as I was talking to the National Press Club just this week; on energy; on housing; transport and infrastructure; population and migration; and recognising the important role of health, in terms of having a healthy workforce and a healthy community to support a strong economy.

The National Cabinet will continue to work with a laser-like mission focus on creating jobs as we come out of the COVID crisis and we work into the years into the future. The National Cabinet will work together with what is known as the Council on Federal Financial Relations, that is basically the meeting of Treasurers. They actually met today. Those treasurers will take responsibility for all of the funding agreements between the states and the Commonwealth. They will no longer be the province and domain of individual Ministerial portfolios, the Treasurers will bring ultimately those agreements together, consulting with the portfolio Ministers but being responsible for all of those agreements.

And National Cabinet agreed today that one of the first jobs that the Council of Federal Financial Relations will need to do, is look at all of those agreements and how they can be consolidated and rationalised. Obviously, there are the large foundational agreements like the ones I've announced today, they will obviously continue in the form that they've been set out. Education is another

which is already in place. But there are multiple other agreements that will be available to the council to be able to be looked at and consolidated and reviewed by the Treasurers to ensure we can get a more effective federation.

Important task forces will continue, that previously worked to COAG in important national agenda issues. Women's safety and the work that the states and territories have done with the Commonwealth to combat domestic violence. This is an important national issue and an important national agenda. It will remain part of the national agenda, as will Indigenous affairs, in particular, the work that is being done on closing the gap and the closing the gap priorities being worked together with the Indigenous peak groups as part of the closing the gap process.

Once a year, the National Cabinet will meet together with the Treasurers as well as the Australian Local Government Association in a new council which is focused on national federation reform. This agreement, this set of processes, the funding agreements, ensuring that we continue to get expert advisory support, both directly to the National Cabinet and each of those Ministerial areas, which won't be pursuing a shopping list of agenda items, they'll be pursuing the tasks that National Cabinet has set them to create jobs in our economy.

Now, over on this side is a long list of Ministerial reforms and regulatory councils that currently exist and interact with COAG. Those forums will be consolidated and reset. Ministers will consider the value of each of those and I suspect we'll see many of them no longer be required. It's important that Ministers at state and federal level talk to each other but they don't have to do it in such a bureaucratic form with a whole bunch of paperwork attached to it. They need to talk to each other, share ideas, but the congestion busting process we're engaged on here is simplifying that. They come together to solve problems, deal with issues and move on. They should talk to each other because they find value in it, not because of the requirements of some sort of bureaucratic process.

There are a series of formal regulatory councils which are created under statutes, particularly things like the Disability Reform Council, the Energy Ministers, they have particular roles under various legislation and there are a number of others but we will be looking to consolidate and reset those as well.

So we want to streamline all of those endless meetings that go on so we can bring it back to one focus: Creating jobs out of the back of this crisis, and ensuring the federation is focused on that job just like we have been focused as a National Cabinet on managing the country through our federation through this national crisis of COVID-19.

So, that is an exciting new agenda for our federation. Federation reform issues and responsibilities between states and territories and the Commonwealth will be considered at the National Cabinet because we think that gives Australians confidence. And this really is a job of rebuilding confidence, right across the

country. And that includes confidence in our governance and making sure that all governments are working closely together and in particular that we're doing so to get Australians back into work.

The final details of which ministerial groups are set in this area, and as I said, the consolidation that takes place in the other areas, that will come in time. But we've agreed on the new structure and we think that will ensure for Australians that they'll get better government, more focused government, at both a state and at a federal level.

And with that, I'll pass you on to Professor Murphy. Thank you.

PROFESSOR BRENDAN MURPHY, CHIEF MEDICAL OFFICER: Thanks, Prime Minister.

So we have been seeing generally less than 20 new cases a day in Australia of COVID-19 and that is what we expect to start seeing. We may see more cases, as the Prime Minister said, as we relax restrictions but our aim is to make sure that outbreaks are small and controlled. An interesting statistic is there are only two people left on ventilators at the moment in Australia, a long way short of the 7,000 potential that we catered for in the worst-case scenario. We are doing about 30,000 tests a day with a very low positivity rate of 0.05 per cent at the moment. We would still like to do some more tests. We would like every person with an acute respiratory problem, cough, cold of any sort to get tested. That is the best way to track the virus.

So today I presented to National Cabinet the national surveillance plan, which is a document that shows how we're going to track surveillance of this virus over the coming months and that will be published on the Department of Health website and give you full information on all the things we're monitoring. I also presented the first report back on the Pandemic Health Intelligence Plan. You'll recall that that was the plan that we used to convince National Cabinet that we were in a fit state to start easing restrictions and that was the basis before people moved to step one of the three-step plan. That first report really is only on two weeks' worth of data because most of the restrictions were only relaxed two weeks ago. So as the Prime Minister said, it is too early to draw definitive conclusions but we are on track. All the measures we thought should be stable and in good shape remain in good shape at the moment. But in two weeks, it's not possible to be absolutely sure and we do need to watch the data over the next one to two weeks to make sure that we're not getting more than the expected small outbreaks that we do expect to see as we relax restrictions. We've got to be sure that we're not going to get a number of outbreaks or outbreaks that are hard to control. We don't expect to get them, we expect to be able to control those outbreaks but at this stage, we do need to be cautious about saying that the relaxation of restrictions hasn't had a deleterious public health effect. We don't think so but we must watch and be very careful.

You'll remember that those parameters to do with epidemiology and modelling of the virus, the public health capacity, our capacity to test and contact trace and follow up people and of course our health system capacity. Our health system is now getting back to business as usual. Elective surgery is heading right back up to normal in a number of jurisdictions and people are starting to go back to the doctor and the clinic and that is all great. So we are on track but it is too early to be absolutely certain. If I can make one plea to everybody as we get back to normal life, just remember the simple principles. Keep practising the physical distancing. Please go and get tested if you are in any way unwell and stay home and keep practising all those hygiene and distancing measures we talked about.

We did have a final discussion today also on public transport, how to make it as safe as possible by trying to reduce density, staggering travel times, lots of enhanced hygiene and we do recognise, the AHPPC has recognised that in a crowded public transport situation some people may choose to wear masks when they are really up close to other people and we acknowledge that is not an unreasonable thing to do, not that we are recommending it in the general community in Australia at the moment because of the low case numbers. But if people do choose to wear masks, they need to be careful that they are not a complete protection and they need to be worn very carefully. We will be publishing some advice on that as well.

So, on track, no reason to deviate from our planned recovery path. But we've got to still all be very careful. Thank you.

PRIME MINISTER: Thank you, Phil?

JOURNALIST: Prime Minister, just on the new National Cabinet structure, do you envisage that once this crisis has passed the Premiers will fly to Canberra for face-to-face meetings like they used to with COAG? How can you assure us over time it doesn't grow into a bureaucracy like COAG which critics said is a place where good ideas went to die?

PRIME MINISTER: Yeah, I used to say that too, and it was true. One of the reasons why the National Cabinet has worked is it has actually operated as a Cabinet. And that means it operates within Cabinet rules and it operates under the Federal Cabinet's rules and that relates to the security of documents, process, procedure and all of those - if I could have that chart back, please, that's it - all of these committees also will operate on that basis as well. When these groups get together, there's a lot of theatre, a lot of people in the room. And that can really, I think, restrict the genuine reform discussions that you have to have. Having these groups operate like a fair-dinkum Cabinet, I think, has been really important. We're all members of Cabinet so we all understand what those rules are and I don't think that has been the MO for how COAG has operated and I think that's a really big change. We do want to meet, well, National Cabinet will meet twice a year in person. The National Federation Reform Council meeting, with the treasurers, that will happen once a year, I

think it's important for that to happen. But what we have noticed is the pace of meetings, the regularity of meetings, is really important and having a very clear mission is really important. There are so many national issues, as you can imagine, across the country and there is a place to deal with those and we're providing a place to deal with those but what we're saying as leaders of government, federal and state, is we must focus on jobs and that's what will drive our monthly agenda. And in the months ahead, that's on a fortnightly basis and more regularly as required. So it's a much more flexible way of working, Phil. It gets rid of so much of the formalities and staging that is around these events and it enables treasurers, as well, I have got to say, and prime ministers and premiers to have these sorts of discussions. Without sort of lifting the veil, I mean, on the night before every treasurers and leaders' meeting I have been to, there is usually a get-together and that is the best conversation you ever have because you're genuinely talking about the issues you need to and that's how National Cabinet has operated. We've been able to find that candour and collegiality in that new format. We will put it all the way through these others and we're not going to have the myriad of these agendas which are going on all the time, bubbling up and distracting often the core focus that the leaders need to create jobs.

Michelle?

JOURNALIST: Wouldn't you expect, though, Prime Minister, that in a more normal situation where you don't have the total focus on a crisis, that you'll get more political fragmentation? You'll have state elections, parties fighting each other and so on. How do you intend to try and smooth that out? And secondly, as you're talking about federalism reform, do you believe in principle that the states should have more revenue-raising powers?

PRIME MINISTER: Look, on the first issue, Michelle, it's just something we have all got to work hard on. Politics still exists and the environment, the media environment we operate in, which is very interested in conflict, that also exists and that's just how it is. And we're all experienced and professional politicians and leaders and we understand that. So it is very much up to each of us to value what we've been able to establish, I think, in the National Cabinet and seek to preserve it. The other way, though, importantly, Michelle, is how we deal with the financial issues of national partnership agreements and as you can see here, that will really be the responsibility of the Treasurers. Previously, all those funding agreements have all been belted out in portfolio ministerial councils, endlessly, round and round and round and then ultimately in a half unresolved sort of state they can trickle through for a stoush between the leaders. That's not a good way to work. Now, the value is that many of the Premiers and Chief Ministers and myself have been Treasurers before as well before. So we understand Treasurers are in a unique position to work across all government areas and they can reconcile a lot of these things and they also have a key responsibility in ensuring constraints and responsible management of public finances and it brings those two issues together. And the Treasurers

are well placed, I think, to resolve many of those issues and so it won't distract the leader's agenda which has to be very focused. That's the third point. And that is where we can focus on an agenda and a clear purpose to create jobs, and I would expect at some point we might be able to nominate, certainly the Federal Government has a jobs target, and that can be the clear purpose of why we're meeting together every month. That's why we have the broader issue of the Federation Reform Council to once a year deal with those broader, important issues like domestic violence and our progress on closing the gap. So it's about managing the agenda, it's about managing ourselves and I think it is about valuing what we have been able to create in these recent months. We have met more times in the last two months than Premiers and Chief Ministers and the Prime Minister have met in 10 years. And so, you know, amazingly, something good has come from that. More than something good, much good has come from that. And we recognise it and we want to preserve it.

I'm just going to take them today.

JOURNALIST: How long will you extend free child care beyond June 30?

PRIME MINISTER: There will be a decision made on that soon. It's under consideration by the Government.

JOURNALIST: Prime Minister, you have said there is no Commonwealth advice for state borders to remain in place. Did you bring that up today in National Cabinet and put a timeframe on that table that you would like states to perhaps hurry up the reopening of those borders?

PRIME MINISTER: We had a very candid discussion about that today, as you would expect we would. That's one of the good things about National Cabinet. And once again, of course, it's the fact that National Cabinet never made a decision to put in place state borders and that is the case. Now, I want to stress that during this period of time, freight and business travel has continued unimpeded. And all the data I've seen, particularly with the movement of freight and goods et cetera, that has continued and the barriers at the borders have not presented any issue when it comes to those quite critical supplies. And that hasn't happened by accident and regardless of the borders being in place, the states have worked very hard on that. But the second point I would make is, that means the borders principally relate to leisure travel between states and territories. Now, under the three-step plan, it wasn't until step three that it was envisaged that there would be interstate travel. Now, whether you have a border or you don't have a border formally put in place, step three of the plan, which was expected to be in place in July, is when that was expected to be the case. Now, I note that all states and territories are working towards that, whether they have borders or not. But the truth is, and I'm sure, and this was discussed today, that it's preferable to be able to be in a situation where you don't have borders as soon as possible because, obviously, that means that the tourism industries in particular and particularly with school holidays coming up might be able to benefit from that travel. So, I think we've got to keep the issue in

perspective. We don't agree on everything. Not everyone always does. It would be a bit weird if they did in a democracy. And we have to bear in mind that in the vast majority of cases, the states and territories have worked very well with the Commonwealth on these issues and I still remain absolutely optimistic that common sense will ultimately prevail on the timetable that National Cabinet has set out.

JOURNALIST: Can I ask you about the situation in Hong Kong and the national security laws aimed at pro-democracy protesters? Would Australia consider applying sanctions against Chinese officials? What's your message to Hong Kongers who are perhaps now considering coming to Australia given that they feel they have lost living in a democracy?

PRIME MINISTER: We've issued several statements on this matter and we've done those in concert with like-minded countries on this issue, as recently as today. And that sets out the Government's very clear and consistent position regarding the basic law and what we consider to be the departure from those principles which have been widely seen as the one-country, two-system process. So we have been fairly clear about that. Obviously, the situation for Australia is principally driven by the fact that we have a large number of Australian residents, and those with connections with Australia, who live in Hong Kong and obviously are keen to provide them with the normal support we would provide to an Australian resident in any situation like this. The Department of Foreign Affairs and Trade is working very hard to ensure that they can provide that support during these times. Now, on the broader issues you raise regarding sanctions, that's not an issue currently that is currently before the Government. That's not something that's under consideration. We have expressed our view and we've expressed it, I think, in a very diplomatic and I think very courteous way and I can say it is exactly what we have communicated directly through our diplomatic arrangements is what we have said publicly and I think it's an observation which is very fair and very reasonable and the issues that we've highlighted outlay our concerns.

JOURNALIST: Prime Minister, given how quickly we're progressing towards the end of stage 3, was there any conversation about the stages beyond that? And if I may, Professor Murphy, what indicators would you be looking for in terms of app downloads, testing figures et cetera to move to beyond stage 3, easing of restrictions?

PRIME MINISTER: Well, I'll start off. We're at 6.1 million downloads now and that's great and we obviously want to still see more and they continue to grow every day and I think it's important that as people continue to move more out and about in the community that they realise that downloading the COVIDSafe app keeps them safe, their families safe, their communities safe and that's the principal reason why we would encourage you to do that. We have only just put step one in place and we are yet to know the full health impacts of that. So being able to speculate about what's beyond step three at this point is very, very difficult. Now, that's not through a lack of willingness to want to do that. I

can understand particularly in the entertainment sector why they would be keen to know when you can get 200 people back in a theatre or for the major sporting codes to have crowds back. But at that stage that is not known and we will step through each of the stages that we've set out and make the assessments and take the advice from our medical experts and on that note I'll pass to mine.

PROFESSOR MURPHY: Thanks, PM. So the things we are looking for to progress beyond stage three will obviously be stable epidemiology, according to the Pandemic Health Intelligence Plan. The same sorts of things we are talking about, only small outbreaks, readily controllably. Very important that we have active testing. We've got to keep our testing rate up because it is the only way we're going to find the outbreaks. I say again and again and again, every Australian who has a cough, cold or sniffle, please get a test. We've got good testing, we've got good stable epidemiology with small outbreaks only and if the Australian public are managing to maintain all these new behaviours of physical distancing, hand hygiene, and all of those things and have shown that they can do things in a safe way in the progressively increased gathering sizes, that will give us the confidence to look at a staged further progression in the future. So as the Prime Minister said, it is early days yet but we will certainly be doing that work. But it is very much keeping much of what we're doing at the moment and really important that the Australian public can embrace these new ways of behaving and interacting and not go silly when we start relaxing.

JOURNALIST: Prime Minister, on the New Zealand travel bubble, would you be supportive of one state, for example, New South Wales, opening up first if other states are refusing to open their state borders? And Professor Murphy, if I may, is there any justification from Queensland saying there is too much community transmission in New South Wales, for example, we must keep them closed?

PRIME MINISTER: The short answer to your first question is yes. And the states are well aware of the Commonwealth's position on that. If we're in a position to introduce a travel-safe zone between Australia and New Zealand at an early stage and we're all aware of the epidemiology in New Zealand, it's on the same basis as here in Australia. And there are health officials who have met on that in the past week and Brendan and I discussed that, Prime Minister Ardern and I, and we discuss it regularly and we are progressing well and I don't intend for the jobs that I know will be created particularly in our aviation sector to be held up on the basis of decisions that Premiers may yet still wish to make. I made it clear today that the jobs in Qantas and in Virgin and our many other airlines, but particularly those two airlines and we all know the challenges with Virgin at present, that trans-Tasman channel being made open again is going to mean jobs for people who work in the aviation sector, it's going to mean jobs for caterers, it's going to mean jobs for baggage handlers and pilots and flight attendants and refuelers and everyone else who's involved in an industry that has taken the biggest beating of them all. And there will be, and Prime Minister Ardern and I agree strongly on this, that the additional benefits,

net positive, that will come for both of our countries opening up to each other again is a strong one and we have both put ourselves in a position to do this. I can't see it happening amongst too many other countries at this stage, I think that is still some time off but we are looking forward to that day being sooner rather than later and so I would hope that if you're in Sydney and Melbourne at the moment you can get to all the states and territories and to Auckland at the same time but let's see what happens.

Brendan?

PROFESSOR MURPHY: Just on the state border issue, AHPPC hasn't made any recommendations about it but we understand states have taken positions based on the differential case numbers in adjacent states and I understand that Queensland is regularly reviewing their position, as are all the other states with borders and as the case numbers fall significantly in New South Wales as they had in Victoria, I am hopeful they will may see fit to reconsider that position.

JOURNALIST: We saw on the eve of Reconciliation Week Rio Tinto blow up one of the oldest Aboriginal heritage sites in the country over in the Pilbara, do you think that should have been allowed to happen?

PRIME MINISTER: I haven't got a brief on that particular project, or the circumstances surrounding it. So it wouldn't be wise for me to go venturing opinions on things that I have not received detailed briefings on the detail.

JOURNALIST: Prime Minister, will you listen to the advice of the Reserve Bank Governor about the risk of turning off JobKeeper and other employment assistance too soon?

PRIME MINISTER: We've had lots of advice on these matters and I think it's important to contextualise all of this. The Government has many measures of support. JobKeeper, JobSeeker, cash flow assistance targeted to industry sector support. And we are planning to ensure that the economy and jobs get the support they need to get us through this crisis and to get us out the other side. JobKeeper and JobSeeker, and how they're currently framed, have got their legislative timeframe heading out to the end of September. But it is important to ensure that we come out of this crisis strongly and we continue to create jobs in our economy. And so we've always been flexible about how we manage this. But what is important to know is that as time goes on, more of the economy gets stronger. And more of your economy is less in need of those specific supports than it was at first. But some sectors of your economy will need them for longer. Now, whether that's in the measures you're talking about or in other measures, well, that's an option for the Government to consider. But I think there's been quite an error being made to think that JobKeeper is the only economic support that the Government is providing. That's not true. There are many, many, many forms of support that the Government is providing and we will target the best measures to do the job that we need it to do and that is to support people, staying in jobs, and getting back into jobs. That's what's the

most important thing and that's what we're focused on and our programs will support that. We have been doing, and will continue to do, the fiscal heavy lifting that the Reserve Bank Governor first said when we were back in Parramatta in March at what was the last COAG meeting. And it's important that we do that and states do it with us and I think $150 billion in six months is some pretty heavy fiscal lifting. The Reserve Bank may have run out of ammo when it comes, largely, to what they can do on cash rates, but the Commonwealth Government, in particular, has certainly stepped into the breach and we've done so significantly and we anticipate that we'll need to do that for some time. But that doesn't mean that that requires you to do it in every single measure that we currently have out there. We've got a lot of flexibility.

JOURNALIST: Why should cabinet secrecy apply to ordinary policy discussions between the federal and state governments? Won't the public need greater transparency about why decisions are being made on, you know, basic things like transport and skills that, after all, aren't part of a national emergency any more?

PRIME MINISTER: Well, in the same reason that in state Cabinets and federal Cabinets they work together under Cabinet rules to come to conclusions and have debates, which produces good decisions that supports essential services and this is just the same process. I mean, it's not a spectator sport. It's a serious policy deliberation which needs to be done between governments and by Cabinet members within Cabinets and it's applying the same disciplines and the same opportunities. What matters is the outcome. What matters is the services. What matters is the hospital beds and the schools and the funding and support and the targeting and the performance measurement and the accountability and that's what all of this is designed to do and that's what this system will do.

JOURNALIST: But Australians have occasionally been mystified by, like, for example, why did the National Cabinet come up with a solution for commercial tenancies and not residential tenancies?

PRIME MINISTER: I explained that decision at the time, you must have missed my explanation.

JOURNALIST: Just in relation to the Reserve Bank again, the language does seem a little different. You talked about getting the economy off medication, the Reserve Bank Governor said it would be, quote, "a mistake" to turn it off the stimulus too early. So are you at odds in any way with what the RBA is saying on that and in relation to the IR stuff that you have been discussing this week, you have been asked a couple of times about the better off overall test, the BOOT test, do you think it has served its purpose in the current environment and do you think you might have to get rid of the BOOT test?

PRIME MINISTER: I think you're falsely creating a difference between the Government and the Reserve Bank. No we are actually ad idem on these issues. And what we have done, I think, has demonstrated that and our

infrastructure programs in particular, which I know Dr Lowe has shown a great deal of interest in, not just recently but for some time, and that program of bringing forward investments, more than a billion dollars just last week announced to pump up programs at local government level with those sort of infrastructure programs, quite small ones, actually, which very strongly job creating in regions right across the country. And so no, I don't think there's any real difference between what the Reserve Bank and the Government is saying and more importantly, what the Government is doing. I think it's very consistent and the numbers and the investments and the supports we're putting in place I think back that up. So we'll continue to go down that path. Now, what I'm interested in, in terms of the announcement I made earlier this week, is employers and employees getting together to ensure that people are in jobs. And I know one thing: If you're not in a job, you're not better off. If you lose your job, you're not better off. And my concern is if we keep going down the path that we're going down and have a discussion that is constrained in a whole range of ways based on things that used to be the norms before, then people are going to lose their jobs and they won't be better off. So I'm interested in making sure Australians coming out of a COVID crisis where millions have less hours, and over a million don't even have a job, and I want to make them better off and that's why the industrial relations changes that I hope to come out of this consultative and good-faith process will deliver changes that will keep people in jobs, that will get people back in jobs. Because when you're in a job, you're better off and that's the better off I'm interested in.

Yep, John?

JOURNALIST: Prime Minister, you talk about on the fiscal side it is not necessarily about continuing existing programs to deliver fiscal support if the economy needs it later in the year. Could you envisage that maybe shovel-ready infrastructure programs could form part of the next leg if fiscal support is required?

PRIME MINISTER: It already does. This is the thing I'm puzzled about when this is written about. Last year, we brought forward around $4 billion worth of infrastructure projects. Last week, we announced more than a billion dollars in extra projects working with local government. We are already doing this. It is not part of the next step, it is part of the now step and it will continue to be. It is an important part of the economic plan that we have been pursuing both through the crisis and indeed before it. That's what you can expect to continue to happen. As you saw on the chart before, infrastructure and transport will be one of those key areas where we will be seeking to create and drive jobs as part of the National Cabinet's JobMaker agenda going forward. So absolutely, John. It is, it was, and it will continue to be. It is a very important part of what we do. And we just want to do it better and coordinate it even better. And the Victorian Premier often says, when I talk to him about this, the challenge is not the bringing forward of expenditure. We've already done that. The challenge is actually getting the projects going on the ground. And in the deregulation area,

this will be critical. Not just when it comes to things like the EPPC Act, of which there is a significant review underway right now and I think we'll be able to make major progress in speeding up approvals of projects to some of these big projects underway, that will be very important. But also the planning and development works that are happening with projects that are already on the books and making sure they can start a lot sooner. So we are looking together, as states and at a federal level, to find those projects that can happen as soon as possible. But there is actually a capacity of the sector to deliver those projects and there are issues around availability of materials and a range of other things and those prices, when the supply and demand get out of sync, actually force the prices of projects up. So it is very much part of the plan and we're looking forward to seeing more of those hit the decks.

One more.

JOURNALIST: With so many media companies closing, does this boost the case for a federal ICAC? And on a similar note, are you comfortable with government facing less scrutiny with so many media companies closing?

PRIME MINISTER: Well anyone who loses a job, that's a bad day. And that's why as a Government we're focused on creating jobs and trying to prevent further job losses, whether it is the media sector and the announcements that were made by News yesterday, I spoke with Michael Miller last night, and it is a hard day for those journalists and those who work in that sector, particularly out in rural and regional areas. But whether it is a journalist's job or whether it's a tradie's job or a health worker's job or anyone else's job, we want to make sure we can get our economy back performing more strongly than it is now as soon as we can so we can create those jobs again. Now, in relation to the other matter you raised, I answered that question to Michelle earlier this week at the National Press Club and that is where that sits.

Thank you all very much.

ADMINISTRATIVE APPEALS TRIBUNAL
FREEDOM OF INFORMATION DIVISION
ADELAIDE REGISTRY

2020/5875 & 5876

SENATOR REX PATRICK
Applicant

SECRETARY
DEPARTMENT OF THE PRIME MINISTER AND CABINET
Respondent

ANNEXURE LM-3

The following 15 pages is the annexure marked **LM-3** referred to in the affidavit of Leonie McGregor made 16 April 2021 before me:

....
Mary Parker

AGS Lawyer within the meaning of
s 55I of the *Judiciary Act 1903*

PRESS CONFERENCE - AUSTRALIAN PARLIAMENT HOUSE, ACT

TRANSCRIPT

04 Sep 2020
Prime Minister
E&OE

PRIME MINISTER: Good afternoon. Australia is something we can never take for granted. And I'm not talking about Uluru or the Great Barrier Reef or the Opera House or the great wilderness across our country, I'm talking about us. I'm talking about our Federation. I'm talking about who we are as a nation. And in every generation, we must continue to define who we are, how we make Australia work, what we hope to achieve, how we protect it, how we make it stronger. And our Federation, some almost 120 years later, remains a happy work in progress. Sometimes it doesn't feel that happy, but I tell you, the goal is one that I think all Australians would share and that's what brings a smile to our face when we think of Australia. Not just the place, as wonderful it is, but how we make Australia work. And that is the task of all of those who come and meet in this place, in our Federal Parliament, but it is also the job of all of those who come together in our state parliaments, those who form governments and seek to work together in the ways that our Federation intended.

This year, the year of the COVID pandemic and the COVID recession, has tested us like we haven't been tested in many generations. And, you know, at times it has felt like Australia could break apart. But it's at those same times I have been encouraged by that all of us have understood just how important Australia is. At the times when sometimes our frustrations have been greatest, and the tensions have been at their peak, that has been exactly the same time when we have been reminded of just how important it is that we continue this great work of our Federation and how it has delivered for Australians for over a century. The National Cabinet began from a realisation that, if we each went and tried to go our own way, that in the face of something at the time we could barely imagine, that we wouldn't prevail, and that we would fall short. And so our Federation instincts kicked in. I remember the day vividly. There was no disagreement, there was no debate about it. We all looked at each other and said, "We've got to do this. And we've got to come together." Now, from time to time, those Federation instincts have grown a little faint, but I can tell you today, once again, as I find each and every time I bring this National Cabinet together, they find it again, and we find the way to work through. And this, I hope, is very reassuring to Australians that, despite the challenges - and it is hard, the Federation is hard, always has been. Anyone who's ever sat in my office has always known that, and we've all tried to find better ways to make it work and

so we remain committed to that. And as we reflected today, on what has been achieved since that day in March, and as we reflected on the devastating news of the national accounts this week and we saw and reflected on the health outcomes that we've been able to achieve over these many months, I can only nominate to you quite honestly Taiwan and South Korea who could claim to have had a better combined outcome on the economy and on health than Australia. There may be others and I'm sure some will nominate. But what I can tell you is that the approach we've taken as a National Cabinet to focus on the health of the nation, and its economic wellbeing, and to see these as twin tasks, has meant that Australia has done extraordinarily well. That's not to say there has not been pain or suffering or hurt or disappointment or frustration. We've had all of that, and more, and there's more to come. But I'd rather be in Australia than anywhere else. And that's the same view of all of my colleagues who sit around that National Cabinet table, indeed, my own Federal Cabinet table. And we want to make sure that that continues to be the case and that's what we've done again today.

So, today we made a number of agreements. The first one, I think, was to acknowledge that how the National Cabinet worked also needed to evolve. One of the reasons COAG and its predecessors never worked was there was the unrealistic and, frankly, not very practical expectation that it could only ever operate on complete, 100 percent consensus. That sets the Federation up to fail. Australia is too diverse a place. The challenges are too disparate to think that, on every single issue, every state and territory is going to come to exactly the same point. That is not a realistic expectation. And as we've gone through the COVID pandemic, whereas back in March, as we looked forward, we all had a similar risk outlook as to what might happen, so we moved quickly to put in place the PPE capabilities and stockpiles, and to get the respirators, and build up our ICU capacity, and get the testing equipment in and have those arrangements put in place so we could build our defences, now, almost six months later, all the states and territories sit in a different position and they're coming from a different point of risk. And so it is not surprising that they all have different outlooks about what their challenges are right now, and what they might be in the months ahead. So, we've decided that this notion of 100 percent, absolute consensus on any issue is not a way that the National Cabinet can indeed work. And so what we will do is we will set out areas where we can come together, and get as many states and territories as possible to come around that agreement. Not everyone has to get on the bus for the bus to leave the station. But it is important the bus leaves the station, and we all agree on that. We all agree on that. Even when, on occasions, some might not want to get on, they know we need to keep moving forward and that is supported, and that's what we agreed to do today. And I think that is a change in the way our Federation works.

So, we agreed today seven out of eight states and territories, we agreed that before you know what you're going to do, you've got to agree about where you want to get to. And we agreed today with the objective that was set out in the

May plan to be at the end of that step three process, which we will seek to ensure is even better defined. We said before we wanted to get there in July and the virus prevented us from achieving that. Seven out of eight states and territories want us to get back to that position in December of this year and I thank them for that commitment. And that, having that ambition is not enough, and that aspiration that we will now fashion a revised plan just like I outlined the last one to get us there, over these months that are ahead. And the componentry of that plan, there's things that need to go into it not its final form but the key areas of actions that need to take place. They will be brought up through both the AHPPC, the medical expert panel on the health measures that are necessary, and what's called the National Coordinating Mechanism, which is on the economic side of the things that need to be achieved. What's different about this plan from the last one is it just isn't about how many people you can have in a cafe, as important as that is. It's about how the testing regimes have to work, the availability of passenger manifests for people moving around the country, the sort of surveillance testing arrangements which can be, frankly, through the testing of sewerage or, more broadly, the specific testing arrangements and the sort of ratios you need to hit to ensure that you can have a confidence about the level of outbreak, if it were to occur in any place. In all of these areas, there's a necessity to put the protections in place so, as we open up, that we can be confident and states can look at each other and be more confident about how people can move between the various jurisdictions. It means that we need to have a good understanding and an open data room between states and territories to know what the incidence of outbreaks are or case numbers are, and the source of those things, so states can make decisions in confidence as part of a plan.

We agreed that moving to the hotspot model as a concept is what must be in that plan. This precise definition of that hotspot, well, the national definition which the Acting Chief Medical Officer, Professor Kelly, has provided, is a good starting point. But it's not the final point and there will be further discussion on how that can be more specifically defined and this will take some time to get that right. But the idea of ultimately moving beyond a situation where you have hard borders, but you move to a situation where you can have a workable hotspot concept, then that is something we are going to give it our best possible go to define and to make work. States, of course, will reserve ultimately the decisions they take, but all of those who have committed to this path have agreed that we should work hard to get that in its best possible form. The protections, the response capabilities, all of which forms the plan.

State bilateral and multilateral arrangements will also form part of this plan and I think that reflects the very different issues that you have, particularly when you're seeking to transition out of border arrangements we currently have. As you know, the New South Wales and Victorian Premiers are very keen to get their border down as soon as it's safe to do so. And so bilateral arrangements, which would become a trilateral arrangement and I welcome the participation of South Australia in joining in that same way to ensure that those issues

around the Victorian border, with their neighbouring states in New South Wales and South Australia, South Australia will join that process with New South Wales and Victoria, which the Commonwealth is also a part of. But whatever that bilateral or multilateral arrangement might be to deal with specific issues in different parts of the country, that forms part of the plan. Tasmania, I note, in particular already has a goal of having its border down in December as well and I welcome their commitment to that, as I do all the states and territories who have committed to this today. Now, Western Australia has set out some very specific circumstances in their state as to why they won't be joining that aspiration at this time. That said, they wish us well, and they will participate in that process, where they've got things they believe that they can offer and I believe there are many things they can offer in that process. So, they are not standing completely separate for that process. They will continue to work with us. But, for them, they have got their path set, and we respect that. Western Australia has a very different border and a very different economy than most of the other states and territories where these decisions have been made. There are not large border towns. In fact, to the best of my knowledge, there are virtually none along the Western Australian border. Their economy is of a much greater scale than the South Australian and the Tasmanian economies. So, they will watch carefully, they will look on, and the thing about our new way of working in National Cabinet is the door always remains open and they are always able to join us at a subsequent time. But this, I believe, will give us a more sustainable way forward. Because it's not just about now until December. In the absence of a vaccine, we may have to live this way for years, and we need it to be as sustainable and workable for as long as possible. And so I need to encourage everyone that we need to look just beyond not just the now. No one is asking anyone to take anyone's borders down now. No one's asking that. It's about when we get to the next stage and what the next stage looks like, and then how that works not just for the next few months, but potentially years, but let's hope that that's not necessary.

The second thing that was agreed was the agricultural code has been adopted by five out of the eight states and territories. Those who didn't join were Queensland, Western Australia and Tasmania, but they will look on, again, to see how that process works, and particularly South Australia, New South Wales and Victoria will begin immediately. And I think the Premier of Victoria may have indicated this in his press conference. They will begin immediately to put that prescriptive code in place to facilitate greater engagement of agricultural workers and other important workers in the agricultural sector, so as to not dislocate what is occurring in the ag sector between those three states and territories. Again, I thank them for their support.

On international arrivals, it was agreed that we needed to further boost the capacity for inbound arrivals into Australia, particularly for those Australians seeking to come home. We noted that New South Wales has been doing all the heavy lifting on this, and they really are at their capacity for the time being. And so, as I discussed with Cabinet during the course of this week, the Transport

Minister will be working with others to see if we can get flights that currently all seek to come to Sydney, to see if we're in a position to try and get them to go into other ports, whether that be in Perth, in Adelaide, in Darwin, the ACT, or elsewhere, even Tasmania. Premier Gutwein was keen to be part of this, if that's possible. We want to get more Australians home and we need to do that safely as well, and not compromise the quarantine arrangements we have here as well. About almost 4,000 Australians are coming home every week, but we know there are many more who are trying to get home, and further support has been provided to DFAT to assist those Australians, particularly in hardship, overseas.

As part of that approach, I spoke to Prime Minister Ardern this morning, and what we, I advised her was that Australia will be looking to apply the same hotspot approach to New Zealand. So, that means, when we're in a position to do so, and when the Acting Chief Medical Officer has come to a set of arrangements with New Zealand, then we would be able to have New Zealanders come to Australia. That doesn't mean Australians can go to New Zealand. That's a matter for Prime Minister Ardern. But if there's no COVID in Christchurch, and there's no COVID in Queensland, then there's no reason both of them can't come to Sydney. And that will mean, I think, an important boost for our tourist economy, whether it's in New South Wales or anywhere else. And so Prime Minister Ardern was very happy to have further discussions on that, but ultimately that's a decision for our border and people coming in to Australia. But we would just need to ensure that the arrangements in place of identifying hotspots and things of that nature were well understood and were practical.

The treasurers, through the Treasurers' Subcommittee of National Cabinet, recommended today some great work that Treasurer Frydenberg and his counterparts had been working on. We have now reduced 82 existing agreements between all the states and territories to five core agreements. I never thought I would ever say that. There's still a lot of work to do, then, on consolidating the content of those agreements, but that was adopted by National Cabinet. We also agreed to the tasking of the National Cabinet Subcommittee on Energy. That will task them with some short and medium term priorities, and that does include the resetting of the gas market. We received, importantly, a briefing today from the Bureau of Meteorology, a briefing that I've received, along with other senior Cabinet ministers, regarding the upcoming summer season. And we agreed that the Emergency Management Australia would immediately be tasked to convene with the states and territories to ensure there was a seamless operational arrangement between states and territories that was COVID-safe. That would mean, given the prospect of bushfires, whether in particular in northern Australia and south west Western Australia, or indeed cyclones and floods in other places, that the movement of emergency services workers, bushfire firefighters, and Defence Force personnel could be done as quickly as possible. We obviously don't want

firefighters doing two weeks in hotel quarantine when there's a fire burning in south western Australia. We need these arrangements to work first time, and so Emergency Management Australia has been tasked with that.

And we also noted again our benchmark report that has provided on the social impacts of what is occurring with COVID-19. The very real stressors that are on mental health, and we affirmed again our support to putting in place all the mental health supports we can, and domestic violence supports, to ensure that those issues are addressed as best as we all can, working together. I'm sorry, that was a very long introduction. It was a long meeting. As I said, it was a day again when National Cabinet understood just how important Australia was, and we found our way through, again, and I thank them for their cooperation and their commitment to what we're seeking to do.

Professor Kelly.

PROFESSOR PAUL KELLY, ACTING CHIEF MEDICAL OFFICER: Thank you, PM. So, today, as the PM has said, we had a lot of discussion about COVID-19 here in Australia, and so just the outlook at the moment. The numbers of cases, 26,000, just over 26,000 cases now. 737 deaths, sadly. Putting that in a global context, we've reached a milestone overnight of 26 million cases. So, one thousandth of that is here in Australia. So, we have our issues. We've had our outbreak particularly in Victoria over the past few weeks, but, again, very good news in comparing last week with this week on a 7 day average, we've halved the number of cases in Victoria. That's been that sort of trend for the past few weeks. And so good news there. Also, the numbers of cases are contracting into Melbourne and into the hotspots that were originally identified there several weeks ago. Today we have less than a hundred new cases in Australia, and six out of eight jurisdictions have no cases at all. So, Victoria and New South Wales are there. Queensland on alert, as we've seen in the last few weeks in terms of cases, but no new cases today. That's all very good news. 67,000 tests yesterday. So, that's continuing. But that's something to think about what the PM has mentioned, about the different experiences we're having right now in Australia in relation to this pandemic. So, in some states, they haven't had cases for many weeks, and in some states the testing rates have dropped, partly because of that, and partly because of not having a flu season this year. But, still, we need to remain vigilant, even in places where there are no cases and have been no cases for some time. We've seen the New Zealand experience in relation to that. So, even after a hundred days, you can get cases. Similarly in Thailand overnight that was also reported, first cases for several months.

So, we need to remain vigilant. It's the reason why we have this proposed hotspots definition. And there are three potential uses for that. There is an in principle agreement that we will have a hotspot discussion in seven out of eight jurisdictions. That's been agreed. More than that and I can report from the Australian Health Protection Committee yesterday eight out of eight jurisdictions agreed that hotspots are to be used by the Commonwealth in

relation to what we may offer in support to various states that are experiencing hotspots. That was agreed by all of the Chief Health Officers and myself. But, of course, hotspots also guide what happens locally in states, and that's absolutely their prerogative to work with that. And, indeed, what happens in terms of border restrictions, and as the PM's mentioned, that's a commitment that we've had to go forward and to look in more detail in that. The transparency of data across borders is absolutely crucial to that, as well as the clarity of what is being done and why, as well as, of course, the public health readiness if there was an outbreak to occur, particularly in places where there hasn't been a case for some time. We have to be absolutely ready and be committed to do that if it occurs.

So, I'll leave it there, PM.

PRIME MINISTER: Thank you. Mark?

JOURNALIST: An observation and a question, it seems today you're accepting that the 'we're all in this together' consensus that National Cabinet was established to achieve, is now not achievable, so you're changing the rules and lowering the expectations. That's an observation you might like to comment on. Secondly, you've stated a desire for all Australians to be able to travel across borders to be together as families at Christmas. Are you saying today that won't happen?

PRIME MINISTER: What I'm saying today is that 7 out of 8 states and territories has agreed with that ambition for Christmas. And whether that's achieved in Western Australia or not, well, that will be up to Western Australia. But what National Cabinet is, is practical. And we're not going to make the mistakes that previous Federation arrangements enabled to be made. And I'm not going to hold Australia back when one or two jurisdictions, at this point in time because of their own circumstances, don't wish to go along with the path that the country is seeking to go in. I think that's just common sense, Mark. I think that's just practical. I think that's what people would expect of me. That's what you try and do every day. It doesn't matter whether you're running a business or you are running a community organisation or you're a parent, you try and get all the kids in the car. And you try and do everybody at the same place at the same time. Particularly if they're teenagers, that gets a lot harder and they'll do their own thing every now and again. Now I know you were going to make the obvious comparisons, and I would encourage you not to, and to resist that temptation, Mark. What I'm saying is, is that we all seek, in each and every day, to try and get as many people going in the same direction as possible. And what we have achieved, I think, today is a common sense set of rules as to how we can take the Federation forward. I consider, you know, all of my partners as Premiers and Chief Ministers in the National Cabinet, we've come together all as the adults in the room on this, Mark. So, I can make that one really clear, to ensure that we're going forward and doing the best thing we believe is in the interests of the country.

Lanai?

JOURNALIST: You've conceded that, or you've accepted that WA is not on the bus right now, or not getting on the bus right now. When would you like them to get on the bus?

PRIME MINISTER: Well, that's a matter for them.

JOURNALIST: Do you accept that the border could be in place for years?

PRIME MINISTER: Well, only the Premier of Western Australia could answer that question.

JOURNALIST: Prime Minister, on the definition of a hotspot, could we get some clarity on that? Like what's been proposed? Are we talking about LGAs with 10 or 50 cases? It seems pretty nutty that we have a, basically a virtual COAG with the same parochialism, and it can't land on a definition of a hotspot?

PRIME MINISTER: I think that's a very cynical view, Andrew. What we agreed today is that, we first needed to agree where we wanted to get to, and that was to get to a sustainable set of arrangements where Australians could move around, using a hotspot model by Christmas. That's what we agreed today. And what we also have today is a commonwealth defined hotspot, which is the starting point for having one more broadly agreed by those states and territories, which are going to go down that path. And, you know, not everything is gonna turn up every time on the same day at the same time. What we're on is the path to get to that agreed position. We've set out, for the first time, a Commonwealth defined position. And for those who agree to go down the path of having a hotspot, well, we'll now work on the precise details with them now. Well, the hotspot decision of the commonwealth has been released. And so you can read that at your leisure.

JOURNALIST: That was the first part of my question. The second part, if in a few months' time, we're in the same situation we have been in the last few weeks, where we're hitting roadblocks with states and so forth. Is it an option for the Federal Government to start using its financial levers to ensure compliance, or, with the border openings and things?

PRIME MINISTER: No, that's not my approach. The idea that because a Premier or a Chief Minister might have a different view to me about how we should go forward is not a reason for me to punish through withholding funds to states and territories for essential services. I'm not about that. I'm not going to do that. I'm going to work together with people. And I think some have made those suggestions. I don't think they're practical suggestions. We will continue to guarantee the essential services that Australians rely on in every state and territory, and I will seek to bring states and territories together as best as I can to ensure we're all heading in the same direction. Many of you who stand in the courtyard now have been covering this place for a very long time. The idea that there are differences of view between states and territories will not come as an earth-shattering conclusion to you. I mean, that has been the mainstay of how

states and the Commonwealth have been seeking to work together for 120 years almost. I think today we have arrived at an even more practical way of dealing with our differences. And to acknowledge that they occur. A system that doesn't think, or is designed around a principle that everyone will agree every time on everything, just, frankly, doesn't, doesn't, doesn't pass the pub test.

Brett?

JOURNALIST: You speak about not taking Australia for granted. What do you say to Australians who want to come home to Australia but can't? And can you elaborate a little bit more on what was agreed today in terms of international borders? We're seeing some quite distressing cases of Australians not being able to get home, they're becoming increasingly anxious about that closure.

PRIME MINISTER: We're doing everything we can, Brett, to help people get home as quickly as we can. We obviously have restrictions based on the requests made to us by the state about how many people can come in and be in quarantine at any one time. New South Wales have had to do the heavy lifting on that. What I got agreement out from those other states and territories today was that they would be open, and work with us to take further flights in those places if we can get the planes to fly there. I mean these are commercial flights, they're not flights run by the Australian Government. They're commercial flights, which aren't, I'd be surprised if they were running at anything near other than a massive loss on every single flight. And so to get them to go to places that would enable us to take, get more Australians back into the country, I think it would be very useful. The idea that New Zealanders would not have to go into quarantine because they're coming from COVID-free areas would also free up paces, places I should say, in quarantine. Equally, if states aren't requiring Australians coming from areas where there is no COVID cases, like the ACT, and that they don't have to go into hotel quarantine in places, well, that obviously frees up more capacity as well. And so I think the agreements we've made today to go down a hotspot path is a concept I think that will also free up some of that movement. As I said, we've given additional resources and support to DFAT to assist people in hardship. And our consular officers are doing everything they can to support people in those arrangements. But ultimately it means we need to have more arrivals coming back into Australia, and for that to happen, then we have to have confidence that the quarantine arrangements will be able to withstand that. Otherwise we open the country up to a different kind of risk.

JOURNALIST: Prime Minister, Prime Minister, Prime Minister, to Professor Kelly first if I may. You have 30 years' experience as an epidemiologist, what, in your medical opinion, is the reason for a farmer in New South Wales not being able to go over the border into Queensland, where there's no COVID, and harvest a crop? And if I may, PM, if Premiers are telling you that they don't agree with the

man to your right and all the experience that the committee he heads brings, will you demand that the Premiers present their own medical advice and show Australians that they are being led by the health advice and not by politics?

PRIME MINISTER: Well, I might start. The Agricultural Workers' Code would enable us to overcome the problem you've outlined. And that's why I was pleased today that New South Wales, Victoria, South Australia, the ACT, and the Northern Territory all agreed to that code. And, in particular, on that Victorian border with both South Australia and New South Wales, that will enable, I hope, to get over many of the problems just like the ones you've mentioned. Now, it was put to Queensland today that they should be part of that conversation, and they've said, "Not yet. No, we won't be doing that." Now, what I've always said about states that have made their own decisions about borders is that they obviously need to be transparent in my view, about the basis for those decisions. We have provided a clinically based, scientifically based, definition of what a "hotspot" is in Australia. And where states are moving to make different decisions on different criteria, I think it's only reasonable not just to me, I'm just another Australian it's important, I think, more broadly that people understand why they would be taking a different assessment and what medical advice that was based on. I've said that consistently for months.

Rosie?

JOURNALIST: There are businesses that are growing increasingly concerned about Victoria's road map that will be announced on Sunday. Is it too confusing for Victoria to go its own way with its traffic light system at this stage? Wouldn't it be better that they use the national plan that's already been set out, or the new one that you're going to agree to? And just on the New Zealand travel bubble, are you suggesting that that would likely, or could be in place by Christmas, if we've got Australians travelling around the country based on hotspots, we can also have New Zealanders coming in not from hotspots?

PRIME MINISTER: Well, first of all, I mean, Premier Andrews will outline his plan, I understand, on Sunday. That will be his plan, Victorian Government's plan. That is about reopening an economy from Stage 4 lockdown into its next phase. What we're talking about, and what we've talked about today, isn't about Stage 4 going forward. That is about how Australians can move around the country, how hotspots are defined, how information is shared. So, they're two different tasks. So, it's not like he has a very prescriptive plan from the commonwealth about how he opens up Victoria. We have engaged with him and the National Coordinating Mechanism has provided a lot of information and support, and potential ways that can be done. That is true. We have engaged with him on all of those. And I'll have further discussions with the Premier. But, ultimately, what the Premier does in Victoria will be a matter for him, and he will define how that works. Now, they have been engaging industry far more than I think happened on the way in, for the way out. I welcome that. I know there's been a lot of feedback, and issues raised with that system. I'm aware of elements of it, but I'm not aware, I haven't seen the full package

myself. I'm sure that is still being worked on by the Victorian Government. But I do like it that they are talking to industry about how this can happen. I think in these situations it's always best, if it's as simple as possible, that it is a negative list based approach. What I mean by that is it's always talked about a black list and a white list, but what that means is that you have a number of things you can't do rather than specifying the things you can, and leaving the rest in a rather ambiguous state. That was a principle that we used in the early phases of the pandemic, when we said what you couldn't do, and therefore if that wasn't one of those things, then you could do everything else. We've always found that to be a more simple and clear approach, and avoids any ambiguity. The Premier is going to have to make decisions with his health advisers about the level of cases. I mean, the number of cases is still too high. And one of the things I know the Premier is keen to avoid and I believe Victorians, I think, would have some sympathy with this. Is they don't want to have gone through all of this terrible restriction that they've gone through, these many weeks and more weeks to come, only to seek to re-emerge and relapse. They would want to be confident that the way out was sustainable and built up the strength and the capabilities so they would never have to go back to this. And I know that's an issue that the Premier is considering very carefully. And they're the issues that the Premier will be working through, and I wish him well with doing that. And he and I, I'm sure, will speak further about that between now and then. Now, in terms of New Zealand, yes, that is very possible. But I wouldn't describe it as the "bubble". I wouldn't say necessarily it will be a two-way bubble. That will be up to the New Zealanders. But if we can get to a position where we understand how the hotspots can be identified in New Zealand, then that would mean, hopefully, between now and then we may well be in a position for New Zealanders to come to Australia and experience Australia, which will be great for our tourism industry, and we'd welcome that, and it would also take a lot of pressure off rooms in quarantine, which means more Australians can get home.

David?

JOURNALIST: Two days ago, where Annastacia Palaszczuk was complaining, basically, that some of her travel industry people were losing JobKeeper. She's the one with the border control that's depriving those travel industry people of customers. We're seeing that around the country. Should states that impose these restrictions on their own economy carry more of the burden of the economic help to their own people because of the costs of their decisions on state borders?

PRIME MINISTER: Well, JobKeeper is a national program, and it's transitioning. And it's extended and expanded out until the end of March. And JobKeeper has been a lifesaver for businesses, particularly tourism and hospitality businesses, not just in Queensland but many other places. But the best way for tourism businesses to revive is to have more tourists. It's pretty simple. That's what I

know they want. And we need to do that in the best and safest way we can. And so I think many of the things we agreed today provide a plan to achieve that.

JOURNALIST: Prime Minister, there are hundreds of Defence personnel posted around the country at the moment, away from their families. Many can't go home because they can't avoid quarantine on the way back. Now, should the states be looking at giving them exemptions?

PRIME MINISTER: Wherever you put a border up, and this is why I've been quite honest about this. It may be unintended, but the reality is you get some very cruel and get some very hard outcomes for people's lives. My primary concern, particularly at the moment, is to be ensuring that we can get people to medical treatment. And Australians should be able to access a hospital in whatever state it's in. Because they're Australian hospitals. And it's important that we facilitate that. And I want to thank, particularly, the New South Wales and South Australian Governments, and I want to particularly thank the Health Minister in New South Wales, Brad Hazzard. I've dealt with Brad on a number of these cases now, getting people in to surgery, getting people in to hospitals. Blasting through some of the bureaucracy that can occur, that inevitably arises because there are border arrangements in place. This is why I agree with the New South Wales Premier that the sooner you can get this down the better. And that must be the goal. So, whether it's Defence Force personnel looking to go home, whether it's kids at boarding school at the moment in COVID-free areas, wanting to go home to a COVID-free area for the holidays, and not have to spend two weeks in a hotel in a capital city and be away from their parents I find that heartbreaking too. So, these are the practical issues that need to be resolved. Now, I welcome the fact that the Queensland Government has set up this new unit, which I understand is operational from today, good a number of specialists there, particularly in the medical area that will be looking at particular cases to ensure that people can get from A to B to get their treatment. I welcome that. There's been a lot of discussion about this. There's been just some absolutely awful cases and so that as a first response I welcome that. But as long as you've got these borders like this particularly in the eastern states where there is a lot of movement for these purposes you are going to get these outcomes. That's why what seven out of the eight states and territories have agreed today is so important, to avoid that. That's the only way you will ultimately get to avoid it.

JOURNALIST: In the UK at the moment about Tony Abbott's role, Nicola Sturgeon said he is a misogynist, do you share those views and what do you make of that debate?

PRIME MINISTER: I wish the former Prime Minister well. And as I've said before, he's a good hire he knows a lot about trade and he did a lot of great work for Australia on trade when it came to the China free trade agreement and

Japan and Korea. He set Australia up very well and the fact that we now have a current account surplus that we've had trade surpluses now for record periods of time I think speaks very well to his trade credentials so I wish Tony well.

Rosie?

JOURNALIST: When do you hope the Commonwealth's definition of a hotspot will be in place. And are you suggesting that Queensland has agreed to adopt the Commonwealth's hotspot, so what seven of eight states...

PRIME MINISTER: Have agreed that the concept of using a hotspot approach to manage movement of people around the country is something we should pursue as part of our plan to realise the goal we set out in July to now be achieved in December. The national the Commonwealth definition of a hotspot is the starting point for defining that, and the Acting Chief Medical Officer will work with the states and territories now to get greater precision to that and when that is done well that's when it can be announced but that definition is available for people to see, and its clinical basis.

Rosie?

JOURNALIST: I just wanted to check then, so Queensland will continue to use its definition of 28 days of no community transmission before it opens up to those states?

PRIME MINISTER: Queensland will use, sorry?

JOURNALIST: So what do you think of that definition, is it reasonable?

PRIME MINISTER: Well the Commonwealth definition is the one that I clearly believe, is backed by the clinical and scientific work that's been done by the Acting Chief Medical Officer. That's the view of the Commonwealth. The definition that we have provided is obviously the one that I think is appropriate. What states do is a matter for them ultimately but what we have agreed to do today is to actually move to a hotspot model. So we don't have a hotspot model working necessarily in Queensland at the moment. We've got a very hard border which is operating in Queensland at the moment and so what we have agreed to do is to move towards and adopt a hotspot model with as far as possible a common definition and the Commonwealth definition provides the starting point for how that is defined.

JOURNALIST: Just a question on tax and then I think Clare's going to follow up on farmers and Queensland. There's obviously a discussion at the moment about bringing forward the stage 2 tax cuts but of course under the stage 3 tax cuts, high income earners such as yourself will get an $11,000 a year tax cut while low income people will get $255 dollars a year. Now as part of those discussions to bring forward the stage 2 tax cuts, do you think you should give up some of that tax cut and if not why should someone such as yourself get $11,000 in tax cuts while low income and part-time workers get $255 a year under those changes?

PRIME MINISTER: Well Sam you made a range of speculative... no I understand what the current legislative program is and that is the legislative programme, and any changes we might make to that will be announced in the Budget, and that's in October.

Clare?

JOURNALIST: Professor Kelly, in your medical opinion, is it safe for a farmer in NSW to go over the border and work in Queensland? Is it ok?

PROFESSOR PAUL KELLY, ACTING CHIEF MEDICAL OFFICER: So as, several questions have come to this already and the Prime Minister has answered them really. We've got a start of a hotspot definition we've,

JOURNALIST: In your medical opinion though?

PROFESSOR PAUL KELLY, ACTING CHIEF MEDICAL OFFICER: So that is what we are working on so we can get that absolute clarity about these sort of particular matters. At this point, Queensland has made their decision about how they look at risk in terms of people coming across the border and that is their decision to make and we'll continue to work on that.

PRIME MINISTER: Before you shout over the top of him, you might let him finish his answer. Professor Kelly?

PROFESSOR PAUL KELLY, ACTING CHIEF MEDICAL OFFICER: Thank you, Prime Minister. So we look forward to the day where there can be transparency about these things and a risk-based approach to what should happen. And part of that is the hotspot definition but part of that is also an understanding across borders that we can be absolutely sure of the information that is held on one side of the border and can be shared with the other. That is absolutely crucial.

JOURNALIST: This was a year started with bushfires, a deadly pandemic and now you're being briefed on La Niña. What is the Australian plan for dealing with those weather events and how much more can Australians take?

PRIME MINISTER: This is why Emergency Management Australian is pulling all the states and territories together. They have quite detailed plans, as do the states and territories and the La Niña event will see a much greater rainfall over the summer period and that will put a lot of stress, particularly with as the soil moisture increases, then that obviously creates the risk of flooding across south eastern Australia and in north eastern Australia. The risk of cyclones also. But we also learned today was that the bushfire risk in south west Western Australia and in northern Australia is also related to these events. Now, for things like cyclones and floods, most of that response, if not all is largely contained within those states and territories and they are well equipped to deal with those issues and they have the resources and they are the first responders both for dealing with those events and the immediate recovery and aftermath of those events. We have the DRFA arrangements for emergency support and so on and that will be rolled out as it always is. But they are making their own plans and already have those in place to ensure that they can

respond to those quite specific events. Now, one of the challenges going into this season is ensuring they have COVID-safe emergency response measures and that's why, particularly with a situation like bushfires in Western Australia, if we have to move people from one part of the country to another, ADF personnel or others then we need to have quite streamlined arrangements and that's what the EMA is doing right now to make sure that is the case but these disasters, whether they are bushfires or whether they are floods or whether they are cyclones or indeed pandemics for that matter, they present challenges to us every year and I believe we have the best people to respond to those challenges. They're very well aware of what's coming up this year and the plans and preparations are already in place. Thanks, everyone.

PRIME MINISTER OF AUSTRALIA

The Hon Scott Morrison MP

ADMINISTRATIVE APPEALS TRIBUNAL
FREEDOM OF INFORMATION DIVISION
ADELAIDE REGISTRY

2020/5875 & 5876

SENATOR REX PATRICK
Applicant

SECRETARY
DEPARTMENT OF THE PRIME MINISTER AND CABINET
Respondent

ANNEXURE LM-4

The following 3 pages is the annexure marked **LM-4** referred to in the affidavit of Leonie McGregor made 16 April 2021 before me:

....
Mary Parker

AGS Lawyer within the meaning of
s 55I of the *Judiciary Act 1903*

ADDENDUM

TO CABINET HANDBOOK

NATIONAL CABINET

The Addendum sets out the secure and confidential handling requirements for documents associated with National Cabinet.

11.1 BACKGROUND

11.1.1 The National Cabinet was established by the Council of Australian Governments 48th Meeting to deal with the national response to the coronavirus pandemic (COVID-19) to ensure a coordinated response across the country to the many issues that relate to the management of COVID-19.

11.1.2 The National Cabinet comprises the Prime Minister of Australia, and all the Premiers and Chief Ministers of states and territories.

11.1.3 Each state and territory that is represented on the National Cabinet is completely sovereign and autonomous. However, states and territories have agreed to work together and be unified and to be as consistent and coordinated as possible in our national response.

11.1.4 The National Cabinet meets as required and generally at least once a week.

11.1.5 The National Coordinating Mechanism (NCM) and the Australian Health Protection Principals Committee (AHPPC) are subcommittees of the National Cabinet.

11.1.6 The NCM comprises senior officials of Australian, states and territories governments. The NCM will coordinate the whole-of-government responses to issues outside the direct health management of COVID-19. Topic-specific NCMs are also convened as necessary.

11.1.7 The principal advising body to the National Cabinet is the AHPPC, which comprises senior medical officers of states and territories. The medical advice of the AHPPC is the basis for the protocols, the guidelines and the decisions made by the Prime Minister, Premiers and Chief Ministers, together with their respective Cabinets.

Cabinet Office
Department of Premier and Cabinet

Tasmanian Government

11.2 TASMANIAN MEMBERSHIP

11.2.1 The Premier is Tasmania's representative on the National Cabinet. The Premier may delegate another Minister to represent Tasmania on the National Cabinet as needed.

11.2.2 In representing Tasmania on the National Cabinet, the Premier (or delegate Minister) will be supported by the Secretary, Department of Premier and Cabinet (DPAC).

11.2.3 The Secretary, DPAC may delegate the Deputy Secretary, Policy and Intergovernmental Relations (DSPIR) or another Deputy Secretary within DPAC to support the Premier for the National Cabinet, as needed.

11.2.4 The DSPIR is Tasmania's representative on NCMs. The DSPIR can delegate this responsibility to another appropriate Senior Executive Service officer, as needed. Senior officials from other agencies will be invited to participate in NCMs as required.

11.2.5 The Director of Public Health is Tasmania's representative on AHPPC. The Director of Public Health can delegate their responsibility to another member of Public Health, as needed.

11.3 CONFIDENTIALITY AND SECURITY

11.3.1 The National Cabinet is constituted as a Cabinet Office Policy Committee, as provided for in the 'Australian Government Cabinet Handbook (13th Edition)'. The principles and procedures for the security and handling of Cabinet documents, as set out in that Cabinet Handbook and the Australian Government's Protective Security Policy Framework apply.

11.3.2 To this end all proceedings and documentation associated with the National Cabinet are to be treated as 'CABINET-IN-CONFIDENCE' as if they were proceedings and documentation of the Cabinet of the Government of Tasmania. The restrictions on confidentiality and the handling, storage and security of documents described in the Tasmanian Cabinet Handbook apply to papers associated with the proceedings of the National Cabinet.

11.4 NATIONAL CABINET PAPERS

11.4.1 To facilitate access to National Cabinet papers, the Australian Government has created two protected Citrix accounts for each state and territory that can be used to access the papers. Essentially this provides an online Outlook email account for two nominated users for each state and territory that will allow them to print or securely share the documents circulated for the National Cabinet.

11.4.2 To be allowed to access the system nominated users have to complete a National Cabinet Systems and Document Handling Agreement.

11.4.3 The nominated Tasmanian contacts for the National Cabinet papers are the DSPIR and the Director of Intergovernmental Relations in DPAC.

11.4.4 Within DPAC, National Cabinet papers may be shared electronically within the existing IT system used for the distribution of Cabinet documents.

11.4.5 National Cabinet papers are allowed to be shared physically or electronically by secure means, approved by either the Secretary or the DSPIR, with relevant Heads of Agencies to provide advice on matters being considered by the National Cabinet.

11.4.6 Heads of Agencies are allowed to share National Cabinet papers or selected information from those papers further within their agencies on a strict need-to-know basis for the purpose of providing advice to the Premier, Ministers and DPAC support officers. The sharing of papers or information is to be consistent with the existing provisions in the Cabinet Handbook concerning the storage and distribution of hard copy and electronic documents, including drafts or working documents.

11.4.7 DPAC's Cabinet and Executive Council Office can share National Cabinet papers and related documents, such as advice, with relevant Ministers consistent with the existing provisions in the Cabinet Handbook.

11.4.8 DPAC will maintain a complete database of National Cabinet papers within the existing IT system used for the storage of Cabinet documents. National Cabinet papers shared with agencies are treated as 'for information' copies of Cabinet documents and are to be destroyed after their use in accordance with Cabinet and Executive Council Office instructions and Disposal Authorisation 2158 for short-term value records.

11.4.9 Documents generated for National Cabinet purposes are Commonwealth records, however, the papers received by Tasmania as part of the National Cabinet process also fall within the State's Cabinet processes and are to be considered and treated as any other document for our Cabinet.

11.5 NATIONAL CABINET DECISIONS

11.5.1 The Premier, or delegate Minister, is authorised to take decisions on behalf of the Government of Tasmania in relation to matters considered by the National Cabinet, and amend this Addendum, as required.

11.5.2 Decisions made by the National Cabinet at a meeting are recorded by the Australian Government and Tasmania will be provided with that information through the National Cabinet process.

ATTACHMENT FOUR

SENATOR PATRICK'S SUBMISSIONS - IN REPLY

& AFFADVITS

ADMINISTRATIVE APPEALS TRIBUNAL **No 2020/5875**
FREEDOM OF INFORMATION DIVISION **No 2020/5876**
ADELAIDE REGISTRY

SENATOR REX PATRICK
Applicant

SECRETARY
DEPARTMENT OF PRIME MINISTER AND CABINET
Respondent

APPLICANT'S SUBMISSIONS IN REPLY

A. INTRODUCTION

1. In broad terms, Senator Patrick's reply addresses these issues:

   (a) The crux of the Respondent's submission is that a "Cabinet" or a "committee of Cabinet" is whatever the Prime Minister says it is. That cannot be correct.

   (b) The Respondent relies on the statement by Gleeson CJ in *Egan v Willis & Cahill* (1996) 40 NSWLR 650, that the concept of responsible government is "*not immutable*". If there has been some recent change to responsible government in Australia the public should be told what it is and who changed it. In any event, Gleeson CJ went on to say, at 661:

   > *Since the dispute has been brought to a court of law, the question must be answered according to law.*

   (c) The Respondent has not identified any legal basis for his position. Rather, the Respondent urges this Tribunal to simply adopt what he and Ms McGregor say they understand Cabinet and a committee of Cabinet to be and, by this means, to give meaning to "Cabinet" as it appears in s 4(1) of the *Freedom of Information Act 1982*. That is not an approach to statutory construction recognised or known to Australian law.

   (d) The assertion (just that – an assertion) that damage might be done to relations with the States is unsupported by evidence and insufficient to entitle the Respondent to a blanket privilege.

2. There is another – quite fundamental – issue in relation to the claim under s 47B(a) of the *Freedom of Information Act 1982*: if that claim had been made earlier (i.e. at the time

access to documents was refused) Senator Patrick could have invoked a different procedure:

(a) The documents subject to a claim of that kind are only "*conditionally exempt*" – s 47B.

(b) If the documents are only conditionally exempt, then, ordinarily, they would be produced subject only to exceptional cases.

3. Because the Respondent has not followed the ordinary practice, Senator Patrick has been denied the opportunity to press arguments of that kind.

B. THE RESPONDENT'S EVIDENCE

4. To the extent the Respondent relies on Mr Gaetjens' and Ms McGregor's affidavits to inform the Tribunal as to the operations of Cabinet and suggest there could be damage to Commonwealth-State, little weight should be given to that evidence.[1] This is so for two reasons:

(a) *First*, the evidence of Mr Gaetjens and Ms McGregor does not rise above bare assertions or opinion without foundation. Aside from in an exceptionally broad and unparticularised manner, neither Mr Gaetjens nor Ms McGregor have stated the bases for their opinions.

(b) *Second*, the Respondent seeks to rely upon their evidence as "expert" evidence. With respect, there is no basis for the Tribunal to treat their evidence as "expert" evidence. Neither of the witnesses is independent – Mr Gaetjens is the Respondent, and Ms McGregor is employed by the Department of Prime Minister and Cabinet. There has also been no compliance with the Tribunal Guideline for Persons Giving Expert and Opinion Evidence.

C. COMMITTEE OF CABINET

5. The Respondent asserts that the Prime Minister has a (apparently unbounded) discretion to appoint whoever he wishes to Cabinet – in fact, it goes so far as to assert that Cabinet ministers do not have to be federal members or even Ministers: {RS [12], [19], [24]}. That proposition is not consistent with 120 years of practice, the principle of responsible government, or any other aspect of the Australian federal system of government.

6. The Respondent relies on paragraph 19 of Ms McGregor's Affidavit to support this position by reference to the War Cabinet established during World War II. However, the

[1] Noting that the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate: *Administrative Appeals Tribunal Act 1975* (Cth), s 33(1)(c).

matters stated Ms McGregor's Affidavit, [19], are, with respect, not correct. The Applicant relies on the affidavit of Philip Dorling affirmed 7 May 2021 (**Second Dorling Affidavit**), which addresses and annexes the objective historical records. The War Cabinet comprised of the Prime Minister (or acting Prime Minister) and other senior ministers: Second Dorling Affidavit, [11].

7. The Respondent has not been able to identify any examples where members of a committee of Cabinet have not also been federal Ministers. This is because there are none. The Respondent's position reflects a significant departure from convention.

8. To the extent the Cabinet Handbook sets out the Prime Minister's understanding of committees of Cabinet, the National Cabinet does not conform to those matters. Significantly, National Cabinet does not derive its powers from the federal Cabinet, and federal Cabinet does not retain the ultimate power of decision: Cabinet Handbook (13th ed), para. 5; Cabinet Handbook (14th ed), para 5. In addition:

   (a) The States and Territories are autonomous and sovereign and remain so in their participation in National Cabinet: Agreed Facts, [3], [4].

   (b) On 5 May 2020, the Prime Minister stated that "the Commonwealth has no direct authority at all" with respect to matters before National Cabinet: Affidavit of Philip Dorling affirmed 16 April 2021 (**First Dorling Affidavit**), [17];

   (c) The Prime Minister does not and cannot control the membership of the National Cabinet. For example, the Premier of Tasmania may delegate another Minister to represent Tasmania on the National Cabinet: McGregor Affidavit, Annexure LM-4, cl 11.2.1.

D. CONFIDENTIALITY

9. The Respondent asserts that the deliberations of National Cabinet are and remain strictly confidential and that this has been agreed upon by the members of National Cabinet.

10. There is no objective evidence that this is the case.

11. The evidence of Mr Gaetjens in this respect comprises bare assertions and conclusions as to what the National Cabinet has agreed and the "*understanding and expectation*" of confidentiality: Mr Gaetjens' Affidavit, [24], [25]. There is no evidence of any such understanding of the National Cabinet members themselves.

12. The objective evidence is to the contrary. The Prime Minister and the first ministers (quite properly) speak openly and frankly about the business of National Cabinet. The disagreements between its members and the objective evidence suggests that the members of National Cabinet *do not* consider themselves bound by any obligation of confidence: First Dorling Affidavit, [24], [29]. Nor do they consider themselves bound by

any notions of collective responsibility and solidarity: see, Ms McGregor's Affidavit, [39], [44].

13. Ms McGregor refers to an agreement deliberations would remain confidential: McGregor Affidavit, [27], yet, at paragraph 30 of her affidavit Ms McGregor proceeds to disclose the matters considered and agreed upon by National Cabinet. The Respondent cannot have it both ways.

E. DAMAGE TO RELATIONS – s 47B

14. The Respondent relies on s 47B(a) to prevent disclosure of the documents sought by the Applicant as it "*would, or could reasonably be expected to, cause damage to relations between the Commonwealth and a State*". This is a bar and it raises factual issues.[2] The evidence does not satisfy the statutory test.

15. Mr Gaetjens' evidence is non-specific and does not point up by reference to any document (or even a part of a document) how such harm might occur. He does not identify what the harm might be. Instead, it is just a blanket claim. More detail is required before exemption can be established – which is why the documents only attract "conditional" exemption under s 47B.

16. There is no evidence of "damage" to the relations between the Commonwealth and States.

Dated: 11 May 2021

Geoffrey Watson

Diana Tang

[2] See, *Diamond v Chief Executive Officer of the Australian Curriculum, Assessment and Reporting* at [100]-[101]; *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 36 FCR 111 at 122-123 per Davies, Wilcox and Einfeld JJ.

AFFIDAVIT

ADMINISTRATIVE APPEALS TRIBUNAL
FREEDOM OF INFORMATION DIVISION
ADELAIDE REGISTRY

No 2020/5875
No 2020/5876

SENATOR REX PATRICK
Applicant

SECRETARY
DEPARTMENT OF PRIME MINISTER AND CABINET
Respondent

Affidavit of: **Philip Warren Dorling**
Address:
Occupation: Adviser
Date: 7 May 2021

I, Philip Warren Dorling of 1 affirm:

1. I am a political adviser to the Applicant, Senator Rex Patrick. I make this affidavit in support of Senator Patrick's applications in this Tribunal.

2. The facts stated in this affidavit are within my own knowledge, except where otherwise stated, in which case they are based on information and belief. Where I make statements based on information provided to me by another person, I believe that information to be true and correct.

3. Exhibited to me are attached documents marked **Annexure PWD-1**, **Annexure PWD-2** and **Annexure PWD-3**.

My background

4. Some details of my background are given in paragraphs 3 to 5 of my affidavit affirmed on 16 April 2021.

5. In addition to those details, I also record here that my PhD thesis dealt with Australian and New Zealand policy in the Taiwan Straits Crisis of 1954-1955 and was in part based on extensive examination of historical Cabinet, External Affairs, Defence and other records of

the Government of Prime Minister Sir Robert Menzies. For three years, 1992 to 1994, I also worked as a historian with the Department of Foreign Affairs and Trade, responsible for researching, and editing volumes of the Department's authoritative historical publication, *Documents on Australian Foreign Policy 1937-1949*. As a consequence of this background I have familiarity with historical records documenting Australian Cabinet processes and decision-making during the 1940s and 1950s.

Matters arising from the affidavit of Ms Leonie McGregor

6. I have read the affidavit of Leonie McGregor, First Assistant Secretary, Cabinet Division, Department of the Prime Minister and Cabinet, sworn on 16 April 2021.

7. I noted paragraph 19 of Ms McGregor's affidavit in which she states:

> *Over time, Cabinet committees have taken on many forms. For example, during times of National crisis, such as during World War II, special purpose Cabinet committees were established. Prime Ministers Menzies and Curtin each established a War Cabinet consisting of a limited selection of Commonwealth Ministers. On 4 February 1942 the State Premiers were invited to and attended a Curtin Government War Cabinet meeting. On 27 August 1942, Prime Minister Curtin announced that 'a leading member of the Opposition' Sir Earle Page would be appointed a member of the War Cabinet, due to his experience. In the 1950s, a wide variety of Cabinet committees were formed and officials regularly participated.*

8. After reading Ms McGregor's affidavit, I examined relevant historical records held by the National Archives of Australia relating to the War Cabinet during the Second World War as well as Cabinet processes in the post-war period. I also consulted the relevant volumes of the official history of Australia in the War of 1939 to 1945.

9. Appendix 1 of Volume 1 of the Civil series of the official history, Sir Paul Hasluck's *The Government and the People, 1939-1941*, published by the Australian War Memorial, in 1952, contains full Australian Government Ministry lists during the Second World War as well as lists of the members of the War Cabinet and the Advisory War Council during the wartime governments of Prime Ministers Robert Menzies, Arthur Fadden, John Curtin, Francis Forde and Ben Chifley. These Ministry and War Cabinet lists show that across the five wartime governments, only Ministers were members of the War Cabinet. A copy of the Appendix 1 to Hasluck's *The Government and The People* is at **Annexure PWD-1**.

10. It is correct that persons other than Ministers attended War Cabinet meetings. The Chiefs of Staff of the Australian Armed Services and other senior officials, notably the Secretary of the Department of Defence Coordination (from April 1942 the Department of Defence), Sir Frederick Shedden attended War Cabinet meetings whenever required to provide advice on the military situation or other defence matters. Shedden served as Secretary to

the War Cabinet throughout the Second World War. However none of the officials in attendance were members of the War Cabinet, nor were State Premiers who attended the War Cabinet by invitation on one occasion.

11. War Cabinet meetings were comprised of the Prime Minister (or the acting Prime Minister) and other senior ministers. War Cabinet meetings were not constituted by a single minister.

12. I have examined relevant records relating Ms McGregor's assertion that in August 1942 Sir Earle Page, an Opposition parliamentarian and not then a Minister, was appointed to the War Cabinet under Labor Prime Minister John Curtin. With respect, Ms McGregor's understanding is incorrect.

13. The Ministry and War Cabinet lists at **Annexure PWD-1** show that Page served as Minister of Commerce in the Third Menzies Ministry and in the Fadden Ministry. Page was not a member of the War Cabinet in either Government. Nor is he listed as a member of the War Cabinet during the subsequent Governments of Prime Ministers Curtin, Forde and Chifley.

14. Records contained in the official papers of Sir Frederick Shedden, then Secretary to the War Cabinet, show that In August 1942, with the concurrence of the full Cabinet, Prime Minister Curtin invited Page, then a prominent Opposition member of Parliament, to become a member of the Advisory War Council. This appointment was explained in terms of Page's recent international experience. The Advisory War Council was comprised of the Prime Minister, other senior Ministers, and senior Opposition Members of Parliament. It was a political alternative to the formation of a bipartisan "*National Government*" along the lines of that in the United Kingdom under Conservative Prime Minister Winston Churchill with Labour leader Clement Attlee serving as Deputy Prime Minister. Although the Advisory War Council membership overlapped with the membership of the War Cabinet, and frequently discussed a similar agenda, it was not part of the Cabinet, a state of affairs reflected in the use of the words "*Advisory*" and "*Council*" in the name of this body which functioned from October 1940 to August 1945. The distinction between the War Cabinet and the Advisory War Council was well recognised by political participants at the time and by historians and archivists subsequently.

15. Page was a member of the Advisory War Council from August 1942 to September 1943.

16. Contrary to Ms McGregor's assertion, Page was not made a member of the War Cabinet. Rather he was invited by Prime Minister Curtin to attend War Cabinet meetings "*in a consultative capacity*". The Prime Minister stated publicly that Page would attend War

Cabinet meetings "*when it is considered that his advice will be of value*". Arrangements were made for Page to be provided with War Cabinet agenda when it was considered necessary in connection with his attendance "*in a consultative capacity*". Page was not provided with other War Cabinet papers because he was not a member of the War Cabinet.

17. In this respect Page's status when attending War Cabinet meetings, as an Opposition Member of Parliament and not a Minister, was effectively the same as officials including the Chiefs of Staff who attended War Cabinet meetings as advisers if and when required, but who were not members of the War Cabinet.

18. Relevant extracts from Sir Frederick Shedden's official file on the matter: National Archives of Australia, Series, A5954, Item 721/19, are at **Annexure PWD-2**. These extracts are:

    (a) Extract from Minutes of a Meeting of Full Cabinet on 26 August 1942 in which it was recorded that Prime Minister Curtin had advised that Page had been invited to act as a co-opted member of the Advisory War Council and that "*he had also been asked to attend War Cabinet meetings in a consultative capacity*".

    (b) Advisory War Council Minute 1042 of 27 August 1942 in which it was recorded that Page attended the Council meeting on that day and that Prime Minister Curtin had inter alia advised that Page "*would also be asked to attend meetings of the War Cabinet as necessary, in a consultative capacity*".

    (c) Public statement by Prime Minister Curtin on 2 September 1942 in which it is stated that Page "*will attend meetings of the War Cabinet when it is considered that his advice will be of value*".

    (d) Copy of a letter from Shedden to Page on 30 September 1942 in which Shedden advised that Page would be supplied with relevant War Cabinet agenda "*as may be necessary in connection with your attendance in a consultative capacity at meetings of the War Cabinet*".

    (e) Press Release by Prime Minister Curtin on 29 September 1943 in which it was stated that Page would no longer serve as a member of the Advisory War Council.

    (f) Copy of a letter Prime Minister Curtin to Page on 6 October 1943 thanking Page for his service on the Advisory War Council.

19. While Ms McGregor refers to the formation of a wide variety of Cabinet committees and the regular attendance of officials in the 1950s, participation by officials in Cabinet committee meetings is quite different from membership of Cabinet and Cabinet Committees.

20. Cabinet handbooks and Cabinet committee lists from the Menzies Government show only Ministers were members of Cabinet Committees. As an illustration of this, attached at **Annexure PWD-3** are relevant extracts from the "*Handbook of Cabinet and Cabinet Committees*" issued under the authority of the then Cabinet Secretary, Sir Alan Brown, in 1950 at the beginning of the post-war Menzies Government. The Handbook is held by the National Archives of Australia: Series A4917, Item 1.

21. The Handbook notes that "*Cabinet meetings are essentially meetings of Ministers*". The accompanying list of Cabinet Committees shows that only Cabinet Ministers were members of Cabinet Committees. All Cabinet Committees comprised more than one Minister.

Affirmed by the deponent)
at GUNGAHLIN ACT)
in) Signature of deponent
on 07 MAY 2021)
Before me:)

Philip Dorling.

LORIS MANNS
Justice of the Peace # 2290
Signature of witness

AFP
Gungahlin Police Station
Anthony Rolfe Ave
Gungahlin ACT 2912
Phone (02) 6256 7777

ADMINISTRATIVE APPEALS TRIBUNAL
FREEDOM OF INFORMATION DIVISION
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Applicant

SECRETARY
DEPARTMENT OF PRIME MINISTER AND CABINET
Respondent

ANNEXURE PWD-1

The following 10 pages are the annexure PWD-1 referred to in the affidavit of Philip Warren Dorling made 7 May 2021 before me:

ACT
LORIS MANNS
Justice of the Peace # 2290
07 MAY 2021

AFP
Gungahlin Police Station
Anthony Rolfe Ave
Gungahlin ACT 2912
Phone (02) 6256 7777

Philip Dorling

APPENDIX 1

WARTIME MINISTRIES

First Menzies Ministry: 26th April 1939 to 14th March 1940

Rt Hon Robert Gordon Menzies, K.C.	Prime Minister and Treasurer; from 13 Nov 1939 Minister for Defence Coordination; from 23 Feb 1940 Minister for Trade and Customs.
Rt Hon William Morris Hughes, K.C.	Attorney-General and Minister for Industry.
Rt Hon Richard Gardiner Casey, D.S.O., M.C.	Minister for Supply and Development to 26 Jan 1940.
Hon Geoffrey Austin Street, M.C.	Minister for Defence to 13 Nov 1939; from 13 Nov 1939 Minister for the Army.
Hon Sir Henry Somer Gullett, K.C.M.G.	Minister for External Affairs; from 12 Sep 1939 Minister for Information.
Senator the Hon George McLeay	Minister for Commerce.
Senator the Hon Hattil Spencer Foll	Minister for the Interior.
Hon Eric John Harrison	Postmaster-General and Minister for Repatriation.
Hon John Norman Lawson	Minister for Trade and Customs to 23 Feb 1940.
Hon Sir Frederick Harold Stewart	Minister for Health and Minister for Social Services; from 13 Nov 1939 Minister for the Navy; from 26 Jan 1940 Minister for Supply and Development.
Hon James Valentine Fairbairn	Minister for Civil Aviation; Vice-President of the Executive Council to 26 Jan 1940; Minister assisting the Minister for Defence to 13 Nov 1939; from 13 Nov 1939 Minister for Air.
Hon John Arthur Perkins	Minister without portfolio administering External Territories.
Hon Percy Claude Spender, K.C.	Minister without portfolio assisting the Treasurer to 3 Nov 1939; from 3 Nov 1939 acting Treasurer; from 26 Jan 1940 Vice-President of the Executive Council.
Senator the Hon Philip Albert McBride	Minister without portfolio assisting the Minister for Commerce.
Senator the Hon Herbert Brayley Collett, C.M.G., D.S.O.	Minister without portfolio administering War Service Homes.
Hon Harold Edward Holt	Minister without portfolio assisting the Minister for Supply and Development; from 23 Feb 1940 also assisting the Minister for Trade and Customs.

DND 1/1

COAG Legislation Amendment Bill 2021 [Provisions]
Submission 7 - Attachment 1

War Cabinet

(Established 15th September 1939)

Rt Hon Robert Gordon Menzies, K.C., Rt Hon William Morris Hughes, K.C., Rt Hon Richard Gardiner Casey, D.S.O., M.C. (to 26 Jan 1940); Hon Geoffrey Austin Street, M.C., Hon Sir Henry Somer Gullett, K.C.M.G., Senator the Hon George McLeay (to 13 Nov 1939); from 13 Nov 1939, Senator the Hon Hattil Spencer Foll, Hon Sir Frederick Harold Stewart, Hon James Valentine Fairbairn. Coopted to War Cabinet when necessary: Hon Percy Claude Spender, K.C.

Economic Cabinet

(Established 12th December 1939)

Rt Hon Robert Gordon Menzies, K.C., Rt Hon Richard Gardiner Casey, D.S.O., M.C. (to 26 Jan 1940), Senator the Hon George McLeay, Hon Eric John Harrison, Hon John Norman Lawson (to 23 Feb 1940), Hon Percy Claude Spender, K.C., Senator the Hon Philip Albert McBride.

Second Menzies Ministry: 14th March 1940 to 28th October 1940

Rt Hon Robert Gordon Menzies, K.C.	Prime Minister, Minister for Defence Coordination and Minister for Information; from 11 Jun 1940 Minister for Munitions.
Hon Archie Galbraith Cameron	Minister for Commerce and Minister for the Navy.
Rt Hon William Morris Hughes, K.C.	Attorney-General and Minister for Industry.
Hon Geoffrey Austin Street, M.C.	Minister for the Army and Minister for Repatriation to 13 Aug 1940.
Hon Sir Henry Somer Gullett, K.C.M.G.	Vice-President of the Executive Council, Minister in Charge of Scientific and Industrial Research and Minister assisting the Minister for Information to 13 Aug 1940.
Hon Sir Frederick Harold Stewart	Minister for Supply and Development and Minister for Social Services.
Hon Harold Victor Campbell Thorby	Postmaster-General and Minister for Health.
Hon Percy Claude Spender, K.C.	Treasurer.
Senator the Hon George McLeay	Minister for Trade and Customs.
Hon John McEwen	Minister for External Affairs.
Senator the Hon Hattil Spencer Foll	Minister for the Interior.
Hon James Valentine Fairbairn	Minister for Air and Minister for Civil Aviation to 13 Aug 1940.
Senator the Hon Philip Albert McBride	Minister without portfolio assisting the Minister for Commerce to 13 Aug 1940; from 14 Aug 1940 Minister assisting the Minister for Commerce, Minister for the Army and Minister for Repatriation.

PwD-1/2

COAG Legislation Amendment Bill 2021 [Provisions]
Submission 7 - Attachment 1

Hon Arthur William Fadden	Minister without portfolio assisting the Treasurer and the Minister for Supply and Development to 13 Aug 1940; from 14 Aug 1940 Minister assisting the Treasurer and the Minister for Supply and Development and Minister for Air and Minister for Civil Aviation.
Senator the Hon Herbert Brayley Collett, C.M.G., D.S.O.	Minister without portfolio in charge of War Service Homes and assisting the Minister for Repatriation to 13 Aug 1940; from 14 Aug 1940 Minister in charge of War Service Homes and assisting the Minister for Repatriation, Vice-President of the Executive Council, and Minister in charge of Scientific and Industrial Research.
Hon Horace Keyworth Nock	Minister without portfolio assisting the Prime Minister and in charge of External Territories and assisting the Minister for the Interior.

War Cabinet: From 14th March 1940

Rt Hon Robert Gordon Menzies, K.C., Hon Archie Galbraith Cameron, Rt Hon William Morris Hughes, K.C., Hon Geoffrey Austin Street, M.C. (to 13 Aug 1940), Hon Percy Claude Spender, K.C., Senator the Hon Hattil Spencer Foll, Hon Sir Frederick Harold Stewart, Hon John McEwen, Hon James Valentine Fairbairn (to 13 Aug 1940); from 14 Aug 1940 Senator the Hon Philip Albert McBride, Hon Arthur William Fadden.

Economic Cabinet: From 14th March 1940

Rt Hon Robert Gordon Menzies, K.C., Hon Archie Galbraith Cameron, Senator the Hon George McLeay, Hon Harold Victor Campbell Thorby, Hon Percy Claude Spender, K.C., Hon Sir Frederick Harold Stewart, Senator the Hon Philip Albert McBride, Hon Arthur William Fadden.

Meetings lapsed about the end of May 1940.

Third Menzies Ministry: 28th October 1940 to 29th August 1941

Rt Hon Robert Gordon Menzies, K.C.	Prime Minister and Minister for Defence Coordination; Minister for Information to 13 Dec 1940.
Hon Arthur William Fadden	Treasurer.
Rt Hon William Morris Hughes, K.C.	Attorney-General and Minister for the Navy.
Hon Percy Claude Spender, K.C.	Minister for the Army.
Senator the Hon George McLeay	Postmaster-General and Minister for Repatriation to 26 Jun 1941; Vice-President of the Executive Council; from 26 Jun 1941 Minister for Supply and Development.
Hon John McEwen	Minister for Air and Minister for Civil Aviation.
Senator the Hon Hattil Spencer Foll	Minister for the Interior; from 13 Dec 1940 Minister for Information.

PWD-1/3

COAG Legislation Amendment Bill 2021 [Provisions]
Submission 7 - Attachment 1

Rt Hon Sir Earle Christmas Grafton Page, G.C.M.G.	Minister for Commerce.
Hon Sir Frederick Harold Stewart	Minister for External Affairs, Minister for Health and Minister for Social Services.
Senator the Hon Philip Albert McBride	Minister for Supply and Development to 26 Jun 1941; Minister for Munitions.
Hon Eric John Harrison	Minister for Trade and Customs.
Hon Harold Edward Holt	Minister for Labour and National Service; from 26 Jun 1941 Minister in charge of Council for Scientific and Industrial Research.
Senator the Hon Herbert Brayley Collett, C.M.G., D.S.O.	Minister without portfolio to 26 Jun 1941 administering War Service Homes and assisting Minister for Repatriation; from 26 Jun 1941 Minister for Repatriation.
Hon Thomas Joseph Collins	Minister without portfolio to 26 Jun 1941 assisting Prime Minister, administering External Territories and assisting Minister for the Interior; from 12 Mar 1941 assisting Postmaster-General; from 26 Jun 1941 Postmaster-General and Minister assisting Minister for Supply and Development.
Senator the Hon John William Leckie	Minister without portfolio to 26 Jun 1941 assisting Minister for Trade and Customs, and Minister for Labour and National Service; from 12 Mar 1941 assisting the Minister for the Army; from 26 Jun 1941 Minister for Aircraft Production and Minister assisting the Minister for Munitions.
Hon Hubert Lawrence Anthony	Minister without portfolio to 26 Jun 1941 assisting the Treasurer and the Minister for Commerce; from 26 Jun 1941 Minister for Transport and Minister assisting the Treasurer and the Minister for Commerce.
Hon Eric Sydney Spooner	From 26 Jun 1941 Minister for War Organisation of Industry.
Hon Joseph Palmer Abbott, M.C.	From 26 Jun 1941 Minister for Home Security and Minister assisting the Minister for Defence Coordination and Minister for the Army.
Hon Allan McKenzie McDonald	From 26 Jun 1941 Minister for External Territories and Minister assisting the Minister for the Interior.

War Cabinet: From 28th October 1940

Rt Hon Robert Gordon Menzies, K.C., Hon Arthur William Fadden, Rt Hon William Morris Hughes, K.C., Hon Percy Claude Spender, K.C., Hon John McEwen, Senator the Hon Hattil Spencer Foll; from 26 Jun 1941 Senator the Hon Philip Albert McBride.

PWD-1/4

WARTIME MINISTRIES

Economic and Industrial Committee

(Established 4th July 1941)

Hon Arthur William Fadden, Senator the Hon George McLeay, Rt Hon Sir Earle Christmas Grafton Page, G.C.M.G., Hon Sir Frederick Harold Stewart, Hon Eric John Harrison, Hon Harold Edward Holt, Hon Hubert Lawrence Anthony, Hon Eric Sydney Spooner.

Fadden Ministry: 29th August 1941 to 7th October 1941

Hon Arthur William Fadden	Prime Minister and Treasurer.
Rt Hon Robert Gordon Menzies, K.C.	Minister for Defence Coordination.
Rt Hon William Morris Hughes, K.C.	Attorney-General and Minister for the Navy.
Hon Percy Claude Spender, K.C.	Minister for the Army.
Senator the Hon George McLeay	Minister for Supply and Development and Vice-President of the Executive Council.
Hon John McEwen	Minister for Air and Minister for Civil Aviation.
Senator the Hon Hattil Spencer Foll	Minister for the Interior and Minister for Information.
Rt Hon Sir Earle Christmas Grafton Page, G.C.M.G.	Minister for Commerce.
Hon Sir Frederick Harold Stewart	Minister for External Affairs, Minister for Health and Minister for Social Services.
Senator the Hon Philip Albert McBride	Minister for Munitions.
Hon Eric John Harrison	Minister for Trade and Customs.
Hon Harold Edward Holt	Minister for Labour and National Service and Minister in charge of Council for Scientific and Industrial Research.
Senator the Hon Herbert Brayley Collett, C.M.G., D.S.O.	Minister for Repatriation.
Hon Thomas Joseph Collins	Postmaster-General.
Senator the Hon John William Leckie	Minister for Aircraft Production.
Hon Hubert Lawrence Anthony	Minister for Transport.
Hon Eric Sydney Spooner	Minister for War Organisation of Industry.
Hon Joseph Palmer Abbott, M.C.	Minister for Home Security.
Hon Allan McKenzie McDonald	Minister for External Territories.

War Cabinet: From 29th August 1941

As for the previous Ministry.

PwD-1/3

COAG Legislation Amendment Bill 2021 [Provisions]
Submission 7 - Attachment 1

Economic and Industrial Committee: From 29th August 1941

As for the previous Ministry. The Committee lapsed after 7th October 1941.

First Curtin Ministry: 7th October 1941 to 21st September 1943

Rt Hon John Curtin	Prime Minister; Minister for Defence Coordination to 14 Apr 1942; from 14 Apr 1942 Minister for Defence.
Hon Francis Michael Forde	Minister for the Army.
Hon Joseph Benedict Chifley	Treasurer; from 22 Dec 1942 Minister for Postwar Reconstruction.
Rt Hon Herbert Vere Evatt, K.C.	Attorney-General and Minister for External Affairs.
Hon John Albert Beasley	Minister for Supply and Development to 17 Oct 1942; from 17 Oct 1942 Minister for Supply and Shipping.
Senator the Hon Joseph Silver Collings	Minister for the Interior.
Hon Norman John Oswald Makin	Minister for the Navy and Minister for Munitions.
Hon Edward James Holloway	Minister for Social Services and Minister for Health; from 21 Feb 1942 Minister assisting the Minister for Munitions.
Senator the Hon Richard Valentine Keane	Minister for Trade and Customs and Vice-President of the Executive Council.
Hon Arthur Samuel Drakeford	Minister for Air and Minister for Civil Aviation.
Hon William James Scully	Minister for Commerce to 22 Dec 1942; from 22 Dec 1942 Minister for Commerce and Agriculture.
Senator the Hon William Patrick Ashley	Postmaster-General and Minister for Information.
Hon Edward John Ward	Minister for Labour and National Service.
Hon Charles William Frost	Minister for Repatriation and Minister in charge of War Service Homes.
Hon John Johnstone Dedman	Minister for War Organisation of Industry and Minister in charge of Council for Scientific and Industrial Research.
Hon Hubert Peter Lazzarini	Minister for Home Security and Minister assisting the Treasurer.
Senator the Hon James Mackintosh Fraser	Minister for External Territories; Minister assisting the Minister for Commerce to 17 Oct 1942; from 21 Feb 1942 assisting the Minister for the Army; from 17 Oct 1942 assisting the Minister for Supply and Shipping.

PWD-1/6

COAG Legislation Amendment Bill 2021 [Provisions]
Submission 7 - Attachment 1

Senator the Hon Donald Cameron	Minister for Aircraft Production; Minister assisting the Minister for Munitions to 21 Feb 1942.
Hon George Lawson	Minister for Transport and Minister assisting the Postmaster-General.

War Cabinet: From 7th October 1941

Rt Hon John Curtin, Hon Francis Michael Forde, Hon Joseph Benedict Chifley, Rt Hon Herbert Vere Evatt, K.C., Hon John Albert Beasley, Hon Norman John Oswald Makin, Hon Arthur Samuel Drakeford; from 11 Dec 1941 Hon John Johnstone Dedman.

Production Executive

(Established 6th November 1941)

Hon John Albert Beasley, Hon Norman John Oswald Makin, Hon Edward John Ward, Hon John Johnstone Dedman; from 12 Dec 1941 Hon Joseph Benedict Chifley and Senator the Hon Donald Cameron also members; from 29 Jan 1942 Senator the Hon Richard Valentine Keane; from 26 Feb 1942 Hon William James Scully, Hon Edward James Holloway.

Second Curtin Ministry: 21st September 1943 to 6th July 1945

Rt Hon John Curtin	Prime Minister and Minister for Defence.
Rt Hon Francis Michael Forde	Minister for the Army.
Hon Joseph Benedict Chifley	Treasurer; Minister for Post-war Reconstruction to 2 Feb 1945.
Rt Hon Herbert Vere Evatt, K.C.	Attorney-General and Minister for External Affairs.
Hon John Albert Beasley	Minister for Supply and Shipping to 2 Feb 1945; from 2 Feb 1945 Vice-President of the Executive Council.
Hon Norman John Oswald Makin	Minister for the Navy and Minister for Munitions; from 2 Feb 1945 Minister for Aircraft Production.
Senator the Hon Richard Valentine Keane	Minister for Trade and Customs.
Hon Edward James Holloway	Minister for Labour and National Service.
Hon Arthur Samuel Drakeford	Minister for Air and Minister for Civil Aviation.
Hon William James Scully	Minister for Commerce and Agriculture.
Senator the Hon William Patrick Ashley	Postmaster-General and Vice-President of the Executive Council to 2 Feb 1945; from 2 Feb 1945 Minister for Supply and Shipping.
Hon John Johnstone Dedman	Minister for War Organisation of Industry to 19 Feb 1945[1]; Minister in charge of Council for Scientific and Industrial Research; from 2 Feb 1945 Minister for Post-war Reconstruction.

[1] For administrative reasons (chiefly of a legal nature) the department was not abolished by Federal Executive Council until 13 Jul 1945.

PWD-1/7

COAG Legislation Amendment Bill 2021 [Provisions]
Submission 7 - Attachment 1

Senator the Hon Joseph Silver Collings	Minister for the Interior.
Hon Edward John Ward	Minister for Transport and Minister for External Territories.
Senator the Hon James Mackintosh Fraser	Minister for Health and Minister for Social Services.
Hon Charles William Frost	Minister for Repatriation.
Hon Hubert Peter Lazzarini	Minister for Home Security; from 2 Feb 1945 Minister for Works.
Senator the Hon Donald Cameron	Minister for Aircraft Production to 2 Feb 1945; from 2 Feb 1945 Postmaster-General.
Hon Arthur Augustus Calwell	Minister for Information.

War Cabinet: From 21st September 1943

As for the previous Ministry.

Production Executive: From 21st September 1943

Hon John Albert Beasley, Hon Norman John Oswald Makin, Hon Edward John Ward, Hon John Johnstone Dedman, Hon Joseph Benedict Chifley, Senator the Hon Donald Cameron (to 2 Feb 1945), Senator the Hon Richard Valentine Keane, Hon William James Scully, Hon Edward James Holloway; from 2 Feb 1945 Senator the Hon William Patrick Ashley.

Forde Ministry: 6th July 1945 to 13th July 1945

Rt Hon Francis Michael Forde	Prime Minister and Minister for the Army.
Rt Hon Joseph Benedict Chifley	Treasurer.
Rt Hon Herbert Vere Evatt, K.C.	Attorney-General and Minister for External Affairs.
Hon John Albert Beasley	Minister for Defence and Vice-President of the Executive Council.
Hon Norman John Oswald Makin	Minister for the Navy, Minister for Munitions and Minister for Aircraft Production.
Senator the Hon Richard Valentine Keane	Minister for Trade and Customs.
Hon Edward James Holloway	Minister for Labour and National Service.
Hon Arthur Samuel Drakeford	Minister for Air and Minister for Civil Aviation.
Hon William James Scully	Minister for Commerce and Agriculture.
Senator the Hon William Patrick Ashley	Minister for Supply and Shipping.
Hon John Johnstone Dedman	Minister for Post-war Reconstruction and Minister in charge of Council for Scientific and Industrial Research.

PwD-1/8

COAG Legislation Amendment Bill 2021 [Provisions]
Submission 7 - Attachment 1

Senator the Hon Joseph Silver Collings	Minister for the Interior.
Hon Edward John Ward	Minister for Transport and Minister for External Territories.
Senator the Hon James Mackintosh Fraser	Minister for Health and Minister for Social Services.
Hon Charles William Frost	Minister for Repatriation and Minister in charge of War Service Homes.
Hon Hubert Peter Lazzarini	Minister for Home Security and Minister for Works.
Senator the Hon Donald Cameron	Postmaster-General.
Hon Arthur Augustus Calwell	Minister for Information.

War Cabinet: From 6th July 1945

Rt Hon Francis Michael Forde, Rt Hon Joseph Benedict Chifley, Rt Hon Herbert Vere Evatt, K.C., Hon John Albert Beasley, Hon Norman John Oswald Makin, Hon Arthur Samuel Drakeford, Hon John Johnstone Dedman.

Production Executive: From 6th July 1945

As for the previous Ministry.

Chifley Ministry: From 13th July 1945

Rt Hon Joseph Benedict Chifley	Prime Minister and Treasurer.
Rt Hon Francis Michael Forde	Minister for the Army.
Rt Hon Herbert Vere Evatt, K.C.	Attorney-General and Minister for External Affairs.
Hon John Albert Beasley	Minister for Defence.
Hon Norman John Oswald Makin	Minister for the Navy, Minister for Munitions and Minister for Aircraft Production.
Senator the Hon Richard Valentine Keane	Minister for Trade and Customs.
Hon Edward James Holloway	Minister for Labour and National Service.
Hon Arthur Samuel Drakeford	Minister for Air and Minister for Civil Aviation.
Hon William James Scully	Minister for Commerce and Agriculture.
Senator the Hon William Patrick Ashley	Minister for Supply and Shipping.
Hon John Johnstone Dedman	Minister for Post-war Reconstruction and Minister in charge of Council for Scientific and Industrial Research.
Senator the Hon Joseph Silver Collings	Vice-President of the Executive Council.
Hon Edward John Ward	Minister for Transport and Minister for External Territories.

PWD-1/9

COAG Legislation Amendment Bill 2021 [Provisions]
Submission 7 - Attachment 1

Senator the Hon James Mackintosh Fraser	Minister for Health and Minister for Social Services.
Hon Charles William Frost	Minister for Repatriation.
Hon Hubert Peter Lazzarini	Minister for Works and Housing and Minister for Home Security.
Senator the Hon Donald Cameron	Postmaster-General.
Hon Arthur Augustus Calwell	Minister for Immigration and Minister for Information.
Hon Herbert Victor Johnson	Minister for the Interior and Minister assisting the Minister for Works and Housing.

War Cabinet: From 13th July 1945

Rt Hon Joseph Benedict Chifley, Rt Hon Francis Michael Forde, Rt Hon Herbert Vere Evatt, K.C., Hon John Albert Beasley, Hon Norman John Oswald Makin, Senator the Hon Richard Valentine Keane, Hon Arthur Samuel Drakeford, Hon John Johnstone Dedman.

Production Executive: From 13th July 1945

As for the previous Ministry.

ADVISORY WAR COUNCIL

Constituted by National Security (Advisory War Council) Regulations (S.R. No. 235 of 1940) on 28th October 1940 and abolished on 31st August 1945.

Labour Party Representatives

From 29 Oct 1940 Rt Hon John Curtin (to 5 Jul 1945), Rt Hon Francis Michael Forde, Hon John Albert Beasley, Hon Norman John Oswald Makin; from 14 Mar 1941 Rt Hon Herbert Vere Evatt, K.C.; from 13 Jul 1945 Rt Hon Joseph Benedict Chifley.

United Australia Party and Country Party Representatives

From 29 Oct 1940 Rt Hon Robert Gordon Menzies, K.C. (to 18 Feb 1944), Rt Hon Arthur William Fadden, Hon Percy Claude Spender, K.C., Rt Hon William Morris Hughes, K.C. (to 18 Feb 1944; reappointed 19 Apr 1944); from 16 Oct 1941 Hon John McEwen; from 4 Aug 1941 Senator the Hon Philip Albert McBride (to 16 Oct 1941); from 24 Feb 1944 Rt Hon Sir Earle Christmas Grafton Page, G.C.M.G.[1]

[1] Coopted as member 26 Aug 1942 and continued to attend until arrangement discontinued 29 Sep 1943.

PWD 1/10

ADMINISTRATIVE APPEALS TRIBUNAL
FREEDOM OF INFORMATION DIVISION
ADELAIDE REGISTRY

No 2020/5875
No 2020/5876

SENATOR REX PATRICK
Applicant

SECRETARY
DEPARTMENT OF PRIME MINISTER AND CABINET
Respondent

ANNEXURE PWD-2

The following 6 pages are the annexure PWD-2 referred to in the affidavit of Philip Warren Dorling made 7 May 2021 before me:

ACT
LORIS MANNS
Justice of the Peace # 2290
07 MAY 2021

AFP
Gungahlin Police Station
Anthony Rolfe Ave
Gungahlin ACT 2912
Phone (02) 6256 7777

Philip Dorling.

Extract from Minutes of Meeting of Full Cabinet held on Wednesday, 26th August, 1970.

SIR EARLE PAGE.

"The Prime Minister referred to the fact that Sir Earle Page had returned to Australia and that he had been invited to act as a co-opted member of the Advisory War Council.

The Prime Minister had made it clear that Sir Earle was not to act as an Opposition Member and not for a specific period.

Sir Earle had also been asked to attend War Cabinet meetings in a consultative capacity."

PWD-2/1

ADVISORY WAR COUNCIL MINUTE.

CANBERRA, 9TH AUGUST, 1942.

(3042) APPOINTMENT OF SIR EARLE PAGE AS A MEMBER OF THE WAR CABINET AND THE ADVISORY WAR COUNCIL.

1. Sir Earle Page was welcomed to the meeting of the Council, which recorded its appreciation of the services rendered by him whilst overseas.

2. The Prime Minister stated that he had co-opted Sir Earle as a member of the Advisory War Council and he would also be asked to attend meetings of the War Cabinet as necessary, in a consultative capacity. This had been done so that Sir Earle could have knowledge and experience, gained as special representative of the Government of the United Kingdom War Cabinet and the Pacific War Council, London, which would be available to assist with the conduct of the war.

3. The action [illegible] was noted and endorsed by the Council.

The P.M. informed me that Sir Earle Page would not be known as not a member of the Council

(Sgd) J.E.S. 10/8

PWO-2/2

National Archives of Australia NAA: A3959, 721/19

HOUSE OF REPS.

PARLIAMENTARY DEBATE: - 2/9/42

RIGHT HONORABLE [illegible] PAGE

Mr. CURTIN (Prime Minister).—Honorable members will, I am sure, join with me in expressing our pleasure at the safe return to Australia and to the Parliament of the Right Honorable member for Cowper (the Hon. Earle Page), and in his reappointment to Cabinet. In order that his knowledge and experience gained as a special representative of the Commonwealth on the British War Cabinet and the Pacific War Council in London may be available to the country with the resultant [illegible] Earle Page will act as a co-opted member of the Australian Advisory War Council and will attend meetings of the War Cabinet when it is considered that his advice will be of value.

Mr. ARCHIE CAMERON.—Will the Prime Minister move that the statement be printed, as there are certain things I should like to say regarding it?

Mr. CURTIN.—I shall answer the honorable member's question to-morrow.

Mr. ARCHIE CAMERON.—Then I propose to move that the statement of the Prime Minister be printed, and to ask leave to continue my remarks later.

Mr. CURTIN.—I did not table any paper.

Mr. SPEAKER (Hon. W M Nairn).—No paper has been tabled.

Mr. ARCHIE CAMERON.—The matter is of the utmost importance to the House, and no matter what the opinions of the Government may think about it, there are certain things which I want to say on the subject. In view of the extraordinary circumstances, I ask the Prime Minister to be good enough to move that the statement which he has just read regarding the right honorable member for Cowper [illegible] Page be printed.

Mr. CURTIN.—I told the honorable member that I would answer his question to-morrow.

Mr. ARCHIE CAMERON.—I accept that assurance for the time being.

PWD-2/3

National Archives of Australia NAA: A5954, 72/1/3

CANBERRA, A.C.T.

7th September, 1942.

Dear Sir Earle,

The Prime Minister has asked me to let you know that, in view of the invitation extended to you to act as a co-opted member of the Advisory War Council and to attend meetings of the War Cabinet in a consultative capacity, he has directed that you should receive the same documents and papers as are circulated to members of the Advisory War Council.

2. These comprise the following and arrangements are being made for their distribution to you to commence forthwith:-

(a) Daily Situation Reports and Summaries thereof, issued by General Headquarters, South-West Pacific Area;

(b) Allied Land Forces Headquarters Intelligence Summaries;

(c) Certain cablegrams on the international and war situation received from the Dominions Office and from Australian representatives abroad;

(d) Agenda submitted for consideration by the Advisory War Council.

3. Arrangements will also be made for the circulation to you of relevant War Cabinet agenda as may be necessary in connection with your attendance in a consultative capacity at meetings of the War Cabinet.

Yours sincerely,

(Sgd.) F. G. SHEDDEN

(F.G. Shedden)
Secretary.

The Rt. Hon. Sir Earle Page, CH, GCMG, MP.,

PWD-2/4

THIS PAGE IS REPRODUCED FROM A BAD
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as a member of

Mr. Sadden that

sufficient.

No. 10

PWD-2/5

26 OCT 1943

Dear Sir Earle,

As you know, arrangements for the co-option of yourself as a member of the Advisory War Council have been discontinued, and I should like to take this opportunity of expressing to you the appreciation of the Government and my personal thanks for the ready co-operation and the able assistance you have rendered to the Government and the Council during your period of service as a co-opted member over the past twelve months.

Yours sincerely,

[Sgd.] JOHN CURTIN

The Rt. Hon. Sir Earle Page,
G.B.E., G.C.M.G., M.P.

PWD-2/6

National Archives of Australia
NAA: A5954, 727/19

ADMINISTRATIVE APPEALS TRIBUNAL
FREEDOM OF INFORMATION DIVISION
ADELAIDE REGISTRY

No 2020/5875
No 2020/5876

SENATOR REX PATRICK
Applicant

SECRETARY
DEPARTMENT OF PRIME MINISTER AND CABINET
Respondent

ANNEXURE PWD-3

The following 7 pages are the annexure PWD-3 referred to in the affidavit of Philip Warren Dorling made 7 May 2021 before me:

ACT
LORIS MANNS
Justice of the Peace # 2290
07 MAY 2021

AFP
Gungahlin Police Station
Anthony Rolfe Ave
Gungahlin ACT 2912
Phone (02) 6256 7777

Philip Dorling

CONFIDENTIAL

COPY NO. 19

HANDBOOK

of

CABINET AND CABINET COMMITTEES.

---ooOoo---

MR. BROWN

PWD-3/1

GENERAL FUNCTIONS OF CABINET.

Cabinet Government rests on the need to reconcile two principles of our constitution -

(a) Ministerial responsibility; and

(b) Collective responsibility.

Each Minister in charge of a Department is responsible to Parliament for the administration of his Department along lines which command the support of his colleagues.

In addition, all Ministers are collectively responsible for the Government's policy and must share in formulating it.

The system of Cabinet Government, therefore, is the instrument by which practical effect is given to this principle of collective responsibility of Ministers who are separately responsible to Parliament for the administration of their own Departments.

Cabinet meetings are essentially meetings of Ministers. The Secretary to Cabinet is present to record the decisions.

PWD-3/2

MEMBERS OF CABINET

Rt. Hon. R.G. Menzies, K.C., M.P.,	Prime Minister.
Rt. Hon. A.W. Fadden, M.P.	Treasurer.
Hon. E.J. Harrison	Minister for the Interior and Resident Minister in the United Kingdom.
Hon. H.E. Holt, M.P.	Minister for Labour and National Service & Minister for Immigration.
Hon. J. McEwen, M.P.	Minister for Commerce & Agriculture.
Hon. P.C. Spender, K.C., M.P.	Minister for External Affairs & Minister for External Territories.
Rt. Hon. R.G. Casey, C.H., D.S.O., M.C., M.P.	Minister for National Development & Minister for Works and Housing.
Hon. P.A. McBride, M.P.	Minister for Defence.
Rt. Hon. Sir Earle C.G. Page, G.B.E., C.H., M.P.	Minister for Health.
Senator the Hon. N. O'Sullivan	Minister for Trade and Customs.
Senator the Hon. G. McLeay	Minister for Post, Shipping & Transport.
Hon. C.F. White, D.F.C., V.D., M.P.	Minister for Air & Minister for Civil Aviation.
Hon. H.L. Anthony, M.P.	Postmaster-General & Acting Minister for the Interior.
Hon. J. Francis, M.P.	Minister for the Army & Minister for the Navy.
Senator the Hon. J.A. Spicer, K.C.	Attorney-General.
Hon. Dame Enid M. Lyons, G.B.E., M.P.	Vice-President of the Executive Council.
Senator the Hon. W.H. Spooner	Minister for Social Services.
Senator the Hon. H.J. Cooper, M.B.E.	Minister for Repatriation.
Hon. Howard Beale, K.C., M.P.	Minister for Supply.

PWD-3/3

FLOOD RELIEF (F.R.)

Page (Chairman)
Spender
Anthony
Spooner
Beale

JUBILEE CELEBRATIONS (J.C.)

Menzies (Chairman)
Spender
McBride
White
Anthony
Lyons
Beale

NATIONAL HEALTH SERVICES (N.H.S.)

Page (Chairman)
Fadden
Spender
Spooner

NATIONAL SERVICE BILL (N.S.B.)

Menzies (Chairman)
Holt
McBride
White
Anthony
Francis

POST J.C. MARKETING OF WOOL (P.J.C.)

McEwen (Chairman)
Menzies
Fadden
McBride
Spooner
Cooper

R.A.A.F. SUBSISTENCE (R.A.F.)

Menzies (Chairman)
McBride
White
Anthony
Francis
Spicer

PURCHASE OF SECOND HAND SHIPS (P.S.)

Menzies (Chairman)
Fadden
McLeay
Beale

RECRUITING (R)

McBride (Chairman)
Fadden
Holt
White
Francis

SALARIES OF PERMANENT HEADS (S.P.H.)

Menzies (Chairman)
Fadden
McBride.

PWD-3/4

X

AD HOC COMMITTEES OF CABINET - MEMBERSHIP.

AID TO SOUTH AND SOUTH EAST ASIA (S.E....)

Menzies (Chairman)
Fadden
McEwen
Spender
Casey
O'Sullivan

CANBERRA HOSPITAL ACCOMMODATION (C.H...)

Page (Chairman)
Casey
Anthony

COMMONWEALTH PUBLIC SERVICE (C.P.S.)

Menzies (Chairman)
Fadden
Casey
McBride

C.P.I.S.

Fadden (Chairman)
Holt
Casey
Cooper

DEFENCE FORCES (D.F.)

McBride (Chairman)
Fadden
White
Francis

DEPARTMENT OF INFORMATION (D.O.I.)

Anthony (Chairman)
Spender
Beale

FLAX INDUSTRY (F.I.)

McLeay (Chairman)
McBride
Beale

FLOOD PREVENTION (F.I.)

Casey (Chairman)
Fadden
Page
Anthony
Spooner

PWD - 3/5

Australia NAA A4907

AD HOC COMMITTEES OF CABINET - MEMBERSHIP.

AID TO SOUTH AND SOUTH EAST ASIA (S.E.A.)

Menzies (Chairman)
Fadden
McEwen
Spender
Casey
O'Sullivan

CANBERRA HOSPITAL ACCOMMODATION (C.H.A.)

Page (Chairman)
Casey
Anthony

COMMONWEALTH PUBLIC SERVICE (C.P.S.)

Menzies (Chairman)
Fadden
Casey
McBride

C.R.T.S.

Fadden (Chairman)
Holt
Casey
Cooper

DEFENCE FORCES (D.F.)

McBride (Chairman)
Fadden
White
Francis

DEPARTMENT OF INFORMATION (D.O.I.)

Anthony (Chairman)
Spender
Beale

FLAX INDUSTRY (F.I.)

McLeay (Chairman)
McBride
Beale

FLOOD PREVENTION (F.P.)

Casey (Chairman)
Fadden
Page
Anthony
Spooner

PMD-3/6

NAA: A4907, 1

REHABILITATION OF POST OFFICE SERVICES (R.P.O.S.)

Anthony (Chairman)
Paddon
Casey
McBride

SOCIAL SERVICES (S.S.)

Paddon (Chairman)
Page
Spooner
Cooper

TRANSPORT POLICY (T.P.)

McLeay (Chairman)
Paddon
Casey
McBride
White
Anthony.

PWD-3/7

AFFIDAVIT

ADMINISTRATIVE APPEALS TRIBUNAL
FREEDOM OF INFORMATION DIVISION
ADELAIDE REGISTRY

No 2020/5875
No 2020/5876

SENATOR REX PATRICK
Applicant

SECRETARY
DEPARTMENT OF PRIME MINISTER AND CABINET
Respondent

Affidavit of: **Philip Warren Dorling**
Address:
Occupation: Adviser
Date: 13 May 2021

I, Philip Warren Dorling of affirm:

1. I am a political adviser to the Applicant, Senator Rex Patrick. I make this affidavit in support of Senator Patrick's applications in this Tribunal.

2. The facts stated in this affidavit are within my own knowledge, except where otherwise stated, in which case they are based on information and belief. Where I make statements based on information provided to me by another person, I believe that information to be true and correct.

3. Exhibited to me are attached documents marked **Annexure PWD-4**, **Annexure PWD-5**, **Annexure PWD-6**, and **Annexure PWD-7.**

Further Matters arising from the affidavit of Ms Leonie McGregor

4. As indicated in my affidavit affirmed on 7 May 2021, I have read the affidavit of Leonie McGregor, First Assistant Secretary, Cabinet Division, Department of the Prime Minister and Cabinet, sworn on 16 April 2021.

5. In her affidavit, at paragraph 19, Ms McGregor states that *"On 4 February 1942 the State Premiers were invited to and attended a Curtin Government War Cabinet meeting."*

6. In my affidavit of 7 May 2021, at paragraph 10, I observed that:

> *It is correct that persons other than Ministers attended War Cabinet meetings. ... However none of the officials in attendance were members of the War Cabinet, nor were State Premiers who attended the War Cabinet by invitation on one occasion.*

7. Further to my affidavit of 7 May 2021, I can advise that the National Archives of Australia has now made available to me the minutes of the meetings of the War Cabinet and the Advisory War Council held on 4 February 1942, as well as the records of a meeting of Commonwealth and State Ministers held on 3 and 4 February 1942. I have examined these records, together with contemporary newspaper reports, and relevant facts are outlined below.

8. On 3 and 4 February 1942, Prime Minister John Curtin presided over a meeting of Commonwealth and State Ministers in Canberra. The participants in this meeting included the Prime Minister and other Commonwealth Ministers, the Premiers of the States and other State Ministers. A number of Commonwealth officials were also present.

9. On 4 February 1942 the *Canberra Times* newspaper reported that the Premiers had been invited by the Prime Minister to attend a meeting of the War Cabinet.

10. On 4 February 1942, a combined meeting of the War Cabinet and the Advisory War Council (a non-Cabinet body comprised of the Prime Minister, senior Commonwealth Ministers and senior Opposition parliamentarians) was held in Canberra. The State Premiers were present by invitation. Other persons present included two Commonwealth Ministers who were not members of the War Cabinet or the Advisory War Council, and the three Chiefs of Staff of the Australian Armed Services.

11. On 5 February 1942 The Age newspaper reported that the State Premiers had attended a meeting of the War Cabinet at the invitation of the Prime Minister.

12. The War Cabinet and Advisory War Council minutes confirm that the War Cabinet was comprised of the Prime Minister and other senior Ministers as listed in Appendix 1 to Volume 1 of Sir Paul Hasluck's official history (**Annexure PDW-1** to my affidavit of 7 May 2021).

13. Opposition Members of the Advisory War Council were not members of the War Cabinet.

14. The State Premiers attended to the combined meeting of the War Cabinet and Advisory War Council on 4 February 1942 on invitation from the Prime Minister.

15. The combined meeting of the War Cabinet and Advisory War Council adopted two resolutions relating to the evacuation of civilian population and industry. These resolutions were incorporated in the official record of the Meeting of Commonwealth and State Ministers as the outcome of discussions between the War Cabinet, Advisory War Cabinet and the Premiers of the States. This reflected that fact that, notwithstanding combined meetings, these were separate and distinct entities.

16. The Premiers were invited to attend the meeting of the War Cabinet and Advisory War Council, but were not members of either body.

17. The cover page, list of representatives, and final page of the official record of the meeting of Commonwealth and State Ministers on 3-4 February 1942, National Archives of Australia, Series A461, Item BH326/1/3 Part 2, are at **Annexure PWD-4**.

18. A copy of Minutes of the Advisory War Council meeting on 4 February 1942, National Archives of Australia, Series A2682, Item Volume 4, is at **Annexure PWD-5**.

19. A copy of Minutes of the War Cabinet meeting on 4 February 1942, National Archives of Australia, Series, A2673, Item Volume 10, is at **Annexure PWD-6.**

20. Newspaper articles entitled *"War Cabinet – Premiers to Attend"*, in *The Canberra Times*, 4 February 1942, page 2, and *""War Cabinet Meets – Premiers Attend"*, in *The Age*, 5 February 1942, p. 2 are at **Annexure PWD-7**.

Affirmed by the deponent)
at Belconnen Police SRW.)
in ACT)
on 13 May 2021) Signature of deponent
Before me:)

JULIAN TAYLOR
ACT Justice of the Peace # 2672
Signature of witness

AFP
AUSTRALIAN FEDERAL POLICE

Belconnen Police Station
Benjamin Way, BELCONNEN ACT 2617
Ph: 6256 7777

ADMINISTRATIVE APPEALS TRIBUNAL
FREEDOM OF INFORMATION DIVISION
ADELAIDE REGISTRY

No 2020/5875
No 2020/5876

SENATOR REX PATRICK
Applicant

SECRETARY
DEPARTMENT OF PRIME MINISTER AND CABINET
Respondent

ANNEXURE PWD-4

The following 3 pages are the annexure PWD-4 referred to in the affidavit of Philip Warren Dorling made 13 May 2021 before me:

13/05/21

JULIAN TAYLOR
ACT *Justice of the Peace # 2672*

CONFIDENTIAL

1942.

COMMONWEALTH OF AUSTRALIA.

CONFERENCE

OF

COMMONWEALTH AND STATE MINISTERS.

HELD AT

CANBERRA, 3RD AND 4TH FEBRUARY, 1942.

PROCEEDINGS OF THE CONFERENCE.

By Authority:
L. F. Johnston, Commonwealth Government Printer, Canberra.
(Printed in Australia.)

F.962.

PWD 4-1

REPRESENTATIVES.

Commonwealth.

The Honorable J. Curtin, M.P.	Prime Minister and Minister for Defence Co-ordination
The Honorable F. M. Forde, M.P.	Minister for the Army
The Honorable J. B. Chifley, M.P.	Treasurer
The Honorable H. V. Evatt, LL.D., K.C., M.P.	Attorney-General and Minister for External Affairs
The Honorable J. A. Beasley, M.P.	Minister for Supply and Development
Senator the Honorable W. P. Ashley, M.P.	Postmaster-General and Minister for Information
The Honorable J. J. Dedman, M.P.	Minister for War Organization of Industry and Minister in Charge of Council for Scientific and Industrial Research
The Honorable H. P. Lazzarini, M.P.	Minister for Home Security and Minister assisting the Treasurer.
The Honorable G. Lawson, M.P.	Minister for Transport and Minister assisting the Postmaster-General

New South Wales.

The Honorable W. J. McKell, M.L.A.	Premier and Colonial Treasurer

Victoria.

The Honorable A. A. Dunstan, M.L.A.	Premier, Treasurer and Solicitor-General.
The Honorable A. E. Lind, M.L.A.	President of Board of Land and Works, Commissioner of Crown Lands and Survey, and Minister of Forests

Queensland.

The Honorable W. Forgan Smith, M.L.A.	Premier and Chief Secretary
The Honorable F. A. Cooper, M.L.A.	Treasurer

South Australia.

The Honorable T. Playford, M.H.A.	Premier, Treasurer, and Minister of Immigration

Western Australia.

The Honorable J. C. Willcock, M.L.A.	Premier, Treasurer, and Minister for Forests

Tasmania.

The Honorable R. Cosgrove, M.H.A.	Premier and Minister for Education
The Honorable J. E. Guilfoyle, M.H.A.	Resident Minister in Canberra

Also Present.

Sir George Knowles	Solicitor-General.
Dr. J. H. L. Cumpston	Director-General of Health
Major-General F. A. Maguire	Director-General Army Medical Services
Mr. A. W. Coles, M.P.	Chairman War Damage Insurance Organization
Mr. E. G. Bonney	Chief Commonwealth Censor
Mr. A. Welch	Secretary to Minister for Home Security

PWD-4-2

WAR CABINET AND ADVISORY WAR COUNCIL —DISCUSSIONS WITH PREMIERS OF THE STATES, CANBERRA, 4th FEBRUARY, 1942

RESOLUTIONS

1. EVACUATION OF CIVILIAN POPULATION

(a) That under ordinary circumstances there should not be general evacuation measures in this regard to destruction by the enemy and to the normal needs of essential production.

(b) That limited evacuation might be appropriate to be confined as far as possible to areas and zones of possible targets and to certain selected areas by the responsible authorities of some children.

(c) That in the first place consideration should be given to providing for safe areas in the vicinity of concentrations of population. [illegible] be made prior to the commencement of the Service after consultation with the Commonwealth of the Service authorities at Headquarters [illegible] and the Premiers of the States [illegible]

That provision in the legislation which is quoted here should be considered by Service Departments and the Premiers [illegible] subsequent to the passage of the legislation in connection with the above.

The special arrangements that will be necessary to secure the contingency of military operations in Australia are now being examined by the Service authorities. They involve problems of—

(i) maintenance of security;

(ii) maintenance of general administration, including the administration of justice;

(iii) such evacuation from operational areas as is directed;

(iv) destruction of civilian property which would be of value to the enemy.

Proposals as to the above will be made to the States at an early date with a view to the establishment of some suitable co-ordination or form of direction and control.

2. EVACUATION OF INDUSTRY.

It was agreed to recommend to the State Governments that an examination be made of the evacuation of industry in the light of the provisional principles set forth in the resolution. Action to be taken at the discretion of the States and the [illegible] conference [illegible] the addition of representatives of the Commonwealth Department of War Organization of Industry, the Department of Labour and National Service and the Department of Supply [illegible]

The following were advised:—

(i) The evacuation of war industry in any area that would be undertaken in unprepared.

(ii) New factories save in exceptional circumstances should be established inland.

(iii) Where possible key industrial establishments situated in the coastal area [illegible] should be duplicated elsewhere, either wholly or in part.

(iv) Dispersible stores and plant of all kinds should be dispersed as far as possible located inland.

(v) In connection with (i) to (iv) above provision should be made for adequate air raid precautions measures for the protection of vital factories and establishments to enable production to be continued.

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ADMINISTRATIVE APPEALS TRIBUNAL
FREEDOM OF INFORMATION DIVISION
ADELAIDE REGISTRY

No 2020/5875
No 2020/5876

SENATOR REX PATRICK
Applicant

SECRETARY
DEPARTMENT OF PRIME MINISTER AND CABINET
Respondent

ANNEXURE PWD-5

The following 2 pages are the annexure PWD-5 referred to in the affidavit of Philip Warren Dorling made 13 May 2021 before me:

13/05/21

JULIAN TAYLOR
Justice of the Peace # 2672
ACT

MINUTES

of

ADVISORY WAR COUNCIL MEETING.

CANBERRA, 4th FEBRUARY, 1942.

PRESENT: The Hon. John Curtin, M.P., Prime Minister and Minister for Defence Co-ordination.
The Hon. F.M. Forde, M.P., Minister for the Army.
The Hon. H.V. Evatt, K.C., M.P., Attorney-General and Minister for External Affairs.
The Hon. J.A. Beasley, M.P., Minister for Supply and Development.
The Hon. N.J.O. Makin, M.P., Minister for the Navy and Minister for Munitions.
The Hon. A.W. Fadden, M.P.
The Rt. Hon. W.M. Hughes, C.H., K.C., M.P.
The Hon. P.C. Spender, K.C., M.P.
The Hon. J. McEwen, M.P.

The following were also present at this meeting :-

The Hon. J.B. Chifley, M.P., Treasurer.
The Hon. A.S. Drakeford, M.P., Minister for Air.
The Hon. J.J. Dedman, M.P., Minister for War Organisation of Industry.
The Hon. E.P. Lazzarini, M.P., Minister for Home Security.
Senator the Hon. H.P. Ashley, Postmaster-General and Minister for Information.
The Hon. W.J. McKell, M.L.A., Premier of New South Wales.
The Hon. A.A. Dunstan, M.L.A., Premier of Victoria.
The Hon. W. Forgan Smith, M.L.A., Premier of Queensland.
The Hon. T. Playford, M.L.A., Premier of South Australia.
The Hon. J.C. Willcock, M.L.A., Premier of Western Australia.
The Hon. R. Cosgrove, M.L.A., Premier of Tasmania.
The Hon. A.E. Lind, M.L.A., Minister of Forests, Victoria.
The Hon. F.A. Cooper, M.L.A., Treasurer, Queensland.
The Hon. J.F. Gaha, M.L.C., Minister for Health, Tasmania.
Vice-Admiral Sir Guy Royle, K.C.B.,C.M.G., Chief of the Naval Staff.
Lieut.-General V.A.H. Sturdee, C.B.E., D.S.O., Chief of the General Staff.
Air Chief Marshal Sir Charles Burnett, K.C.B., C.B.E., D.S.O., Chief of the Air Staff.

(728) REVIEW OF OPERATIONS AND DEFENCE POSITION BY CHIEFS OF STAFF.

A review of operations and the defence position was made by the Chiefs of Staff for War Cabinet, Advisory War Council and Premiers of the States.

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(729) WAR CABINET AGENDUM No. 56/1942 - SUPPLEMENT No. 1 - EVACUATION OF ESSENTIAL INDUSTRY AND CIVILIAN POPULATION FROM VULNERABLE AREAS.

This agendum was discussed at the meeting of the War Cabinet and Advisory War Council with the Premiers of the States. The resolutions adopted are quoted in War Cabinet Minute No. (1850).

Secretary.

PRIME MINISTER.

PWD-5-2

ADMINISTRATIVE APPEALS TRIBUNAL
FREEDOM OF INFORMATION DIVISION
ADELAIDE REGISTRY

No 2020/5875
No 2020/5876

SENATOR REX PATRICK
Applicant

SECRETARY
DEPARTMENT OF PRIME MINISTER AND CABINET
Respondent

ANNEXURE PWD-6

The following 3 pages are the annexure PWD-6 referred to in the affidavit of Philip Warren Dorling made 13 May 2021 before me:

13/05/2021
JULIAN TAYLOR
ACT *Justice of the Peace # 2672*

MINUTES

of

WAR CABINET MEETING

CANBERRA, 4th FEBRUARY, 1942.

1229

PRESENT: The Hon. John Curtin, M.P., Prime Minister and Minister for Defence Co-ordination.
The Hon. F.M. Forde, M.P., Minister for the Army.
The Hon. J.B. Chifley, M.P., Treasurer.
The Hon. H.V. Evatt, K.C., M.P., Attorney-General and Minister for External Affairs.
The Hon. J.A. Beasley, M.P., Minister for Supply and Development.
The Hon. E.J.O. Makin, M.P., Minister for the Navy and Minister for Munitions.
The Hon. A.S. Drakeford, M.P., Minister for Air.
The Hon. J.J. Dedman, M.P., Minister for War Organisation of Industry.

The following were also present for this meeting :-

The Hon. H.P. Lazzarini, M.P., Minister for Home Security.
Senator the Hon. W.P. Ashley, Postmaster-General and Minister for Information.
The Hon. A.W. Fadden, M.P.
The Rt. Hon. W.M. Hughes, C.H., K.C., M.P.
The Hon. P.C. Spender, K.C., M.P.
The Hon. J. McEwen, M.P.
The Hon. W.J. McKell, M.L.A., Premier of New South Wales.
The Hon. A.A. Dunstan, M.L.A., Premier of Victoria.
The Hon. W. Forgan Smith, M.L.A., Premier of Queensland.
The Hon. T. Playford, M.L.A., Premier of South Australia.
The Hon. J.C. Willcock, M.L.A., Premier of Western Australia.
The Hon. R. Cosgrove, M.L.A., Premier of Tasmania.
The Hon. A.E. Lind, M.L.A., Minister of Forests, Victoria.
The Hon. F.A. Cooper, M.L.A., Treasurer, Queensland.
The Hon. J.F. Gaha, M.L.C., Minister for Health, Tasmania.
Vice-Admiral Sir Guy Royle, K.C.B., C.M.G., Chief of the Naval Staff.
Lieut.-General V.A.H. Sturdee, C.B.E., D.S.O., Chief of the General Staff.
Air Chief Marshal Sir Charles Burnett, K.C.B., C.B.E., D.S.O., Chief of the Air Staff.

(1849) REVIEW OF OPERATIONS AND DEFENCE POSITION BY CHIEFS OF STAFF.

A review of operations and the defence position was made by the Chiefs of Staff for War Cabinet, Advisory War Council and Premiers of the States. The review covered the following principal subjects :-

(1) NAVY -

(a) Disposition of R.A.N. and New Zealand ships.

(b) Disposition of Japanese ships.

(c) Attack by United States Fleet on Japanese Mandated Islands on 1st February.

(d) Representations made to Vice-Admiral H.F. Leary, United States Navy (in command of Anzac Forces) regarding operation of Naval forces in Solomon Islands-New Hebrides area.

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(e) United States reinforcements for New Caledonia and Samoa.

(f) United States losses at Pearl Harbour.

(g) General naval strategy - concentration of forces to defeat Japan. United States forces available by May 1942 in Pacific area (nine battleships, five or six aircraft carriers and ancillary craft). United Kingdom forces available in Indian Ocean by May 1942 (seven battleships, three aircraft carriers and ancillary craft). Difficulty next three to four months.

(2) ARMY -

(a) Strength and disposition of forces in Australia, Port Moresby and Rabaul - state of equipment.

(b) A.I.F. forces at Singapore and in the Netherlands East Indies.

(c) Transfer of two A.I.F. Divisions from Middle East to Netherlands East Indies.

(3) AIR FORCE -

(a) Strength and disposition of R.A.A.F. in Australia and abroad.

(b) United States air forces in Australia.

(c) Outline of programme of deliveries of aircraft from overseas - recent arrangements for supply of 250 Kittyhawk fighters.

(d) Operations in Rabaul and the Netherlands East Indies.

(1650) AGENDUM No. 56/1942 - SUPPLEMENT No. 1 - EVACUATION OF ESSENTIAL INDUSTRY AND CIVILIAN POPULATION FROM VULNERABLE AREAS.

(Previous reference - Minute No. (1794)).

This agendum was discussed at a meeting of the War Cabinet and Advisory War Council with the Premiers of the States. The following resolutions were adopted :-

(1) Evacuation of Civilian Population:

(a) That undue emphasis should not be placed upon evacuation measures as this would be detrimental to morale and to the maintenance of essential production.

(b) That limited evacuation might be undertaken, to be confined as far as possible to areas contiguous to possible targets and in certain congested areas to the evacuation of young children.

(c) That, in the first place, evacuation should, wherever possible, be merely to a safer area in the metropolis concerned.

(d) Decisions in respect to the foregoing are to be made by the Governments of the States after consultation with the G.O.C. of the Command or District concerned, and the necessary plans are to be prepared in advance.

That paragraph 10 of the Agendum, which is quoted hereunder, be remitted to the State Governments and the G.O.Cs. of Commands for information in connection with the above :-

"The special arrangements that will be necessary to meet the contingency of Military operations in Australia are now being examined by the Service authorities. This

PWD-6-2

involves problems of :-

(i) maintenance of security;

(ii) continuance of general administration, including the administration of justice;

(iii) such evacuation from operational areas as is directed;

(iv) destruction of civilian property which would be of value to the enemy.

Proposals as to the above will be made to the States at an early date with a view to the establishment of some satisfactory uniform system of direction and control."

(2) Evacuation of Industry:

It was agreed to recommend to the State Governments that an examination be made of the evacuation of industry in the light of the provisional principles set forth in the Agendum. Action is to be taken at the discretion of the States, and any existing machinery is to be used with the addition of representatives of the Commonwealth Department of War Organisation of Industry, the Commonwealth Department of Labour and National Service and the Services.

The following were adopted :-

(i) The evacuation of war industry on any scale that would be worthwhile is impracticable.

(ii) New factories, save in exceptional circumstances, should be established inland.

(iii) Where possible, key industrial establishments situated in the coastal areas most liable to attack should be duplicated elsewhere either wholly or in part.

(iv) Destructible stores and stocks of all kinds should be dispersed and as far as possible located inland.

(v) In conjunction with (i) to (iii) above, provision should be made for adequate A.R.P. measures for the protection of vital factories and establishments to enable production to be continued.

PRIME MINISTER.

Secretary.

PWD-6-3

SENATOR REX PATRICK
Applicant

SECRETARY
DEPARTMENT OF PRIME MINISTER AND CABINET
Respondent

ANNEXURE PWD-7

The following 2 pages are the annexure PWD-7 referred to in the affidavit of Philip Warren Dorling made 13 May 2021 before me:

13/05/21
JULIAN TAYLOR
ACT *Justice of the Peace # 2672*

Canberra Times (ACT : 1926 - 1995), Wednesday 4 February 1942, page 2

WAR CABINET

Premiers to Attend

For the first time, State Premiers will today attend a meeting of the War Cabinet.

The Prime Minister (Mr. Curtin) and the service Ministers will reveal to the Premiers secret information on the progress of the war. Chiefs of the fighting services will also be present.

The invitation to the Premiers followed a general review of the war given by Mr. Curtin to the Premiers' conference yesterday. At this meeting, State Government advisers were permitted to remain while Mr. Curtin was speaking.

Mr. Curtin gave the Premiers yesterday what was described as a confident but realistic outline of the background of the present situation in the Pacific. He dealt generally with strategic dispositions of the ABDA powers and the measures being taken for the marshalling of the resources of the democracies. Mr. Curtin also dealt briefly with the close co-operation between Australia and the United States.

PWD-7-1

National Library of Australia http://nla.gov.au/nla.news-article2579887

Age (Melbourne, Vic. : 1854 - 1954), Thursday 5 February 1942, page 2

WAR CABINET MEETS

Premiers Attend

CANBERRA, Wednesday. — For seven hours to-day the War Council reviewed the war situation and laid plans to meet the serious threat against the Commonwealth.

The meeting was historic, as, for the first time, State Premiers were present, at the invitation of the Prime Minister (Mr. Curtin) to learn, at first hand, details of war developments. The chiefs of the fighting services also attended the meeting. The only absentee among the members of the War Council was Mr. Menzies, who sent a telegram regretting his inability to be present.

Mr. Curtin said after the meeting that the discussion was of a most intimate and highly important nature which, for security reasons, could not be revealed.

The invitation to the Premiers followed the more general review of the war given to them and their Ministers and advisers by Mr. Curtin at the Premiers' Conference yesterday. Besides enabling the Premiers to be fully informed on the military situation, the meeting also gave the Commonwealth Government an opportunity to provide a clear picture of the aspects upon which State co-operation was necessary.

At the Premiers' Conference yesterday some Premiers were critical of the powers assumed by the Commonwealth to control the railways in the event of an emergency. They feared a disturbance of the financial control which they exercised over their own railway systems, but the Commonwealth was able to reassure them. The Premiers were informed that most of the powers about which fears were held by the States would be used only when absolutely necessary.

PwD-7-2

National Library of Australia http://nla.gov.au/nla.news-article205277386

ATTACHMENT FIVE

DECISION OF JUSTICE WHITE

5 AUGUST 2021

Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division:	FREEDOM OF INFORMATION DIVISION
File Number:	2020/5875 & 2020/5876
Re:	**Patrick**
	APPLICANT
And	**Secretary, Department of Prime Minister and Cabinet**
	RESPONDENT

DECISION

Tribunal:	**The Honourable Justice White**
Date:	**5 August 2021**
Place:	**Adelaide**

1. The decisions under review, namely the decisions of Mr Hupalo of 6 and 10 August 2020 respectively, are set aside.

2. The Applicant be granted access to:

   a. the documents sought in his letter of request of 10 July 2020 which is the subject of AAT 2020/5875; and

   b. the documents sought in his letter of request of 10 July 2020 which is the subject of AAT 2020/5876, other than those sought in paragraph 1 of the letter and the Cabinet Handbook and other than Items 2-7 in the Minutes of the meeting on 15 March 2020.

.....**[SGND]**.....
The Honourable Justice White

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CATCHWORDS

FREEDOM OF INFORMATION – review of the refusals by the Department of Prime Minister and Cabinet to give access to documents to minutes of the National Cabinet – whether documents are exempt documents pursuant to s 34(1) of the *Freedom of Information Act 1982* (Cth) (the FOI Act) – consideration of the meaning of "committee of the Cabinet" – whether National Cabinet is a committee of the Cabinet – whether documents are conditionally exempt documents pursuant to s 47B of the FOI Act because their disclosure would or could reasonably be expected to cause damage to relations between the Commonwealth and a State – decisions set aside – order for access made.

LEGISLATION

Constitution ss 61, 62, 64
Acts Interpretation Act 1901 (Cth) s 23(b)
Administrative Appeals Tribunal Act 1975 (Cth) ss 37, 44A(1)
Evidence Act 1995 (Cth) s 130
Freedom of Information Act 1982 (Cth) ss 3, 4, 11, 11A, 11B, 15, 22, 24A, 31A, 31B, 33A, 34, 47B, 47C, 47D-47J, 54W, 57A, 58, 58E, 61, 93A
Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009 (Cth)
Migration Act 1958 (Cth) s 303
Freedom of Information Bill 1981

CASES

Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 CLR 129
Arnold (on behalf of Australians for Animals) v Queensland (1987) 73 ALR 607
Attorney-General's Department v Cockcroft [1986] FCA 35; (1986) 10 FCR 180
Browne v Dunn (1893) 6 R 67
Commonwealth of Australia v Northern Land Council (1991) 30 FCR 1
Diamond v Chief Executive Officer of the Australian Curriculum, Assessment and Reporting Authority [2014] AATA 707
Drake v Minister for Immigration and Ethnic Affairs (1979) 46 FLR 409

Egan v Willis and Cahill (1996) 40 NSWLR 650

FAI Insurances Ltd v Winneke [1982] HCA 26; (1982) 151 CLR 342

Fisse v Secretary, Department of the Treasury [2008] FCAFC 188, (2008) 172 FCR 513

Jaffarie v Director-General of Security [2014] FCAFC 102; (2014) 226 FCR 505

Jorgensen v Australian Securities and Investments Commission [2004] FCA 143, (2004) 208 ALR 73

McGrath v Director-General, National Archives of Australia [2020] AATA 1790

Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd (1987) 15 FCR 274

Re Guy v Department of Transport (1987) 12 ALD 358

Re MacTiernan and Secretary, Department of Infrastructure and Regional Development [2016] AATA 506

Re Maher and Attorney-General's Department (1985) 7 ALD 731

Re Minister of Immigration and Multicultural Affairs; ex parte Applicant S154/2002 [2003] HCA 60; (2003) 77 ALJR 1909

Re Toomer v Department of Agriculture, Fisheries and Forestry [2003] AATA 1301

Rogers v Home Secretary [1973] AC 388

Sankey v Whitlam [1978] HCA 43; (1978) 142 CLR 1

Secretary, Department of Foreign Affairs and Trade v Whittaker [2005] FCAFC 15; (2005) 143 FCR 15

Secretary, Department of Prime Minister and Cabinet v Summers [2019] AATA 5537

Shi v Migration Agents Registration Authority [2008] HCA 31; (2008) 235 CLR 286

Spencer v Commonwealth of Australia [2012] FCAFC 169; (2012) 206 FCR 309

State of Victoria v Brazel [2008] VSCA 37; (2008) 19 VR 553

The Commonwealth of Australia v Northern Land Council [1993] HCA 24; (1993) 176 CLR 604

Waubra Foundation v Commissioner of Australian Charities and Not-for-Profits Commission (2017) AATA 2424

Whitlam v Australian Consolidated Press Ltd (1985) 73 FLR 414

HEARING DATE

19 May 2021

SECONDARY MATERIAL

Killey I, *Constitutional Conventions in Australia*, (Australian Scholarly Publishing, 2012)

Bagehot W, *The English Constitution*, 1867

Macquarie Dictionary (8th Edition)

Constitutional Conventions in Westminster Systems, Controversies, Changes and Challenges, edited by Galligan B, and Brenton S (Cambridge University Press, 2015)

REASONS FOR DECISION

Justice White

5 August 2021

Introduction [1]
The review by the Tribunal [12]
The evidence [16]
Inspection of the subject documents [23]
Statutory provisions [29]
The Cabinet documents exemption [38]
The meaning of the term "committee of the Cabinet" [41]
The establishment of the National Cabinet [67]
The composition of the National Cabinet [90]
The reliance on historical precedents [94]
The discretion of the Prime Minister of the day [104]
Control of membership by the Prime Minister? [110]
The relationship of the National Cabinet with the Cabinet [121]
The relevant time [124]
The evidence [129]
A Cabinet Office Policy Committee [142]
Assessment of the evidence [149]
The Cabinet Secretary [156]
Conclusion on the relationship between the National Cabinet and the Cabinet [160]
The manner of operation of the National Cabinet [161]
Confidentiality of the National Cabinet deliberations [171]
Sub-committees of the National Cabinet [174]
Collective responsibility and solidarity [177]
The respondent's opinion evidence [197]
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The effect of disclosure of the minutes of 29 May 2020 [254]
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Conclusion [276]

Decision [277]

Introduction

1. The effect of s 34 of the *Freedom of Information Act 1982* (Cth) (the FOI Act), in conjunction with ss 31A and 31B, is to make records of the Federal Cabinet and its committees exempt from access under that Act.

2. On 10 July 2020, the applicant made two applications under the FOI Act to the Department of the Prime Minister and Cabinet (DPMC) for access to information concerning the National Cabinet established in March 2020 as part of the Governmental response to COVID-19.

3. By the first application, the applicant sought access to:

> All meeting notes/minutes taken from the meeting of the National Cabinet on 29 May 2020.

4. By the second application, the applicant sought access to a range of documents concerning the formation and functioning of the National Cabinet, being:

> 1. Any documents (including correspondence) that provide the formal notification to the Governor-General that the National Cabinet was/was being formed in March 2020.
> 2. The documents that outline/describe the rules that the National Cabinet is bound by. To clarify further, the documents might include rules or guidance on the following issues:
>
> a. How decisions of the National Cabinet are arrived at (e.g. majority, consensus etc.)
>
> b. Whether any jurisdiction has a right of veto over decisions of the National Cabinet.
>
> c. Whether decisions of the National Cabinet are binding on the Commonwealth and the States/Territories.
>
> d. Whether the National Cabinet operates within the conventions, policies and guidance set out in the Cabinet Handbook.
>
> e. Whether Premiers and Chief Ministers are bound by conventions of Cabinet solidarity and confidentiality.
>
> f. Who is to serve as the Secretary of the National Cabinet and how the National Cabinet's decisions are recorded and disseminated.
>
> g. What Federal, State and Territory officials are permitted to listen to and participate in National Cabinet discussions.
>
> h. Whether Cabinet note-takers take note of National Cabinet deliberations.
>
> i. Whether deliberations of the National Cabinet (including via teleconference and videoconference) are recorded and/or transcribed, and if not, what

measures are in place to ensure that National Cabinet discussions are not recorded and/or transcribed.

5. I will refer to the documents sought by the applicant collectively as "the subject documents".

6. On 6 August 2020, Mr Hupalo, an Assistant Secretary in the Cabinet Secretariat in DPMC, notified the applicant that the Department had identified five documents as relevant to his first request but said that he had decided to refuse access to them. Mr Hupalo asserted that each of the five documents, being minutes of the National Cabinet, is an official record of the Cabinet which s 34(1)(b) of the FOI Act makes exempt from production. He said that this was so because the National Cabinet is a committee of the Cabinet.

7. On 10 August 2020, Mr Hupalo notified the applicant that no documents had been identified as within the scope of part 1 of the second request and, accordingly, that pursuant to s 24A(1)(b)(ii) of the FOI Act, access to documents of that kind was refused. In relation to part 2 of the request, Mr Hupalo said that two documents had been identified as within the scope of the request, being (a) the Cabinet Handbook (13th Edition) and (b) "the minutes of the relevant National Cabinet meeting". Mr Hupalo did not identify the meeting which he regarded as "the relevant" meeting of the National Cabinet but, as will be seen later, it is the meeting of 15 March 2020. He granted the applicant access to the Cabinet Handbook (13th Edition) but refused access to the minutes. Again, he relied on s 34(1)(b) of the FOI Act, asserting that the National Cabinet is a committee of the Cabinet for the purposes of that provision.

8. The applicant sought review of both decisions by the Australian Information Commissioner, pursuant to Part VII of the FOI Act. However, acting pursuant to s 54W, a delegate of the Commissioner decided not to undertake the review, being satisfied that it was in the interests of the administration of the FOI Act that both of Mr Hupalo's decisions be considered by this Tribunal.

9. The applicant then commenced in the Tribunal the two applications for review with which this decision is concerned. He seeks access to all the documents which are the subject of his first request and to the minutes to which Mr Hupalo referred in responding to the second request.

10. The applications were heard together. At the hearing, the respondent, who is the Secretary of the DPMC, maintained the position that s 34(1)(b) of the FOI Act makes the subject documents exempt from access. He contended, in addition, that the subject documents are "conditionally exempt" from access, pursuant to s 47B of the FOI Act, and that, in the application of s 11A(5) of the FOI Act, the Tribunal should be satisfied that the disclosure of them would, on balance, be contrary to the public interest with the consequence that the applications for review should also be dismissed on this basis.

11. For the reasons which follow, I am satisfied that orders should be made granting the applicant access to each of the subject documents.

The review by the Tribunal

12. The applicant brings his applications to the Tribunal pursuant to s 57A(1)(b) of the FOI Act.

13. The Tribunal's powers on the review derive from s 58(1) of the FOI Act:

> (1) Subject to this section, in proceedings under this Part, the Tribunal has power, in addition to any other power, to review any decision that has been made by an agency or Minister in respect of the request and to decide any matter in relation to the request that, under this Act, could have been or could be decided by an agency or Minister, and any decision of the Tribunal under this section has the same effect as a decision of the agency or Minister.

14. Once a document is established to be an exempt document, the Tribunal may not decide that access be granted to it (s 58(2)).

15. The parties' submissions proceeded on the basis that the Tribunal's task on the review is to determine whether Mr Hupalo's decisions are the correct or preferable decisions on the material before the Tribunal: *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409 at 419 (Bowen CJ and Deane J) to which reference was made in *Shi v Migration Agents Registration Authority* [2008] HCA 31; (2008) 235 CLR 286 at [35] (Kirby J), at [98] (Hayne and Heydon JJ) and at [141] (Kiefel J). However, by s 61(1)(b) of the FOI Act, DPMC has the onus of establishing that Mr Hupalo's decisions are justified or that the Tribunal should give decisions which are adverse to the applicant. The standard of proof required is the balance of probabilities: *Jorgensen v Australian Securities and Investments Commission* [2004] FCA 143, (2004) 208 ALR 73 at [65]; *Fisse v Secretary, Department of*

the Treasury [2008] FCAFC 188, (2008) 172 FCR 513 at [30] (Buchanan J) and at [91] (Flick J).

The evidence

16. The evidence before the Tribunal is wholly documentary. It comprises:

(a) the documents provided to the Tribunal pursuant to s 37 of the *Administrative Appeals Tribunal Act 1975* (Cth) (the AAT Act);

(b) a Statement of Agreed Facts to which is annexed the Cabinet Handbook (14th Edition) (Exhibit A1);

(c) affidavits made by Dr Philip Dorling on 16 April, 7 May and 13 May 2021, tendered by the applicant;

(d) an affidavit of Ms Leonie McGregor made on 16 April 2021, tendered by the respondent;

(e) an affidavit of Mr Philip Gaetjens (the respondent) made on 16 April 2021, tendered by the respondent; and

(f) the Cabinet Handbook (13th Edition) (Exhibit A7).

17. Dr Dorling obtained a doctorate in Politics from Flinders University in 1996 and has considerable experience in politics and public administration. Between 1992 and 1994, he worked as a historian in the Department of Foreign Affairs and Trade; in 2003 he worked in the Department and Premier and Cabinet in Tasmania; and from 2003 to 2008 he worked in the Chief Minister's Department in the Australian Capital Territory. He has also worked as adviser to a number of politicians and is currently the political adviser to the applicant.

18. Mr Gaetjens has been Secretary of DPMC since 2 September 2019 and has more than 40 years' experience in the public sector. In particular, from August 2011 until July 2015, he was Secretary of the New South Wales Department of Treasury, from October 2015 to

June 2018 he was Chief of Staff to the Hon Scott Morrison MP, and from August 2018 to August 2019, he was Secretary of the Commonwealth Department of the Treasury.

19. Ms McGregor has been the First Assistant Secretary in the Cabinet Division of DPMC since May 2019. She had previous experience in that Division having held the position of Assistant Secretary from May to October 2013. Since 1992, Ms McGregor has worked in multiple departments, including the Department of Health, the Department of Finance, the Independent Parliamentary Expenses Authority and DPMC. She held the position of Deputy Director General of Health in the Australian Capital Territory between July 2018 and May 2019. All in all Ms McGregor has had a 29 year career in the public sector.

20. None of the deponents was required to attend for cross-examination.

21. Mr Dorling's evidence was mainly documentary, or derived from documents, as it provided evidence of statements made by the Prime Minister in media statements and press conferences, and documents directed to showing that certain statements of Ms McGregor regarding historical precedents were wrong. It was not suggested that Mr Dorling's evidence was unreliable. I accept his evidence.

22. The respondent's affidavit was directed to the issues of whether the National Cabinet is a committee of the Cabinet and to the effect of disclosure of the subject documents on Commonwealth-State relations. Ms McGregor's affidavit was directed to the same issues, albeit more of the former than the latter. The evidence of each tended to be generalised and conclusionary in form. In some respects, the evidence of each was inconsistent with documentary evidence and seemed to assume the truth of a matter to be decided by the Tribunal (whether the National Cabinet is a committee of the Cabinet), and in some respects both the respondent and Ms McGregor expressed opinions about the effect of disclosure of the minutes on a view of their content which is not borne out by an examination of the documents. As will be seen, I do not accept all their evidence.

Inspection of the subject documents

23. As the evidentiary material did not satisfy me at the commencement of the hearing on 20 May 2021 that the subject documents are exempt documents, I required the respondent

to produce them for inspection, exercising the power conferred by s 58E(2) of the FOI Act. I inspected the documents so produced by the respondent after the hearing had concluded.

24. It is appropriate to record a little about the documents produced for the Tribunal's inspection, but I will endeavour to do so in a manner which does not reveal at this stage matters of substantive content.

25. In an envelope marked "AAT 2020/5875" relating to the applicant's request for "[a]ll meeting notes/minutes taken from the meeting of the National Cabinet on 29 May 2020", the respondent initially produced five documents. The first purported to be a minute of the meeting of the National Cabinet of 24 March 2020. There was nothing on the face of this document, or in the other documents in the envelope, which indicated how it could reasonably be regarded as a minute of the meeting of the National Cabinet held on 29 May 2020. On the Tribunal's enquiry as to whether this document had been produced in error, the respondent's solicitor confirmed that that was the case and on 22 June 2021 provided a replacement document.

26. Three of the remaining four documents initially produced appeared on their face to be extracts of the minutes of the National Cabinet Meeting on 29 May 2020 held by the Attorney-General's Department, the Department of Infrastructure, Transport, Regional Development and Communications and the Department of Home Affairs respectively. In two cases, the extracts were of Item 8 only and in one case of Item 7 only. Somewhat curiously, the fourth document, the original of which has the notation "Original authorised by Cabinet Secretary" and "Agreed as Final by the Prime Minister", contained Items 1 and 2 only, that is, it did not include Items 7 and 8. No minutes were produced initially for Items 3 to 6 inclusive.

27. On the face of the documents initially produced, it was accordingly not apparent how they could, even when considered in combination, be regarded as constituting "all" the minutes of the meeting of the National Cabinet held on 29 May 2020 which the applicant had requested. However, the replacement document produced on 22 June 2021 seems on its face to be complete: it consists of Items 1-11 and concludes with the notation "Original authorised by Cabinet Secretary".

28. In an envelope marked "AAT 2020/5876" and relating to the applicant's second request, the respondent produced a single document, with the heading "Cabinet Minute" and the subheading "National Cabinet", being on its face the minutes of the meeting of the National Cabinet held on 15 March 2020, including an attachment to those minutes.

Statutory provisions

29. The FOI Act grants every person a legally enforceable right, subject to the Act, to obtain access, in accordance with the Act, to documents of an "agency", other than an "exempt document" (s 11).

30. When a person makes a request in accordance with s 15(2) of the FOI Act for access to a document of the agency, the agency must give the person access to the document in accordance with the Act (s 11A(1) and (3)) but is not required to do so if the document is an "exempt document" (s 11A(4)). If the document is "conditionally exempt", the agency must give the person access to it "unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest" (s 11A(5)).

31. The term "agency" is defined in s 4(1) of the FOI Act to include "a Department". It was common ground that DPMC is an agency for this purpose.

32. The term "exempt document" is defined in s 4. It is subpara (a) of the definition which is pertinent presently:

> ***exempt document*** means:
>
> (a) a document that is exempt for the purposes of Part IV (exempt documents) (see section 31B); or
>
> ...

33. The term "conditionally exempt" is defined in s 4(1):

> ***conditionally exempt***: a document is ***conditionally exempt*** if Division 3 of Part IV (public interest conditional exemptions) applies to the document.

34. Section 31B in Part IV of the FOI Act indicates the circumstances in which a document will be "exempt" and "conditionally exempt":

31B Exempt documents for the purposes of this Part

A document is ***exempt*** for the purposes of this Part if:

(a) it is an exempt document under Division 2; or

(b) it is conditionally exempt under Division 3, and access to the document would, on balance, be contrary to the public interest for the purposes of subsection 11A(5).

...

35. Section 34 in Part IV provides that Cabinet documents are exempt:

34 Cabinet documents

General rules

(1) A document is an exempt document if:

(a) both of the following are satisfied:

(i) it has been submitted to the Cabinet for its consideration, or is or was proposed by a Minister to be so submitted;

(ii) it was brought into existence for the dominant purpose of submission for consideration by the Cabinet; or

(b) it is an official record of the Cabinet; or

(c) it was brought into existence for the dominant purpose of briefing a Minister on a document to which paragraph (a) applies; or

(d) it is a draft of a document to which paragraph (a), (b) or (c) applies.

(2) A document is an exempt document to the extent that it is a copy or part of, or contains an extract from, a document to which subsection (1) applies.

(3) A document is an exempt document to the extent that it contains information the disclosure of which would reveal a Cabinet deliberation or decision, unless the existence of the deliberation or decision has been officially disclosed.

Exceptions

(4) A document is not an exempt document only because it is attached to a document to which subsection (1), (2) or (3) applies.

Note: However, the attachment itself may be an exempt document.

(5) A document by which a decision of the Cabinet is officially published is not an exempt document.

(6) Information in a document to which subsection (1), (2) or (3) applies is not exempt matter because of this section if the information consists of purely factual material, unless:

(a) the disclosure of the information would reveal a Cabinet deliberation or decision; and

(b) the existence of the deliberation or decision has not been officially disclosed.

36. In resisting the present applications, the respondent relies on s 34(1)(b), contending that each of the documents sought by the applicant "is an official record of the Cabinet". For this purpose, he relies on the extended meaning of the term "Cabinet" in s 4(1):

> ***Cabinet*** includes a committee of the Cabinet.

37. Division 3 of Part IV of the FOI Act identifies the circumstances in which a document will be "conditionally exempt". I will return to it later.

The Cabinet documents exemption

38. It is convenient to address first the issue of whether s 34(1)(b) makes the subject documents exempt documents for the purposes of Part IV of the FOI Act. The applicant accepted that a finding that s 34(1)(b) has that effect would be determinative of his applications.

39. The hearing proceeded on the basis that each of the subject documents comprises formal minutes of meetings of the National Cabinet. My inspection of the documents confirms that characterisation, although, as indicated, in some cases the documents produced are extracts only. It may be accepted therefore that, if the National Cabinet is a committee of the Cabinet, each of the documents is "an official record" within the meaning of that term in s 34(1)(b) – see *Re Toomer v Department of Agriculture, Fisheries and Forestry* [2003] AATA 1301 at [74].

40. The critical question therefore is whether the subject documents are official records of "the Cabinet". The respondent contends, and the applicant disputes, that the subject documents are of this character because they are official records of a "committee of the Cabinet".

The meaning of the term "committee of the Cabinet"

41. The mere use of the name "National Cabinet" does not, of itself, have the effect of making a group of persons using the name a "committee of the Cabinet". Nor does the mere labelling of a committee as a "Cabinet committee" have that effect. That term has the meaning with which it is used in the FOI Act and, in order for s 34(1)(b) of that Act to be

applicable in the present case, the National Cabinet must come within that statutory meaning.

42. It is therefore necessary to construe the expression "committee of the Cabinet" in the definition of "Cabinet" in s 4(1). It is a composite expression and should be construed as such having regard to its text, context and purpose.

43. The overall purpose of the FOI Act is to give the Australian community access to publicly held documents and thereby to promote representative democracy. So much is stated in s 3 of the FOI Act:

> **3 Objects—general**
>
> (1) The objects of this Act are to give the Australian community access to information held by the Government of the Commonwealth, by:
>
> (a) requiring agencies to publish the information; and
>
> (b) providing for a right of access to documents.
>
> (2) The Parliament intends, by these objects, to promote Australia's representative democracy by contributing towards the following:
>
> (a) increasing public participation in Government processes, with a view to promoting better-informed decision-making;
>
> (b) increasing scrutiny, discussion, comment and review of the Government's activities.
>
> (3) The Parliament also intends, by these objects, to increase recognition that information held by the Government is to be managed for public purposes, and is a national resource.
>
> ...

44. However, the entitlement to access to public documents is qualified by provisions which, in some cases, preclude access altogether to documents of identified classes and which, in other cases, preclude access to the documents whose disclosure would have particular effects.

45. As is apparent from the terms set out earlier in these reasons, s 34 operates to exempt altogether from access under the FOI Act a class of documents described broadly as "Cabinet documents". Subsections (1), (2) and (3) have the effect of making exempt from disclosure the documents to which they refer, simply because of their character as

documents within the class, and without differentiation according to their content or by reference to the effect, or likely effect, of their disclosure. It is reasonable to infer that s 34, although enacted before the decision in *The Commonwealth of Australia v Northern Land Council* [1993] HCA 24; (1993) 176 CLR 604 (*NLC High Court*), reflects the considerations to which the majority in that case referred, at 615-6:

> [I]t has never been doubted that it is in the public interest that the deliberations of Cabinet should remain confidential in order that the members of Cabinet may exchange differing views and at the same time maintain the principle of collective responsibility for any decision which may be made. Although Cabinet deliberations are sometimes disclosed in political memoirs and in unofficial reports on Cabinet meetings, the view has generally been taken that collective responsibility could not survive in practical terms if Cabinet deliberations were not kept confidential ... Despite the pressures which modern society places upon the principle of collective responsibility, it remains an important element in our system of government. Moreover, the disclosure of the deliberations of the body responsible for the creation of state policy at the highest level, whether under the Westminster system or otherwise, is liable to subject the members of that body to criticism of a premature, ill-informed or misdirected nature and to divert the process from its proper course ... The mere threat of disclosure is likely to be sufficient to impede those deliberations by muting a free and vigorous exchange of views or by encouraging lengthy discourse engaged in with an eye to subsequent public scrutiny. Whilst there is increasing public insistence upon the concept of open government, we do not think that it has yet been suggested that members of Cabinet would not be severely hampered in the performance of the function expected of them if they had constantly to look over their shoulders at those who would seek to criticize and publicize their participation in discussions in the Cabinet room. It is not so much a matter of encouraging candour or frankness as of ensuring that decision-making and policy development by Cabinet is uninhibited. The latter may involve the exploration of more than one controversial path even though only one may, despite differing views, prove to be sufficiently acceptable in the end to lead to a decision which all members must then accept and support.
>
> (Citations omitted)

46. So much was in any event confirmed by Minister Viner in the Second Reading Speech for the *Freedom of Information Bill 1981* on 18 August 1981:

> It is of the essence of Cabinet government that the deliberations of Cabinet and Executive Council should be protected from mandatory disclosure.

47. The purpose of the Cabinet documents' exemption informs the understanding of the expression "a committee of Cabinet". It implies a subgroup so closely related to the Cabinet that the considerations which make appropriate the exemption of documents of the Cabinet also make appropriate the exemption of its documents from disclosure.

48. The term "Cabinet" is not defined in the *Constitution* nor in any other legislation of the Australian Parliament. It is not given any recognition in the Constitution as a repository of executive power. Instead the Constitution provides that the executive power of the Commonwealth is exercisable by the Governor-General as the Queen's representative (Constitution s 61) who is advised by the "Federal Executive Council" (s 62). Nevertheless, the Cabinet in the Australian governmental system has a well-recognised existence and function, even if the early development of the Cabinet system be obscure: *Commonwealth of Australia v Northern Land Council* (1991) 30 FCR 1 (*NLC Full Court*) per Black CJ, Gummow and French JJ at 16.

49. Bowen CJ, in *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274 at 279, described the Cabinet as a body which functions according to "convention". This term is capable of a variety of meanings but I understand his Honour to be referring to a body of unwritten normative rules and practices generally observed and acknowledged but not legally binding: Killey I, *Constitutional Conventions in Australia*, (Australian Scholarly Publishing, 2012), at 10-11. Because these normative rules have their origins in underlying principle, they are more than mere practices or usages which happen to be observed.

50. The parties referred the Tribunal to a number of authorities concerning the nature, role and responsibilities of the Cabinet in our system of government. In *FAI Insurances Ltd v Winneke* [1982] HCA 26; (1982) 151 CLR 342 at 373-4, Murphy J described features of the Commonwealth Cabinet:

> [I]n theory, the Governor in Council, and in practice the Cabinet, is the highest political organ of the State. *The Cabinet*, which has no place in the formal Constitution, *is a committee of Ministers of the ruling parliamentary party or parties.* The Cabinet is responsible for all decisions of the Governor in Council, even if in practice the real decisions are left to several Ministers or (as often in regulation-making) to one Minister. The Cabinet decisions are collective decisions. It is well-known that the Ministers who attend and recommend the Council action (including the Minister in charge of the Department concerned) may on occasion disapprove of the action. A Minister making the recommendation for action by the Council may be of opinion that the action proposed is undesirable, contrary to good government or even unconstitutional; he may make a recommendation because a majority of his Cabinet colleagues decide otherwise (or occasionally because a majority of his parliamentary party think otherwise).
>
> (Emphasis added)

51. In *Whitlam v Australian Consolidated Press Ltd* (1985) 73 FLR 414, Blackburn CJ at 421 described the Federal Cabinet in the following way:

> Cabinet is a group of persons who have in common certain political aims. It has to make decisions which must command support in Parliament and, it is hoped, will command substantial support in the electorate ... Each member of Cabinet has a personal responsibility to his conscience and also a responsibility to the government.

52. It has been said that the Cabinet stands at the apex of policy formulation (Peko-Wallsend at 279) and that it is "the repository of *de facto* decision-making power" (*NLC Full Court* at 20). In 1867, Bagehot in "The English Constitution" said at 10:

> The Cabinet, in a word, is a board of control chosen by the legislature, out of persons it trusts and knows, to rule the nation.

53. As seen earlier, in *NLC High Court* the majority used the expression "the body responsible for the creation of state policy at the highest level" with reference to the Federal Cabinet, at 615.

54. These authorities indicate that Cabinets derive their existence from, and are accountable to, the Parliament from which they are drawn. They have a collective responsibility to that Parliament for the administration of the affairs of government, and for its decision-making.

55. Although each of the authorities to which I have referred post-dated the enactment of the FOI Act (in the case of *FAI v Winneke* by about two months), it is reasonable to infer that the Parliament used the term "Cabinet" with the same understanding of its role in our system of responsible and representative government. Apart from anything else, this understanding derives support from the references to the proposals by, and briefing, of "Ministers" to which s 34(1)(a)(ii) and s 34(1)(c) respectively refer.

56. Counsel for the applicant emphasised that the Federal Cabinet is a committee of Ministers comprised of Ministers ordinarily drawn from the party or parties in Government (*FAI v Winneke* at 373) and that the Ministers who form the Executive Council cannot hold office as Minister for longer than three months unless they are or become a Senator or a Member of the House of Representatives (Constitution s 64). The effect is that persons who are not, or who cease to be, elected members of the Australian Parliament can be a member of the Executive Council for only a very short period. As the Cabinet is the *de facto* shadow of the Executive Council, the same position pertains with respect to it as a matter of convention. Counsel then submitted that the s 4 definition of "committee of the Cabinet" should be

construed with regard to this understanding. There is force in this submission, and I consider that it should be accepted.

57. The meaning of the term "Cabinet" in s 34(1)(b) of the FOI Act is not of course controlled by the statements of the Prime Minister of the day. However, statements by Prime Minister Morrison in the Cabinet Handbooks, 13th and 14th Editions, issued on 28 August 2019 and 16 October 2020 respectively, are consistent with these understandings of the term "Cabinet". In each Cabinet Handbook the Prime Minister described the Cabinet as "the primary decision-making body of government" and as "the council of senior ministers who are empowered by the Government to take binding decisions on its behalf".

58. This understanding of the term "Cabinet" assists in the construction of the composite term "committee of the Cabinet".

59. The term "committee" is defined in the *Macquarie Dictionary* (8th Edition) to mean "a person or a group of persons elected or appointed from a larger body to investigate, report, or act in special cases". This supports the view that a "committee of the Cabinet" is a reference to a subgroup of the Cabinet itself, as distinct from a group of persons who are extraneous to the Cabinet.

60. Moreover, the committee must be "of" the Cabinet. The preposition "of" is capable of a variety of meanings. In one sense it means "derivation, origin, or source". In another sense it means "belonging or possession, connection, or association" (*Macquarie Dictionary*, 8th Edition). The former sense seems more apt to the term "committee of the Cabinet". But on either meaning, the preposition suggests a committee derived from the Cabinet or belonging to it.

61. Ms McGregor deposed that there are, or have been, a number of committees of the Cabinet. Some have been standing committees and some ad hoc. She mentioned specifically the National Security Committee, the Expenditure Review Committee, the Productivity Committee, the Regional Australia and Regional Development Committee, the Social Policy and Social Inclusion Committee and the Naval Shipbuilding Enterprise Governance Committee. Ms McGregor did not give evidence about the formation, composition or functioning of these Committees, nor provide any other information about them which may

have informed the context in which the Parliament used the term "committee of the Cabinet" when enacting the FOI Act. However, I am willing to infer that they were established in the manner set out in the Cabinet Handbooks 13th and 14th Editions, albeit in earlier iterations of those Cabinet Handbooks:

> The Cabinet
>
> ...
>
> 2. The Cabinet is a product of convention and practice. ... Provided the guiding principles of a Cabinet system are met – collective responsibility and solidarity – *it is for the Prime Minister of the day to determine the shape, structure and operation of the Cabinet.*
>
> 3. ...
>
> Cabinet Committees
>
> 4. Cabinet committees are usually established around either a subject area, such as national security, or around a general function of government, such as expenditure. Temporary or ad-hoc Cabinet committees may also be established by the Prime Minister to carry out particular tasks.
>
> 5. *Cabinet committees derive their powers from the Cabinet. Generally, Cabinet committee decisions are brought forward to the Cabinet for endorsement, so the Cabinet retains the ultimate power of decision.* While some Cabinet committees may make final decisions for security or practical reasons, *most Cabinet committee decisions are not acted on until they have been endorsed by the Cabinet*, or the Cabinet Secretary agrees that decisions can be implemented without the Cabinet's endorsement because they are urgent. In such cases, the Cabinet should be briefed on the Cabinet committee decision as soon as practicable. *The Cabinet may alter a Cabinet committee decision or ask a Cabinet committee to consider a matter further.*
>
> The Prime Minister
>
> 6. *The Prime Minister is responsible for the membership of the Cabinet and Cabinet committees, determines and regulates all Cabinet arrangements for the Government and is the final arbiter of Cabinet procedures.*
>
> (Emphasis added)

62. These provisions concerning Cabinet committees are consistent with the understanding of the term "committee of the Cabinet" set out above. On the assumption that the iteration of these provisions existed in the Cabinet Handbooks current at the time of enactment of the FOI Act, they support the view that the term "committee of the Cabinet" referred to a committee which derives its function and purpose from the Cabinet and is subordinate to the Cabinet.

63. So far as the evidence provided to the Tribunal reveals, there is no indication that, at the time of enactment of the FOI Act, a committee of the Cabinet had comprised persons who were not themselves members of the Cabinet or members of an "outer Ministry". This militates against a conclusion that the expression "committee of the Cabinet" was intended to encompass a group of such persons.

64. On the basis of the authorities and the material to which I have referred, and the conventions evident in the materials concerning the Cabinet and committees of Cabinet, I conclude that the term "committee of the Cabinet" in the s 4 definition encompasses a group of persons *derived from* the Cabinet and performing a function for, or on behalf of, the Cabinet or a group having such a connection or association with the Cabinet that the group can be said to *belong to* the Cabinet. A group which is not "of" the Cabinet will not be a committee of the Cabinet.

65. This does not mean that the inclusion of one or more persons who are not Cabinet members or not Ministers in a committee of Cabinet would be fatal to its characterisation as such. The fundamental requirement is that the committee be a committee "of" the Cabinet.

66. A number of matters bear on the question of whether the National Cabinet is in such a relationship with the Cabinet that it may properly be characterised as a "committee of the Cabinet" for purposes of the FOI Act. These include factual matters such as the manner by which it was established, its composition, its relationship with the Cabinet and the manner of its operation, as well as its place in the system of responsible and representative government established under the Constitution. I will address these in the following sections of these reasons.

The establishment of the National Cabinet

67. Counsel for the respondent submitted that "the one and only essential feature of a federal Cabinet committee is that it has been established as such a Cabinet committee by the Australian Prime Minister and this is how the National Cabinet was established". Counsel also submitted that the Prime Minister had the ability "to determine what a cabinet committee is" and that the ability of the Prime Minister to establish cabinet committees is a significant matter.

68. This seemed tantamount to a submission that any committee may be a "committee of the Cabinet" for the purposes of the FOI Act merely because the Prime Minister of the day has purported to establish it as such. This premise is unsound. For the reasons already given, the expression "committee of the Cabinet" has its statutory meaning and it is not possible for the Prime Minister to establish by designation a group of persons as a committee of the Cabinet and for s 34(1)(b) to apply to it, if the committee does not otherwise answer the statutory description. But in any event, as will be seen, the evidence does not support a conclusion that the Prime Minister "established" the National Cabinet.

69. All the evidence provided to the Tribunal concerning the establishment of the National Cabinet was secondary in nature. That is to say, the Tribunal did not receive evidence from any primary participant who could give first hand evidence of its establishment.

70. It is understandable that the applicant could not himself provide such evidence as he was not involved in its establishment. Nor was Dr Dorling who, as indicated, is employed by the applicant as his political adviser.

71. Although the respondent deposed that he attends all Cabinet meetings and all meetings of the National Cabinet, he did not depose to having attended the meeting of the Council of Australian Governments (COAG) held on 13 March 2020 at which, it seems, the decision was made to establish the National Cabinet. In fact, he did not depose to having attended any meetings of COAG. Ms McGregor, who is the First Assistant Secretary, Cabinet Division in DPMC, did not claim to have attended the COAG meeting on 13 March 2020 or even the meetings of the National Cabinet which have occurred subsequently.

72. The Prime Minister and any of the other persons who resolved to establish, or witnessed the establishment of, the National Cabinet are persons who could have provided detailed and first hand evidence of the establishment of the National Cabinet but an affidavit from such a person was not provided.

73. It is very evident that it was the need for urgent action to address the COVID-19 pandemic which was the impetus for the establishment of the National Cabinet.

74. The first source of the secondary material provided to the Tribunal is the Statement of Agreed Facts. It records that, at the press conference on 13 March 2020 which followed the COAG meeting held that day, the Prime Minister announced that the "Commonwealth, State and Territory Governments had resolved to form the "National Cabinet"". The T documents included a transcript of the Prime Minister's statement in making that announcement:

> As a result of the advice which was pulled together today by the [A]HPPC, *what we have resolved to do is form a National Cabinet* to deal with the national response to the Coronavirus. The National Cabinet will be made up of the Premiers, Chief Ministers and myself. We will be meeting on a weekly basis to ensure that we get a coordinated response across the country to the many issues that relate to the management of the Coronavirus.
>
> First and foremost, that is about the health and wellbeing of Australians and managing the health response.
>
> ...
>
> And so the members of that Cabinet is who you see before you here today and we are going to be working very closely together to ensure there's a consistency of response, that there's a coordination of response. ....
>
> The National Coordinating Mechanism, which I referred to before, will be feeding up to the National Cabinet every week, issues that can then be coordinated between States and Territories. ... Each and every State and Territory that is represented here is completely sovereign and autonomous in the decisions that they make. But what we've agreed to do together is to work together and be unified and to be as consistent and coordinated as possible in our national response. ...
>
> *[W]e have agreed today to join together in a National Cabinet.* A National Cabinet for an emergency response to these issues that enables us to manage this on a day to day, week to week basis ... And the National Cabinet working together with each of the constituent governments, their Cabinets will continue to do all of their jobs.
>
> (Emphasis added)

75. Although the Prime Minister did not say expressly that the decision to establish the National Cabinet had been made at the COAG meeting, that seems to be the natural inference arising from the fact that he made the announcement in the press conference in which he announced the COAG outcomes. That inference is supported by other evidence (albeit also of a secondary kind). As is apparent, the Prime Minister did not say that he himself, or the Federal Cabinet, had decided to establish the National Cabinet, or that either had established the National Cabinet. He referred instead to a joint resolution to do so.

76. Also on 13 March 2020, the Prime Minister, the federal Minister for Health and the Commonwealth Chief Medical Officer issued a media release, which is the second source of secondary evidence. The media release stated (relevantly):

> A new National Cabinet, made up of the Prime Minister, Premiers and Chief Ministers has been set up and will meet at least weekly to address the country's response to the Coronavirus, COVID-19.
>
> The AHPPC, led by the Commonwealth's Chief Medical Officer and comprising the Chief Health and Medical Officers from each jurisdiction, together with the National Coordination Mechanism convened by the Department of Home Affairs will be the primary bodies that will advise the National Cabinet. The National Coordination Mechanism will work across all jurisdictions, industry and key stakeholders to ensure a consistent approach to managing the impacts of this pandemic beyond the immediate health issues.

77. AHPPC is the acronym for Australian Health Protection Principal Committee.

78. The Statement of Agreed Facts includes agreement that the DPMC had, in a public statement in May 2020, confirmed that it was COAG which had made the decision to establish the National Cabinet:

> On 13 March 2020 COAG decided to establish a National Cabinet, comprising the Prime Minister, Premiers and Chief Ministers, to coordinate Australia's response to COVID-19 across State and Territory Governments and the Commonwealth Government.

79. The Addendum to the Cabinet Handbook issued by the Department of Premier and Cabinet in Tasmania, which Ms McGregor annexed to her affidavit (the Tasmanian Cabinet Handbook), states:

> [11.1.1] The National Cabinet was established by the Council of Australian Governments 48th Meeting to deal with the national response to the Coronavirus pandemic (COVID-19) ...

80. All this material suggests that it was COAG on 13 March 2020 which resolved to establish the National Cabinet and which did establish it. However, there is some other evidence which suggests that the decision to establish the National Cabinet was not made by COAG or at the COAG meeting. In her affidavit, Ms McGregor deposed with respect to the establishment of the National Cabinet:

> [26] The establishment of the National Cabinet was agreed to by the Prime Minister and State and Territory Premiers/Chief Ministers at a meeting held *after* the Council of Australian Governments (COAG) meeting on 13 March 2020.
>
> (Emphasis added)

81. Ms McGregor's statement (which is at least a second hand account) that the decision to establish the National Cabinet was made *after* the COAG meeting is not supported by any other evidence. In particular, it appears to be inconsistent with the inferences arising from the reports of the Prime Minister's statements set out above and inconsistent with the statement issued by DPMC in May 2020, to which reference has just been made.

82. In his affidavit at [14], the respondent deposed that "[t]he Prime Minister, with the agreement of State and Territory leaders, established National Cabinet". This evidence implies that it was the Prime Minister, albeit with the agreement of the Premiers and Chief Ministers, who established the National Cabinet, rather than it being established by the collective decision at COAG or by the COAG participants. There are obvious shortcomings in the manner in which this evidence was given, including:

(a) the respondent does not claim to have been at the COAG meeting on 13 March 2020, or any other meeting, or to have been present on any other occasion when the decision was made to establish the National Cabinet. His evidence is plainly of a secondary kind; and

(b) the conclusionary manner in which the respondent expressed the evidence, that is, without deposing to any primary facts.

83. Moreover, there is an absence of primary evidence to support the respondent's statement and it is inconsistent with Ms McGregor's statement that the national Cabinet was established by joint agreement.

84. It is unfortunate that the evidence which the parties and, in particular the respondent, have provided as to the establishment of the National Cabinet is secondary in nature, when primary evidence must be available. In many respects, a claim that a document is exempt from access under the FOI Act is similar to a claim that a document should not be produced on discovery, or adduced into evidence, on the grounds of public interest immunity, whether at common law or pursuant to s 130 of the *Evidence Act 1995* (Cth). The authorities with respect to such claims have emphasised the need for proper supporting evidence. By way

of example, in *State of Victoria v Brazel* [2008] VSCA 37; (2008) 19 VR 553 at [68], the Court of Appeal in Victoria said:

> ... The claim for immunity must be articulated with rigour and precision, and supported by evidence demonstrating the currency and sensitivity of the information, so as to constitute a compelling case for secrecy. Anything less will be unlikely to suffice.

85. To similar effect, Flick and Perram JJ stated in *Jaffarie v Director-General of Security* [2014] FCAFC 102; (2014) 226 FCR 505 at [26]:

> The "*weight*" to be given to the reasons expressed in support of a claim to privilege will, obviously enough, depend upon the facts and circumstances of each individual case and the persuasiveness of the reasons advanced. Less "*weight*", it may be expected, will be given to reasons expressed as mere assertions and conclusions than the "*weight*" to be given to a course of reasoning, soundly based upon such facts as it is possible to disclose, consistent with the maintenance of the privilege. Some claims may be more susceptible to explanation than others. But those making a claim for privilege, including claims for public interest immunity privilege founded upon concerns as to national security, should be forever conscious of the need to explain the basis upon which the claim is made as fully and as openly as possible – always also conscious of the need to not disclose the very information for which the privilege is claimed. In some cases, perhaps, little information can be publicly disclosed and a court may of necessity have to receive affidavit evidence in confidence. But the confidence and reliance that a court can place upon reasons advanced in support of claims for privilege depend to a very great extent upon the care with which those reasons have been advanced.
>
> (Emphasis in the original)

86. The evidence in this case did not meet the standard suggested by these authorities.

87. On the evidence provided, I am not willing to accept Ms McGregor's evidence insofar as it suggests that the National Cabinet was established *after* the COAG meeting. That assertion is not supported by any other evidence and is inconsistent with the inferences naturally arising from the agreed facts. Nor am I willing to accept the respondent's evidence, given its identified shortcomings and given its inconsistency with the weight of the other evidence. I find that the National Cabinet was established by a collective decision of COAG on 13 March 2020. This, ultimately, was the submission of counsel for the respondent.

88. While it may be accepted that the agreement of the Prime Minister as one of the COAG participants was necessary for the establishment of the National Cabinet, it was not the Prime Minister who established it. I am also satisfied that the Federal Cabinet did not establish the National Cabinet.

89. My conclusion as to the establishment of the National Cabinet, and my rejection of the evidence of Ms McGregor and the respondent to the contrary, is supported by my inspection of the attachment to the minutes of the meeting of the National Cabinet on 15 March 2020.

The composition of the National Cabinet

90. The evidence to which I have already referred indicates that the National Cabinet is comprised of the Prime Minister, the Premiers of each of the States, and the Chief Ministers of the two Territories. Although the evidence indicates that other persons do attend meetings of the National Cabinet, there was no evidence to the effect that they do so as *members*. The evidence suggests instead that these other persons attend in order to assist the individual members or the National Cabinet as a whole. I am therefore satisfied that it is the Prime Minister, the Premiers and the Chief Ministers who comprise the National Cabinet. That is to say, of the nine persons who comprise the National Cabinet, the Prime Minister is the only one who is also a member of the Cabinet.

91. The evidence also indicates (and I find) that the Prime Minister acts as the convenor of the National Cabinet.

92. It is evident that each person is a member of the National Cabinet by reason of the office he or she holds, being Prime Minister, Premier or Chief Minister, as the case may be. They are not chosen by the Prime Minister. That is to say, and as put by counsel for the applicant, the selection of the members of the National Cabinet is not at the discretion of the Prime Minister. Nor is there any evidence that the Prime Minister "appoints" persons as members of the National Cabinet. These matters immediately differentiate the National Cabinet from the committees of the Cabinet to which reference was made earlier, as the Prime Minister is responsible for the membership of those committees and determines and regulates all Cabinet arrangements for the Federal Government.

93. Another point of distinction is that, unlike other Cabinet committees, the National Cabinet is not comprised, at least substantially, of Ministers of the Federal Government. It is not even comprised of persons belonging to the same government, let alone the same political party.

The reliance on historical precedents

94. Ms McGregor seemed to recognise the difficulty which the composition of the National Cabinet posed for the respondent's case by deposing that the establishment of "Cabinets" with limited membership and with the inclusion of State Premiers, or persons who were not Ministers or even members of the Australian Parliament, was not unprecedented. She deposed:

> [19] Over time, Cabinet committees have taken on many forms. For example, during times of National crisis, such as during World War II, special purpose Cabinet committees were established. Prime Ministers Menzies and Curtin each established a War Cabinet consisting of a limited selection of Commonwealth Ministers. On 4 February 1942 the State Premiers were invited to and attended a Curtin Government War Cabinet meeting. On 27 August 1942, Prime Minister Curtin announced that 'a leading member of the Opposition' Sir Earle Page would be appointed a member of the War Cabinet, due to his experience. In the 1950s, a wide variety of Cabinet committees were formed and officials regularly participated.

95. Ms McGregor did not provide any other examples to support her claim that the Federal Cabinet or its committees have in the past comprised (as members) persons who were not Ministers in the Government of the day.

96. In his affidavit, the respondent said that he agreed with the matters to which Ms McGregor had deposed.

97. Counsel for the respondent sought to rely on [19] in Ms McGregor's affidavit by submitting in his written outline of submissions:

> Whilst Cabinet committees have usually consisted of Federal Ministers, this has not always been the case (*McGregor affidavit [19]*)

98. The implication in the evidence and the submission seemed to be that the term "committee of the Cabinet" should be construed in the light of this historical experience. However, apart from any other consideration, the respondent's submission breaks down at the evidential level.

99. The evidence of Mr Dorling (which I accept) and the historical records concerning the matters to which Ms McGregor referred indicate:

(a) all of the members of the War Cabinets during World War II in the five governments led successively by Prime Ministers Menzies, Fadden and Curtin were Ministers in the Federal Government at the time of their membership;

(b) persons who were not members (such as the Chiefs of Staff of the Australian Armed Services, the Secretary of the Department of Defence Coordination and other senior officials) did attend War Cabinet meetings to provide advice when required, but none was a *member* of the War Cabinet.

(c) State Premiers attended by invitation one meeting of the War Cabinet, namely the meeting on 4 February 1942, but not as *members* of the War Cabinet.

(d) Sir Earle Page was not a member of the War Cabinet in the Government led by Prime Minister Curtin, and Prime Minister Curtin did not make the announcement on 27 August 1942 which Ms McGregor attributes to him. Rather, Prime Minister Curtin invited Sir Earle Page to attend meetings of the War Cabinet "in a consultative capacity". The documents indicate that Prime Minister Curtin issued this invitation having regard to the recent international experience of Sir Earle Page;

(e) for similar reasons, Prime Minister Curtin also invited Sir Earle Page to be a member of the Advisory War Council, but the Council was not the War Cabinet or even the Cabinet. It was instead a body comprised of the Prime Minister, senior members of the Federal Government and senior members of the Opposition;

(f) the members of the Cabinet committees established by Prime Minister Menzies at the commencement of the 1950's were all Ministers in his government;

(g) officials may have attended, and even participated in, Cabinet committees but not as members of the Cabinet or of Cabinet committees.

100. In his oral submissions, counsel for the respondent accepted that Ms McGregor's affidavit "would be better worded if [in relation to Sir Earle Page] the words 'appointed a member of' were struck through and replaced with the words 'asked to attend'". Counsel thereby

accepted that the attendances of Sir Earle Page at the War Cabinet meetings were not as a member of that Cabinet.

101. Whilst counsel did not say so expressly, he did not contest the appropriateness of the propositions set out above concerning the membership of Cabinet committees and seemed implicitly to accept that the statement in his written outline of submissions set out above could not be sustained.

102. In any event, counsel did not point to any evidence other than Ms McGregor's [19] as supporting his submission that the committees of the Cabinet have not comprised Federal Ministers.

103. It follows that I reject the evidence of Ms McGregor and the respondent about these matters. As indicated earlier, the context in which the FOI Act was enacted seems to have been that Cabinet committees would be comprised of members of the Cabinet or at least of the outer Ministry.

The discretion of the Prime Minister of the day

104. In addition to emphasising Ms McGregor's statement in [19] that, over time, Cabinet committees have taken on many forms, counsel for the respondents referred to the statement of Gleeson CJ in *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 660:

> [R]esponsible government ... is a concept based upon a combination of law, convention and political practice. The way in which that concept manifests is not immutable.

One may accept that that is so, but the Chief Justice's statement can hardly be regarded as supportive of the proposition for which the respondent contends presently.

105. Counsel also referred to the Chapter written by Professor Patrick Weller in "*Constitutional Conventions in Westminster Systems, Controversies, Changes and Challenges*", edited by Galligan B and Brenton S (Cambridge University Press, 2015), entitled "*Cabinet Government*". Professor Weller expressed the view that "all the Cabinet rules, handbooks, guidelines and codes of conduct are essentially the Prime Ministers' prerogative to change, alter and interpret" and that:

> Cabinet is valuable because of its flexibility. Prime ministers can adjust the working and the forums in the way that they see best. They do not have to ask if the procedures are somehow right, but rather whether they work in reaching a properly informed decision.

106. As is evident, Professor Weller seems to have been speaking at a level of considerable generality. There is no indication that he was expressing views with respect to circumstances like those presently under consideration. In particular, there is no indication that Professor Weller was intending to suggest that the features of a Cabinet and Cabinet Government discussed in the authorities to which reference has already been made are not applicable. In any event, the Professor's views cannot alter the meaning of the statutory expression "committee of the Cabinet", as properly construed.

107. In my view, it may be accepted that the Prime Minister of the day does have a discretion in the establishment of Cabinet committees, including as to their composition, number, terms of reference, relationship with the Cabinet and so on. It should also be accepted that the Parliament intended the term "committee of the Cabinet" should accommodate that flexibility. However, as indicated, the evidence does not provide a single example of a cabinet committee whose membership comprised persons who were not Ministers in the Government of the day, let alone not members of the Australian Parliament. More pertinently to the present case, it does not provide evidence of a single instance of a committee of the Cabinet comprised substantially of persons who are not even members of the Australian Parliament. The characterisation of such a committee as a committee of the Cabinet would be inconsistent with entrenched conventions of responsible government, including that the Cabinet is comprised of Ministers who are responsible and answerable to the Parliament. Counsel for the applicant referred to these conventions as "120 years of practice". It is reasonable to infer that the FOI Act reflects these understandings.

108. Counsel for the respondent sought to diminish the significance of the applicant's reference to "120 years of practice" by submitting that, before the appointment of the Hon Julia Gillard as Prime Minister, there had been 109 years of "convention and practice" that females could not be appointed as Prime Minister of Australia and that, until the Hon Kenneth Wyatt MP was appointed to the Federal Cabinet, there had been a "practice and convention" of Indigenous persons not being appointed to the Federal Cabinet. I regard the issue raised by this submission as a diversion which it is not necessary to address in detail. I indicate,

however, that I do not regard the submission as meritorious. It is a logical fallacy to suppose that the occurrence for the first time of an event in political or governmental life is an indication that there has hitherto been a convention (in the sense of an acknowledged norm) that it should not, or may not, happen.

109. I note again that the inclusion of a few persons in a committee otherwise established as, and having the character of, a committee of the Cabinet may not be fatal to its status as such. It is not necessary for the purposes of this decision to resolve that question. It is sufficient to state my view that the circumstance that the nine member National Cabinet comprises only one person who is a member of the Cabinet is a significant matter pointing against the National Cabinet being a "committee of the Cabinet" for the purposes of the FOI Act.

Control of membership by the Prime Minister?

110. It is convenient to refer at this point to the submission of counsel for the respondent that the Prime Minister has complete control of the membership of the National Cabinet:

> [22] The Respondent's evidence clearly demonstrates (i) the Prime Minister established the National Cabinet and (ii) the Prime Minister could, if he wished to do so, change its membership by, for example, deciding that one or more Premiers or Chief Ministers would no longer belong to it (*McGregor affidavit [22] – [32]*). Contrary to the applicant's submissions ... the Prime Minister therefore has the ability to exert complete control over membership of the National Cabinet.

111. Contrary to counsel's claim, [22]-[32] of Ms McGregor's affidavit do not support his submission. In [22]-[25], Ms McGregor deposed to matters bearing upon Cabinet committees generally:

> [22] The Prime Minister determines the membership, chair, deputy chair, and terms of reference of each Cabinet committee. Cabinet committees are usually established either around a subject area, such as national security, or around a general function of government, such as expenditure. Temporary or ad-hoc Cabinet committees may also be established by the Prime Minister to carry out particular tasks.
>
> [23] Historically, in Australia there have been both (i) ad hoc committees of Cabinet, which were established at the direction of the Prime Minister to handle a specific question and ceased to exist when conclusions were reached on this question and submitted to the Cabinet and (ii) more permanent, standing committees of Cabinet. For instance, even going back to the 1976 Cabinet Handbook, there was clear guidance that ad hoc committees of Cabinet would be 'established from time to time and the Prime Minister will indicate the membership of each committee'.

[24] This establishment of Cabinet committees has sought to assist successive governments to efficiently and effectively respond to government priorities. Whilst some Cabinet committees, such as the National Security Committee and Expenditure Review Committee are regularly established by Prime Ministers, other Cabinet committees have been established to respond to particular issues or priorities that emerge from time to time.

...

[25] As detailed further below, I consider the decision of the Prime Minister to establish the National Cabinet to respond to the COVID-19 pandemic and its consequences, is consistent with these principles.

112. Then, under the heading "National Cabinet" and the subheading "*Establishment*", Ms McGregor deposed:

[26] The establishment of the National Cabinet was agreed to by the Prime Minister and State and Territory Premiers/Chief Ministers at a meeting held after the Council of Australian Governments (**COAG**) meeting on 13 March 2020.

[27] Terms of Reference for the National Cabinet were agreed to by the National Cabinet on 15 March 2020 and set out the working arrangements, including that the committee would be established as a committee of the Commonwealth Cabinet, specifically as a Cabinet Office Policy Committee and that its deliberations would remain confidential.

[28] Cabinet Office Policy Committees consider major policy issues on an as needed basis, including early stage consideration of strategic issues, specialist advice on nationally significant issues and rapidly evolving situations.

[29] The National Cabinet is responsible for coordinating national actions in Australia in response to Australia's coronavirus pandemic, including coordination of Australia's health response and the ongoing recovery from both economic and broader societal impacts of the pandemic.

[30] In establishing the National Cabinet, consideration was given to the importance of the sovereignty of States and Territories, and the Commonwealth, and it was agreed that both the Commonwealth and States and Territories would utilise their existing Cabinet processes as and when appropriate. In practice this means that leaders are able to determine which of the matters before National Cabinet may require endorsement or agreement in their own jurisdiction, prior to any final decisions being agreed.

[31] The National Cabinet held its first meeting on 15 March 2020 when it formally agreed that for the purposes of decision making in relation to the pandemic, Australian Health Protection Principal Committee (**AHPPC**) and the National Coordination Mechanism (**NCM**) would be the National Cabinet's primary advisory bodies.

[32] On 15 March 2020, the Prime Minister announced that National Cabinet 'has now been established formally under the Commonwealth government's cabinet guidelines'. The Prime Minister stated that National Cabinet 'has the status of a meeting of Cabinet that would exist at a federal level' ...

113. I will return to Ms McGregor's references to a "Cabinet Office Policy Committee" in the next section of the reasons.

114. For the moment, I note that, contrary to counsel's submission, Ms McGregor did not depose that the Prime Minister established the National Cabinet. As previously noted, she deposed instead that the establishment of the National Cabinet *was agreed to* by the Prime Minister and the State and Territory Premiers/Chief Ministers at a meeting held on 13 March 2020 *after* the COAG meeting, at [26].

115. In relation to the submission that the Prime Minister could, at his discretion, change the membership of the National Cabinet and had the ability "to exert complete control over [that] membership", it is true that Ms McGregor deposed that it is the Prime Minister who determines "the membership, Chair, Deputy Chair, and terms of reference of each Cabinet committee", at [22]. However, that can be taken to be applicable to the National Cabinet only if it be accepted that the National Cabinet is a Cabinet committee. This is the very matter in issue. Counsel's submission involved therefore a form of "boot straps" or circular reasoning. There is, in any event, no evidence that the Prime Minister could decide unilaterally that one or more Premiers or Chief Ministers would no longer be a member of the National Cabinet. In fact, Ms McGregor's evidence (again secondary in nature) seems to be to the contrary as she deposed in [33] that "the precise structure, shape and operation of the National Cabinet *are matters for its members*" (emphasis added).

116. Ms McGregor's evidence that the National Cabinet determined its own shape, structure and operation is confirmed by later events, namely, the decision made by the National Cabinet on 4 September 2020, on which the respondent replaced reliance in a different context. I will return to that decision later in these reasons.

117. As will be seen, the term "shape, structure and operation" used by Ms McGregor is that used in the Cabinet Handbook (13th Edition) in relation to the Cabinet itself. However there is one important difference. In the case of the Cabinet, the Handbook specifies that it is the Prime Minister of the day who determines its "shape, structure and operation", whereas Ms McGregor deposed that the "precise structure, shape and operation of the National

Cabinet" are matters for its members. She seemed thereby to draw a significant distinction between it and the Cabinet.

118. The submission that the Prime Minister exercises complete control over the membership of the National Cabinet is also contra indicated by the Tasmanian Cabinet Handbook which, with respect to the National Cabinet, states in [11.2.1]:

> The Premier is Tasmania's representative on the National Cabinet. The Premier may delegate another Minister to represent Tasmania on the National Cabinet as needed.

119. It seems reasonable to infer that the other Premiers and Chief Ministers may also delegate another Minister to represent their State or Territory, as the case may be, in the National Cabinet. There is no primary evidence indicating that they may do so only with the permission of the Prime Minister or that the nomination of a delegate by a Premier or a Chief Minister to the National Cabinet is subject to some form of ratification, approval or veto by the Prime Minister. Given the character and purpose of the National Cabinet, the existence of such a requirement seems improbable. In fact, it is probable that the Premiers and Chief Ministers would be surprised to hear that their membership of the National Cabinet is entirely at the discretion of the Prime Minister and that, to use the expression of counsel for the respondent, it is the Prime Minister's "gift".

120. For these reasons, I am satisfied that the composition and membership of the National Cabinet points against it being a committee of the Cabinet.

The relationship of the National Cabinet with the Cabinet

121. The inter-relationship between the National Cabinet and the Cabinet is an important consideration in determining whether the National Cabinet is a committee of Cabinet.

122. As to this relationship, counsel for the respondent submitted:

> Cabinet committees' roles [are] to assist the federal cabinet, when we are talking about the federal level, to make decisions. The evidence reveals historically, there have been a range of diverse committees established to assist Cabinet to make decisions. And so rather than the National Cabinet being something that needs to sit at the apex of decision-making in a single polity to be a committee of cabinet, it needs to be considered in the historical and conventional context of being something to assist the federal cabinet to make appropriate decisions. And that's entirely what the National Cabinet does, in our submission.

123. The logic of the syllogism implicit in this submission does not need to be addressed. As will be seen, the evidence does not in any event support a conclusion that the role of the National Cabinet is to assist the Federal Cabinet, let alone that that is its entire function and purpose. In fact, the evidence that it exists to assist the Federal Cabinet to make appropriate decisions is scant.

The relevant time

124. I commence by stating my view that the Tribunal is to consider whether the National Cabinet was a committee of the Cabinet at the time of the meetings to which the subject documents refer. In the case of the first application, that is 29 May 2020. In the case of the second application, it is the time of the meeting or meetings to which the minutes refer. Although, as previously noted, Mr Hupalo did not identify the date of the meeting(s), Ms McGregor deposed (and I accept) that the minutes are those of the National Cabinet meeting which took place on the 15 March 2020.

125. In relation to this issue, counsel for the respondent drew attention to *Shi*. In that case, the High Court held that the review by the Tribunal for the purposes of s 303 of the *Migration Act 1958* (Cth) of whether a person is a fit and proper person to give migration assistance was to be made by reference to the state of affairs at the time of the Tribunal's own decision, and not that pertaining at the time of the decision under review. However, as the reasons of all members of the Court reveal, the presence of a temporal limitation in the subject matter of the decision under review may indicate that the Tribunal is to carry out its review by reference to circumstances at an antecedent time. By way of example, Kiefel J (with whom Crennan J agreed on this issue), after noting at [141] that the task of the Tribunal was to reach its own conclusion as to the correct decision by conducting an independent assessment and determination of the matters necessary to be addressed and that its exercise of power was not dependent upon the existence of any error in the original decision, continued:

> [142] In considering what is the right decision, the Tribunal must address the same question as the original decision-maker was required to address. *Identifying the question raised by the statute for decision will usually determine the facts which may be taken into account in connection with the decision.* The issue is then one of relevance, determined by reference to the elements in the question, or questions, necessary to be addressed in reaching a decision. It is not to be confused with the Tribunal's general procedural powers to obtain evidence. The issue is whether

> evidence, so obtained, may be taken into account with respect to the specific decision which is the subject of review.
>
> [143] Where the decision to be made contains no temporal element, evidence of matters occurring after the original decision may be taken into account by the Tribunal in the process of informing itself. Cases which state that the Tribunal is not limited to the evidence before the original decision-maker, or available to that person, are to be understood in this light. *It is otherwise where the review to be conducted by the Tribunal is limited to deciding the question by reference to a particular point in time.*
>
> (Emphasis added and citations omitted)

126. It is trite to say that a record of a committee will be an official record of a committee of the Cabinet only if the committee had that status at the time of the proceeding recorded in the document. This requires necessarily that the circumstances pertaining at that time be considered. Accordingly, a temporal limitation of the kind to which Kiefel J referred is implicit in s 34(1)(b) of the FOI Act.

127. In *Waubra Foundation v Commissioner of Australian Charities and Not-for-Profits Commission* (2017) AATA 2424, this Tribunal considered the application of *Shi* in the review of a decision concerning a legislative provision in which a temporal limitation was also implicit – see [56]-[88]. It is not necessary to repeat the reasoning contained therein. I also note that, as was the case in *Waubra*, the conclusion that the Tribunal was to carry out its review by reference to the facts and circumstances pertaining at an antecedent time does not mean that it is confined to considering only that evidence which was in existence at that time.

128. My conclusion as to the relevant time means, amongst other things, that it is the 13th Edition of the Cabinet Handbook, and not the 14th, which is pertinent presently to the assessment of the relationship between the Cabinet and its committees. The 14th Edition of the Handbook, which commenced on 16 October 2020, will be probative only insofar as it sheds light on the position at the antecedent time.

The evidence

129. Again the evidence provided to the Tribunal concerning the relationship between the National Cabinet, on the one hand, and the Federal Cabinet, on the other, is mainly of a secondary kind. Much of it comprised statements of the Prime Minister about the

functioning of the National Cabinet. I will set out below some relevant extracts. I will also refer to the evidence suggesting that the National Cabinet has the status of a "Cabinet Office Policy Committee".

130. However, it is appropriate to note first that, with few exceptions, none of the public statements of the Prime Minister in evidence concerning the National Cabinet contain any explicit reference to it having some inter-relationship with the Federal Cabinet or that its function is to assist that Cabinet to make appropriate decisions.

131. In the press conference following the first National Cabinet meeting on 15 March 2020, the Prime Minister said (amongst other things):

> I want to thank the Premiers and the Chief Ministers for their support in bringing together this National Cabinet. *It has now been established formally under the Commonwealth government's cabinet guidelines. And it has the status of a meeting of Cabinet that would exist at a Federal level, as does the meetings of the AHPPC and the National Coordinating Mechanism, which is feeding up into those arrangements.*
>
> ... The National Cabinet ensures that we have some coordination, but ultimately States and Territories will make their own decisions.
>
> (Emphasis added)

132. The Tribunal has not been provided with any primary evidence indicating how it was that the National Cabinet had been "established formally" under the Commonwealth Government's cabinet guidelines, evidencing such establishment or indicating the basis upon which the Prime Minister asserted that it has "the status of a meeting of the Cabinet that would exist at Federal level". On one view, the statement of the Prime Minister may be no more than a statement of his belief, and not a statement of fact. Alternatively, the statement may indicate no more than that it had been agreed that the National Cabinet was to operate in accordance with the Cabinet guidelines. In this respect, it may be pertinent that the Prime Minister did not say that the National Cabinet was a committee of the Cabinet, or that it operated under the Cabinet, or even that it stood in any particular relationship with the Cabinet.

133. It is also to be noted that the Prime Minister referred to the role of the National Cabinet in promoting coordination of action amongst the States and Territories while stating that it was

for the States and Territories to make their own decisions, with the implication that they were not bound to act in accordance with decisions of the National Cabinet.

134. At the press conference following a meeting of the National Cabinet on 24 March 2020, the Prime Minister stated:

> [I]n taking these decisions, *States and Territories are very aware of their responsibilities of how they need to take actions to enforce these measures*. So I'll refer you to them about how they will achieve that. But they haven't taken these decisions – *and I want to stress, these are decisions that are being taken by the State and Territory Premiers and Chief Ministers with myself as the Prime Minister who convenes the National Cabinet, these are not decisions being made by the Federal Cabinet* and instructed to the States and Territories. That's not how the National Cabinet works. These are decisions being taken together, heads of governments, to form these views. And in these areas in particular, it is the States and Territories that have the lead and the primacy and so they are coming together and setting these in place.
>
> (Emphasis added)

135. As is apparent, in these statements the Prime Minister seemed to emphasise that the decisions of the National Cabinet (which were announced publically) were not decisions of the Federal Cabinet, and were made independently of it, with the implication that the Federal Cabinet did not have responsibility for them. Further the Prime Minister conveyed that it was for the States and Territories to implement the decisions and not the Commonwealth. Thus, the Prime Minister distinguished between the National Cabinet and the Federal Cabinet in a way which did not suggest that the National Cabinet was a committee of the Cabinet.

136. The position described by the Prime Minister seems consistent with that stated in the addendum to the Tasmanian Cabinet Handbook at [11.1.3]:

> Each State and Territory that is represented on the National Cabinet is *completely sovereign and autonomous*. However, States and Territories have agreed to work together and be unified *and to be as consistent and co-ordinated as possible* in our national response.
>
> (Emphasis added)

137. Following a meeting of the National Cabinet on 29 April 2020, the Prime Minister stated in a press conference:

> So we are looking at what the bigger picture of success is when it comes to COVID-19 and we're working to all of that together as a National Cabinet, *our own Cabinet here at a Commonwealth level* will be meeting again today as we do every week to ensure that we are focused on all elements of the recovery and road back.

(Emphasis added)

138. At the press conference following the meeting of the National Cabinet on 5 May 2020, the Prime Minister stated:

> Well, I can't pre-empt decisions of Friday. The National Cabinet, *particularly on these issues where the Commonwealth has no direct authority at all*, our job here is to try and ensure as much consistency across State and Territory jurisdictions as possible. .... And so what you can expect on Friday is that, again, [we] will seek to have as consistent a national position as possible. *But ultimately, each State and Territory are the arbiters of their own position.* But I have no doubt they will seek to do that in as consistent way as possible.
>
> (Emphasis added)

139. This statement made plain the Prime Minister's view that the National Cabinet was addressing some matters over which the Federal Cabinet did not have direct responsibility. There is no indication in the evidence before the Tribunal that this understanding by the Prime Minister was incorrect. The differences in the responsibilities of the National Cabinet and the Cabinet seem inconsistent with a view that the National Cabinet was a committee of Cabinet whose function was to provide assistance to the Cabinet. The statement also seemed to imply that, whatever decision the National Cabinet made, it was still for each State and Territory to decide whether it would act in accordance with the agreed position.

140. At the press conference following the National Cabinet meeting on 29 May 2020, the Prime Minister announced the agreement of the National Cabinet to end COAG, saying:

> The other thing we agreed today is a major change in terms of how COAG will work in the future. And, if I can move to that chart, COAG is no more. It will be replaced by a completely new system and that new system is focused on the success that has been yielded by the operation of the National Cabinet. What we'll be doing is keeping the National Cabinet operating and, particularly during the COVID period, we'll continue to meet on a fortnightly basis. In a normal year it would meet on a monthly basis.
>
> ...
>
> Now, how it will be different to the way COAG worked, is the National Cabinet will be driven by a singular agenda, and that is to create jobs. It will have a job-making agenda. And that National Cabinet will drive the reform process between State and Federal cooperation to drive jobs. It will drive a series of Ministerial Cabinet sub-committees, if you like, that will be working in each of the key areas, and this is an initial list of areas and that will be further consulted on with the States ...

141. In his affidavit, the respondent deposed that the National Cabinet had agreed at the meeting on 29 May 2020 that it would replace COAG as the peak intergovernmental body. Without reference to the minutes themselves, I would regard it as improbable that the National

Cabinet as "the peak intergovernmental body", and with the status of such a body, intended that it be a committee of the Cabinet of one governmental entity and, implicitly, subordinate to it. In the interests of not disclosing for the time being anything concerning the content of the minutes of the meeting of 29 May 2020 with respect to the agreement which the respondent attributed to the National Cabinet. I will not detail my conclusion that the respondent's evidence is not supported by the documents.

A Cabinet Office Policy Committee

142. Earlier, I set out [27]-[28] from Ms McGregor's affidavit. In [27], she deposed that the National Cabinet had agreed on 15 March 2020 to be "established as a committee of the Commonwealth Cabinet specifically as a Cabinet Office Policy Committee". In [28], Ms McGregor deposed that "Cabinet Office Policy Committees consider major policy issues on an as needed basis, including early stage consideration of strategic issues, specialist advice on nationally significant issues and rapidly evolving situations".

143. The Addendum to the Tasmanian Cabinet Handbook includes the following statement:

> The National Cabinet is constituted as a Cabinet Office Policy Committee, as provided for in the 'Australian Government Cabinet Handbook' (13th Edition).

144. The Statement of Agreed Facts includes agreement that DPMC had made a public statement in May 2020 which included:

> By the agreement of all members, the National Cabinet is constituted as a Cabinet Office Policy Committee and operates according to longstanding conventions of Cabinet government, including the guiding principles of collective responsibility and solidarity.

145. I do not regard it as an inappropriate disclosure of the content of the subject documents for me to record that the Terms of Reference for the National Cabinet attached to the minutes of the meeting on 15 March 2020 record the National Cabinet as having agreed:

> All proceedings and documentation of the National Cabinet will remain strictly confidential. To this end the National Cabinet will be constituted as a Cabinet Office Policy Committee, as provided for in the Australian Government Cabinet Handbook (13th Edition).

146. I note, however, that there is no reference in the Cabinet Handbook (13th Edition) to "Cabinet Office Policy Committee". It appears therefore that both the Addendum to the Tasmanian

Cabinet Handbook and the Cabinet minute were prepared on the basis of a misapprehension as to the content of the Cabinet Handbook.

147. It may be inferred that, when the Prime Minister referred at the press conference following the first National Cabinet meeting on 15 March 2020, to the National Cabinet having "now being established formally under the Commonwealth Government's Cabinet Guidelines", he was referring to the agreement of the National Cabinet that it be constituted as a Cabinet Office Policy Committee.

148. This evidence, together with that set out above, was the extent of the evidence before the Tribunal as to the relationship between the National Cabinet and the Cabinet.

Assessment of the evidence

149. Earlier in these reasons I set out [2], [4], [5] and [6] of the Cabinet Handbook (13th Edition) from which inferences as to the relationship of the Cabinet with its committees may be drawn. Putting to one side for the moment the evidence concerning a Cabinet Office Policy Committee, the following conclusions are appropriate on the evidence concerning the relationship of the National Cabinet and the Cabinet:

(a) unlike the Cabinet (and, it may be inferred, Cabinet committees), the Prime Minister does not determine the shape, structure and operation of the National Cabinet – cf [2] of the Handbook. There is no evidence at all of the Cabinet, or even the Prime Minister, delegating to, or entrusting the National Cabinet with, any particular function, or even requesting that it provide assistance to the Cabinet;

(b) the National Cabinet does not derive powers from the Cabinet – cf [5] of the Handbook. At the least, there is no evidence that it does so;

(c) decisions of the National Cabinet are not taken to the Cabinet for endorsement – cf [5] of the Handbook. Again, there is no evidence that this occurs;

(d) the Cabinet does not retain the ultimate power of decision over matters decided at the National Cabinet – cf [5] of the Handbook. The Prime Minister's public

statements concerning the nature of the decisions of the National Cabinet is inconsistent with the Cabinet having this power;

(e) decisions of the National Cabinet may be, and are, acted upon by the States and Territories without being endorsed by Cabinet – cf [5] of the Handbook;

(f) there is no evidence that the Cabinet is briefed on the decisions of the National Cabinet – cf [5] of the Handbook. There is not even evidence that copies of the minutes of the National Cabinet are provided to the Cabinet;

(g) the Prime Minister is not responsible for the membership of the National Cabinet – cf [6] of the Handbook;

(h) there is no evidence that the Cabinet may alter a decision of the National Cabinet or ask it to consider a matter further – cf [5] of the Handbook;

(i) decisions of the National Cabinet are not equivalent to, and do not have effect as, decisions of the Cabinet;

(j) the National Cabinet has addressed matters over which the Commonwealth Government had no, or only indirect, legislative authority or responsibility; and

(k) a principal focus of the National Cabinet has been that of promoting the maximum possible coordination and consistency of approach in addressing COVID-19 in particular.

150. The evidence concerning the National Cabinet being established as a Cabinet Office Policy Committee is unfortunately scant. Paragraph [28] of Ms McGregor's affidavit implies that there is more than one such committee but Ms McGregor does not give any further evidence concerning them.

151. On one view, the name "Cabinet Office Policy Committee" implies a committee of the Cabinet office, rather than a committee of the Cabinet itself (otherwise the inclusion of the word "Office" is otiose). I infer, however, that there are committees said to be committees

of the Cabinet which are known as "Cabinet Office Policy Committees". However, whether these are committees of the Cabinet depends on whether, as a matter of substance, they are within the statutory expression "committee of the Cabinet". I note again that a committee does not become a committee of the Cabinet for the purposes of the FOI Act merely by being given that name. Were it otherwise any group of persons could be made a committee of the Cabinet merely by designation. Hence the significance of the Tribunal not having been provided with evidence generally concerning the establishment, composition, reporting lines and so on of the Cabinet Office Policy Committees.

152. Three things do seem clear. First, while it may have been open to the National Cabinet to describe itself as a Cabinet Office Policy Committee, it could not by itself constitute itself as a committee of the Cabinet for the purposes of the s 4 definition.

153. Secondly, the respondent has not provided any evidence of action taken after the meeting of 15 March 2020 to give effect to the decision of the National Cabinet that it be constituted as a Cabinet Office Policy Committee. That is to say, even if there had been an intention that the National Cabinet be a Cabinet Office Policy Committee, there is no evidence before the Tribunal to indicate that effect was given to that intention.

154. Thirdly, the evidence before the Tribunal suggests that the National Cabinet was much more than a policy committee for the Federal Cabinet. As the Prime Minister noted, a primary purpose of the National Cabinet is the promotion of a coordinated approach amongst the States and Territories and the addressing of matters over which the Commonwealth does not have direct responsibility.

155. In my view, the references to the National Cabinet being constituted as a Cabinet Office Policy Committee do not point persuasively to it being a committee of the Cabinet.

The Cabinet Secretary

156. The Cabinet Handbook indicates that the Cabinet Secretary is the person "appointed by the Prime Minister to manage the day-to-day procedural and operational matters of the Cabinet and any Cabinet committees", para [11]. The importance of the Cabinet Secretary in the

functioning of the Cabinet and of Cabinet committees is indicated, amongst other things, by the following provisions in the Cabinet Handbook:

> 12. The Cabinet Secretary attends all meetings of the Cabinet and Cabinet committees.
>
> 13. Through delegations from the Prime Minister, the Cabinet Secretary has the authority to:
>
> (a) provide authority to ministers to bring items forward for consideration by the Cabinet or a Cabinet committee
>
> (b) finalise the Cabinet and Cabinet committee agendas
>
> (c) maintain and enforce the integrity of Cabinet rules and processes
>
> (d) working with Ministers and the Department of the Prime Minister and Cabinet (PM&C) to uphold the quality and timeliness of documents coming forward for the Cabinet's consideration
>
> (e) recording deliberations of Cabinet and Cabinet committee meetings and authorising Cabinet minutes
>
> (f) approve absences of Cabinet ministers
>
> (g) deal with practical issues regarding the co-option of non-Cabinet ministers and assistant ministers, and the attendance of officials.
>
> 14. The Cabinet Secretary is also responsible for advising the Prime Minister on:
>
> (a) appointments made by the Cabinet, including Board appointments and appointments of Government, and other appointments as required; and
>
> (b) the forward programme of the Cabinet and Cabinet committee meeting dates.
>
> ...
>
> 82 The Cabinet Secretary, in consultation with the Prime Minister, approves the agenda for each Cabinet or Cabinet committee meeting. The Cabinet Division issues agendas to Ministers as early as possible and at least one week in advance of a meeting. The agenda advises the matters to be considered, the Minister responsible for each item and any co-opting arrangements.

157. Quite apart from the references to the Cabinet Secretary in the Cabinet Handbook (both the 13th and 14th Editions), the existence of the office is confirmed by Ms McGregor who deposed in [5] of her affidavit that the Cabinet Division in DPMC exists to support, amongst others, "the Cabinet Secretary". Mr Hupalo made statements to like effect in his letters of 6 August 2020 and 10 August 2020 to the applicant. The minutes of the meetings on 15 March 2020 and 29 May 2020 both contain the notations "Cabinet Secretary" in a manner suggesting that he or she had played some role in their preparation or authorisation.

158. The respondent, who identified himself in his affidavit as Secretary of DPMC (and not as Cabinet Secretary), made no reference at all to the role and function of Cabinet Secretary, let alone to the inter-relationship between the Cabinet Secretary and the National Cabinet. Nor, with the exception of the reference above, did Ms McGregor.

159. I will refer shortly to the evidence concerning the administrative support provided by DPMC to the National Cabinet. For the moment, however, I note that there is no evidence of the Cabinet Secretary, or any other person differently titled, carrying out *in relation to the National Cabinet*, the functions of the Cabinet Secretary stated in [11]-[14] and [82] of the Cabinet Handbook.

Conclusion on the relationship between the National Cabinet and the Cabinet

160. The matters reviewed in this section of the reasons concerning the relationship between the National Cabinet and the Cabinet do not support a conclusion that the former is a committee of the latter.

The manner of operation of the National Cabinet

161. Both the respondent and Ms McGregor provided some evidence as to the manner in which the National Cabinet operated. The respondent deposed that, in addition to attending all Cabinet meetings, he attends all meetings of the National Cabinet. However, the respondent also deposed that he does so along with his State and Territory counterparts and the "Commonwealth and State note takers", at [5].

162. In her affidavit, Ms McGregor deposed to the administrative support which DPMC provides to the National Cabinet, saying:

> [8] Since May 2019 I have had direct responsibility for the operations of the Cabinet including attending Cabinet meetings and preparing minutes (or decisions) of Cabinet meetings. Between May 2019 and 6 March 2021, for example, I have personally attended 81 Cabinet or Cabinet committee meetings as a note-taker for the meetings and I have overseen the lodgement of 2,667 documents to Cabinet and its committees, including National Cabinet. I have also had personal involvement in the development, review and compliance checking of 2,881 Cabinet minutes, including National Cabinet minutes.

163. The manner in which this paragraph of Ms McGregor's affidavit is expressed seemed to imply that there is no relevant distinction between her role and function in relation to preparation for, attendance, and the minute taking at, Cabinet meetings and National Cabinet meetings. It also seemed to assume the truth of the proposition that the National Cabinet is a committee of the Cabinet by referring to the committees of the Cabinet "including National Cabinet". However, counsel for the respondent acknowledged at the hearing that Ms McGregor does not attend meetings of the National Cabinet, whereas Ms McGregor's affidavit indicates that she does attend meetings of the Cabinet and Cabinet committees. Moreover, it seems implicit in this paragraph of Ms McGregor's affidavit that she is not the person who prepares the minutes of the National Cabinet, even if she has some unparticularised "personal involvement" in their "development, review and compliance checking".

164. Ms McGregor's affidavit did not indicate whether she has been solely responsible for the distribution of documents to members of the National Cabinet. For that matter, her evidence does not disclose the means by which documents are distributed to the National Cabinet.

165. However, Section 8 of the Cabinet Handbook (14th Edition) issued by the Prime Minister on 16 October 2020 includes the following statements:

> [160] The Commonwealth Cabinet Office provides secretariat support to the National Cabinet, *in collaboration with State and Territory support areas.*
>
> [161] Note takers will be the Commonwealth Cabinet Secretary, a senior official from the Department of Prime Minister and Cabinet, and a senior official nominated by the States and Territories.
>
> [162] The notebooks remain the property of the Secretary of PM&C and are protected from early public release under the *Archives Act 1983* and cannot be sought under the *Freedom of Information Act 1982* (FOI Act).
>
> ...
>
> [167] To allow adequate time for members to be properly briefed on and consider the matters being brought forward:
>
> (a) National Cabinet Papers and Presentations should be lodged as final with the Secretariat four business days before consideration;
>
> (b) Papers and Presentations should be circulated to all members of the National Cabinet at least two business days before a meeting.
>
> ...

> [169] National Cabinet minutes are circulated to all members of the National Cabinet by the Secretariat.

166. Although there is no express evidence to this effect, I am willing to infer that the arrangements described in these paragraphs of the Cabinet Handbook (14th Edition) also pertained during the currency of the Cabinet Handbook (13th Edition) and, accordingly, were in force in March, April and May 2020. Thus, I accept that there is objective evidence of the administrative support by the Cabinet Division in DPMC of the National Cabinet. It is understandable that, within the Commonwealth Government, it is DPMC which has been entrusted with this responsibility, given its similarity to its existing responsibilities. In this respect, Ms McGregor deposed:

> [14] PM&C is the Commonwealth Department with administrative responsibility for Cabinet matters. As set out in the Cabinet Handbook, the Cabinet Division of PM&C maintains the collection of Cabinet documents for the current government and preserves the Cabinet records of previous governments. PM&C is also the Commonwealth Department with administrative responsibility for intergovernmental relations and communications with State and Territory Governments.

167. Earlier, I referred to the Prime Minister's statement on 15 March 2020 that the National Cabinet "has now been established formally under the Commonwealth Government's Cabinet Guidelines". It may also be pertinent on the present issue to note the Prime Minister's announcement on 13 March 2020 that the principal advising body to the National Cabinet would be the AHPPC, that is a body of medical officers and not, say, DPMC or any Minister in the Federal Government.

168. Finally, of relevance to the manner of operation of the National Cabinet, Ms McGregor deposed:

> **Notebooks and Systems**
>
> [48] The Cabinet Division within PM&C supports the National Cabinet as it does the Cabinet and other Cabinet committees, by providing continuity and impartial support for its operations. Further details of the support the Cabinet Division provides the National Cabinet is set out on pages 30-32 of the Cabinet Handbook.
>
> [49] The Secretary of PM&C is the formal custodian of National Cabinet records. The Cabinet Handbook dictates that members may nominate a senior official to be note takers at National Cabinet meetings, however the notebooks remain the property of the Respondent and are protected from early public release under the *Archives Act* 1983 and cannot be sought under the FOI Act.

> [50] National Cabinet meetings and material are stored in the PM&C maintained document system CabNet. This ensures that authoritative documents are maintained as a record of the National Cabinet.
>
> [51] CabNet is a whole-of-government IT system that facilitates the flow of protected Cabinet information in a secure manner, and supports the running of Cabinet and committee meetings. The minutes for National Cabinet are finalised in CabNet, the same as they are for other Cabinet committees. National Cabinet minutes are circulated outside of CabNet to the States and Territories First Ministers and First Ministers' Departments with relevant protective markings.

169. I accept the evidence given by Ms McGregor in [48]-[51] of her affidavit, while at the same time noting that Ms McGregor deposed to provisions in the 14th Edition of the Cabinet Handbook which was not issued until 16 October 2020, that is, after the relevant time for the purposes of the present issues. I infer, however, that the same arrangements applied during March, April and May 2020.

170. The evidence reviewed in this section of the reasons warrants the conclusion that the Cabinet Division in DPMC provides the *administrative* support for the National Cabinet considered as a whole. I accept that this is consistent with the National Cabinet being a committee of the Cabinet, but do not regard it as a strong indicator that that is so.

Confidentiality of the National Cabinet deliberations

171. Counsel for the respondent emphasised that the deliberations of the National Cabinet are subject to obligations of confidentiality in the same way as are the deliberations of Cabinet. Counsel for the applicant submitted that the claims of confidentiality were belied by the frequent public statements of the Prime Minister and occasionally by others concerning the decisions made by the National Cabinet.

172. However, as counsel for the respondent submitted, there is a relevant distinction between announcement of the outcomes of National Cabinet meetings, on the one hand, and disclosure of the deliberations which culminated in those outcomes, on the other. The disclosure of the decisions reached is not inconsistent with maintenance of the confidentiality of the discussions within the National Cabinet. The examples which the applicant gave which were said to belie the claims of confidentiality were of the former kind.

173. While I accept that confidentiality does attach to the National Cabinet deliberations, I do not regard it as a particularly strong indicator that it is a Cabinet committee. The National Cabinet is likely to have wished (and to have agreed) that its deliberations be confidential whether or not it has the status of a committee of the Cabinet. That is evident in the agreement of the members of the National Cabinet on 15 March 2020 that their deliberations would be "strictly confidential".

Sub-committees of the National Cabinet

174. One matter, perhaps minor, pointing against the National Cabinet being a committee of the Cabinet is that it can and does appoint its own sub-committees. By way of example, in his press conference on 4 September 2020 the Prime Minister referred to the National Cabinet Sub-Committee on Energy. I note also that Section 8, entitled "The National Cabinet", which was incorporated into the Cabinet Handbook for the first time in the 14th Edition (issued on 16 October 2020) provides expressly for sub-committees of the National Cabinet. The Statement of Agreed Facts also identifies some sub-committees of the National Cabinet.

175. There was no evidence suggesting that committees of the Cabinet do establish sub-committees. Whether they may do so and, if so, the status of a sub-committee for the purposes of the FOI Act are not matters which need be addressed presently. However, the ability of the National Cabinet to establish, at its own discretion, sub-committees does suggest a difference between it and other Cabinet committees.

176. As there is no evidence that the National Cabinet had established any sub-committee as at the earlier dates of 15 March 2020 or 29 May 2020, this is not a matter to which I attach weight for present purposes.

Collective responsibility and solidarity

177. The system of responsible government underpins our constitutional system: *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 146 (Knox CJ, Issacs, Rich and Starke JJ). Counsel for the applicant submitted that the National Cabinet has characteristics which are inconsistent with basic precepts of Cabinet responsibility. He

referred to aspects of the system of Cabinet government, in particular, the concepts of collective responsibility and Cabinet solidarity.

178. The Cabinet Handbook (13th Edition), contains a convenient statement of some of these precepts. In addition to [2] set out earlier in these reasons, the Cabinet Handbook provides in section 2 under the heading Cabinet Conventions and Principles:

> ***Guiding Principles***
>
> 17. A Westminster-style Cabinet is defined by adherence to the principles of collective responsibility and Cabinet solidarity. These principles are the binding devices that ensure the unity of purpose of the Government and underpin the formulation of consistent policy advice.
>
> **Collective Responsibility**
>
> 18. Collective responsibility is a long standing and integral part of the Cabinet system. *It requires that whatever the range of private views put forward by ministers in the Cabinet, once decisions are arrived at and announced they are supported by all ministers.* It ensures that the Government is collectively accountable and responsible to the Parliament and to the people of Australia.
>
> 19. In practice, a decision of the Cabinet is binding on all members of the Government regardless of whether they were present when the decision was taken. Issues may, and should, be debated vigorously within the confidential setting of Cabinet meetings. The aim is to reach some form of consensus so that the Prime Minister, as chair of the Cabinet, can summarise what the collective decision is for recording in the Cabinet minute.
>
> **Cabinet Solidarity**
>
> 20. *Members of the Cabinet must publicly support all Government decisions made in the Cabinet, even if they do not agree with them. Cabinet ministers cannot dissociate themselves from, or repudiate the decisions of their Cabinet colleagues unless they resign from the Cabinet. It is the Prime Minister's role as Chair of the Cabinet, where necessary, to enforce Cabinet solidarity.*
>
> ***Operational Values***
>
> 21. The proper implementation of these two guiding principles is entirely dependent on a commitment to three important operational values: consultation; confidentiality; and respect for the primacy of Cabinet decisions.
>
> 22. A strong and effective Cabinet system requires ministers, their staff and departments to respect and adhere to the guiding principles and operational values.
>
> ...
>
> **Primacy of the Cabinet**
>
> 31. Ministers must carry out Cabinet-determined policies with respect to their own portfolios, whether or not they agree with such policies. Ministers (and portfolio agencies) must act on Cabinet decisions as recorded in Cabinet minutes.
>
> **Ministerial responsibility**

> 32. In upholding the Cabinet guiding principles and operational values, ministers must:
>
> a. not talk publicly about matters that they propose to bring to the Cabinet nor announce a major new policy without previous Cabinet approval
>
> b. not express private views on Government policies nor speak about or otherwise become involved in a ministerial colleague's portfolio without first consulting that colleague and possibly the Prime Minister
>
> c. understand that absolute confidentiality of Cabinet discussions is essential
>
> d. adopt a strict need to know approach to any briefing they give to their staff and departmental officers on the outcome of Cabinet decisions
>
> e. enforce the strictest discipline in their offices and departments to avoid Cabinet agenda items or decisions being either knowingly or unknowingly disclosed
>
> f. ensure that proposals prepared for Cabinet consideration have involved thorough consultation across Government, are timely and of high quality, and provide concise and robust advice on implementation challenges and risk mitigation strategies.
>
> (Emphasis added)

179. Support for these fundamental principles as to the role and functioning of the Cabinet in the Cabinet system of government is to be found in *NLC Full Court* at 16-17; *NLC High Court* at 615-6; *FAI v Winneke* at 373-4; and *Sankey v Whitlam* [1978] HCA 43; (1978) 142 CLR 1 at 97-8.

180. The Cabinet Handbook does not state explicitly that the committees of the Cabinet to which it refers are subject to the same principles. However, that seems implicit in their very existence and in the provisions for their establishment. Having regard to their relationship with the Cabinet, it would be remarkable if it were otherwise.

181. Counsel for the respondent submitted that "collective responsibility and solidarity is about members of a cabinet or a cabinet committee being bound by the decisions made by the Cabinet". He submitted that this was the position which the National Cabinet had adopted until making a significant change on 4 September 2020. For the evidence of that change, counsel relied on the transcript of the Prime Minister's Press Conference on 4 September 2020 following the meeting of the National Cabinet that day:

> [T]oday we made a number of agreements. The first one, I think, was to acknowledge that how the National Cabinet worked also needed to evolve. One of the reasons COAG and its predecessors never worked was there was the unrealistic and, frankly, not very practical expectation that it could only ever operate on complete, 100 percent consensus. That sets the Federation up to fail. Australia is too diverse a place. The challenges are too disparate to think that, on every single issue, every State and Territory is going to come to exactly the

> same point. That is not a realistic expectation ... So, we've decided that this notion of 100 percent, absolute consensus on any issue is not a way that the National Cabinet can indeed work. And what we'll do is we will set out areas where we can come together, and get as many States and Territories as possible to come around that agreement. Not everyone has to get on the bus for the bus to leave the station. But it is important the bus leaves the station, and we all agree on that ... Even when, on occasions, some might not want to get on, they know we need to keep moving forward and that is supported, and that's we agreed to do today. And I think that is a change in the way our Federation works.

182. The Prime Minister then went on to refer to the agreement by seven of the eight States and Territories on objectives for the National Cabinet.

183. Counsel for the respondent submitted that the effect was that the National Cabinet had, on 4 September 2020, agreed to move from the requirement of 100 percent consensus for decisions to an acceptance that decisions could be made in the absence of such consensus and that individual States and Territories and, for that matter, the Commonwealth could act in accordance with their own perceived best interests. I agree that the Prime Minister's statement does suggest such a shift. However, a requirement for 100 percent consensus is not necessarily coincident with the existence of collective responsibility and Cabinet solidarity. Indeed, in the conventional operation of cabinets, those principles are applicable even when there has not been complete consensus at the Cabinet table.

184. The Tribunal invited counsel for the respondent to identify the evidence indicating that the National Cabinet had operated on the basis of a requirement for 100 percent consensus for its decisions before 4 September 2020 but counsel did not do so. Instead, counsel sought to demonstrate that the evidence of one circumstance relied upon by the applicant was not an instance of a State acting inconsistently with a decision of the National Cabinet. This concerned the evidence of whether schools should be closed. In media statements issued after the meetings of the National Cabinet on 16, 18 and 20 March 2020, the Prime Minister announced that the National Cabinet had decided that schools should remain open. However, in the media statement issued before the National Cabinet meeting on 22 March 2020, the Premier of Victoria had said that he would inform the National Cabinet that Victoria would implement a shutdown of all non-essential activity across that State to combat the spread of Coronavirus. The Premier's media statement included the following:

> I will also inform National Cabinet that school holidays will be brought forward in Victoria, starting on Tuesday 24 March.

> ... The decision whether to re-open schools after the Term 1 holidays will likewise be determined following advice from the Chief Health Officer.

185. After the meeting of the National Cabinet on 22 March 2020, the Prime Minister issued a media statement which included:

> All leaders agreed that children should go to school tomorrow. Leaders agreed that we cannot see children lose an entire year of their education as a result of school closures caused by COVID-19 ... State Premiers and Chief Ministers agreed that schools will remain open through to the end of the current school terms to support students whose parents choose to send their children to school. Victoria's school break will commence on Tuesday 24 March 2020.

186. Counsel for the respondent submitted that these media statements did not evidence a lack of solidarity as Victoria was acting consistently with the decision of National Cabinet to keep schools open. All it had decided was to bring forward the school holidays. As counsel recognised, this submission involved a "nuanced distinction".

187. In my view, the reality was that Victoria was, despite the National Cabinet decision, not keeping its schools open but was achieving that outcome by bringing forward the school holiday period.

188. I agree with counsel for the respondent that several of the examples on which the applicant relied had occurred after the decision of 4 September 2020 at which the National Cabinet had decided that decisions could be made without 100 percent consensus. Those examples are accordingly of limited utility in the circumstances of the present case.

189. The respondent, who has the relevant onus, did not adduce formal evidence of adoption by the members of the National Cabinet of the principles of collective responsibility and solidarity. I am willing to accept, however, that, by the adoption of the Terms of Reference attached to the minutes of the National Cabinet, it did resolve to act in accordance with such principles.

190. The evidence indicates, however, that, while National Cabinet has sought to achieve consistency in the measures to control COVID-19 and its effects and coordination of the various activities of the States and Territories directed to that end, the States and Territories did not at the relevant times in fact operate wholly in accordance with the principles of

collective responsibility and cabinet solidarity. In particular, it is evident that members of the National Cabinet did not regard themselves as bound to support decisions made at the National Cabinet irrespective of their own views, and that at times they acted in ways which were inconsistent with the National Cabinet decisions. Further, there is no evidence of attempts to enforce solidarity amongst members of the National Cabinet.

191. Numerous illustrations could be given from the evidence but it is not necessary to refer to them all. It is sufficient instead to refer to statements made by the Prime Minister in his various press releases and press conferences:

4 May 2020	Journalist:	[J]ust picking up [what] you said a minute ago ... about ... the easing of restrictions, I think you said that ultimately these are decisions that will be taken by the States and Territories, that on Friday we'll get a framework, but ultimately States and Territories decide. So does that mean that not all States and Territories will start to ease restrictions from Friday?
	Prime Minister:	Well, I can't pre-empt decisions of Friday. The National Cabinet, particularly on these issues where the Commonwealth has no direct authority at all, our job here is to try and ensure as much consistency across State and Territory jurisdictions as possible. ... And so what you can expect on Friday is that, again, *we'll seek to have as consistent a national position as possible. But ultimately, each State and Territory are the arbiters or their own position.* But I have no doubt they will seek to do that in as consistent a way as possible. ...
4 May 2020	Journalist:	Is there anything that you can do as Prime Minister, leader of the nation, to put more pressure on some States that perhaps not everyone agrees with the extent of their lockdown?
	Prime Minister:	We're a Federation and at the end of the day, States have sovereignty over decisions that fall specifically within their domain. And the National Cabinet, more than any other tool I've seen in my time in public life, has brought about a consistency of approach between States and Territories, not a uniformity, but a greater consistency. ... *I respect the fact that they've each got to make their own call, just like I do, and they've got to explain it to the people who live in their State and they've got to justify it. And I think that's the appropriate transparency and accountability.*
4 May 2020	Prime Minister:	*So the Premier in Victoria will continue to make the decisions as he sees them in relation to State Schools, and that's entirely within his bailiwick. Other Premiers are making different decisions,* like in Queensland, New South

Wales, South Australia, the Northern Territory and in Western Australia. And I think they're making good calls.

4 September 2020 Prime Minister: And so it is not surprising that [the States and Territories] all have different outlooks about what their challenges are right now, and what they might be in the months ahead …

(Emphasis added)

192. I regard these statements of the Prime Minister as involving implicitly a recognition that, whatever may have been decided formally, the principles of collective responsibility and Cabinet solidarity were not applied in practice, at least to the full extent which those terms convey in relation to the operations of Cabinets.

193. The Statement of Agreed Facts included agreement that, in May 2020, the respondent had made public statements to the following effect:

> [4] In addition, in May 2020 the Secretary of PM&C made public statements to the following effect:
>
> - The way things generally work is the Prime Minister makes announcements first, then state premiers and territory chief ministers quite often follow on and make their own press statements and hold their own press conferences.
> - The deliberations of the cabinet and the decisions are protected from disclosure. What premiers and prime ministers say after a meeting is a matter for them. The federation comprises the Commonwealth, six sovereign states and two territories. It is not surprising that there are some differences in the application of a principle, because each is sovereign in its own right.

194. This seemed to be a recognition that the Prime Minister, Premiers and Chief Ministers were not required to, and did not, speak with one voice. The sovereign status of each polity meant that each could decide for himself or herself what was said publically including explaining a different application of the matters of principle on which the National Cabinet had decided.

195. In his affidavit, Mr Dorling referred to public statements of the Premiers of Queensland and Western Australia in September 2020 rejecting the Prime Minister's attempt to institute a shared definition of what constitutes a "Coronavirus hotspot" and the agreement in October 2020 of the Commonwealth and each of the States and Territories other than Western Australian on a "National Framework for Reopening". However, these events occurred after the period which is relevant presently.

196. Counsel for the applicant submitted that it is understandable that the National Cabinet does not observe principles of collective responsibility or Cabinet solidarity because the Premiers and Chief Ministers are not accountable (responsible) to the Australian Parliament but are instead accountable (responsible) to the Parliaments in their own States or Territories, as the case may be. They will therefore respond in a way which satisfies their obligations to their own polities. I consider that there is force in that submission and accept it.

The respondent's opinion evidence

197. Before concluding this section of the reasons, I should refer to the submission of counsel for the respondent as to the weight which the Tribunal should give to the evidence of the respondent and Ms McGregor. Counsel submitted that their evidence that the National Cabinet is a committee of the Cabinet should be given "considerable weight" for three reasons: first, the experience of both deponents; secondly, the authorities suggest that such evidence is deserving of weight; and, thirdly, because the evidence is "largely unchallenged".

198. Earlier in these reasons, I set out the senior public service experience of the respondent and Ms McGregor. I accept that they have had considerable public service experience in relation to the operation of the Cabinet.

199. Counsel referred to three authorities said to support the proposition that the Tribunal should attach considerable weight to the opinions of the respondent and Ms McGregor on this question. The first was *Sankey v Whitlam* in which Gibbs ACJ said, at 44, in relation to a claim of public interest immunity:

> Even where the claim is that the document belongs to a class which should be withheld, the Court is still required to give proper respect to the assertion by the Minister or departmental head that production would be contrary to the public interest ...

In the same case, Stephen J at 59-60 referred with approval to the statement of Lord Pearson in *Rogers v Home Secretary* [1973] AC 388 at 406 that "the Court, though naturally giving great weight to the opinion of the appropriate Minister conveyed through the Attorney-General or his representative, must have the final responsibility of deciding whether or not the document or information is to be disclosed".

200. The second authority to which counsel referred was *NLC Full Court* in which Black CJ, Gummow and French JJ said, at 38, in relation to a claim of public interest immunity:

> [W]here the impact of disclosure on the public interest is peculiarly within the knowledge of the Executive, its contentions will be given particular weight.

201. The third authority to which counsel referred was *Spencer v Commonwealth of Australia* [2012] FCAFC 169; (2012) 206 FCR 309 in which the Full Court (Keane CJ, Dowsett and Jagot JJ) said in relation to a claim of public interest immunity:

> [33] [I]f there is cogent evidence of the grounds for the making of the claim for immunity of the class of documents, a matter to be assessed giving due "weight to the assertion of a responsible representative of government that there is a public interest which will be placed in jeopardy by the production of the document" ...
>
> ...
>
> [43] ... The [respondent's] affidavits which ... must be given weight as they contain assertions of responsible representatives of government that there is a public interest which would be jeopardised by the production of the documents ...

202. As indicated, these authorities concerned claims for public interest immunity. The statements to which counsel referred were directed to the Court's consideration of that question with reference to the effect of disclosure of the content of particular documents. They were not directed to the resolution of a question of the kind with which the Tribunal is presently concerned, namely, whether a particular committee is within a particular statutory conception. As I have endeavoured to explain already, that issue turns on a proper construction of the term "committee of the Cabinet" and the application of the found facts to that construction. The resolution of issues of that kind is one with which the Courts are experienced. In contrast, there is no suggestion in the evidence that either the respondent or Ms McGregor have any particular expertise in the resolution of such issues. Nor does it involve matters peculiarly within their knowledge.

203. Quite apart from these considerations, counsel for the respondent acknowledged that the evidence does not support the respondent having been present at the meeting of COAG on 13 March 2020 and accepted that Ms McGregor had not been present. That by itself compromises their ability to express an opinion of utility on the present issue.

204. Counsel also referred to two authorities in the Freedom of Information Division of the Tribunal: *Secretary, Department of Prime Minister and Cabinet v Summers* [2019] AATA

5537 and *McGrath v Director-General, National Archives of Australia* [2020] AATA 1790. In each case the Tribunal member (Perry J and Forgie DP respectively) had attached weight to the evidence of a public servant. However, in the first case, the evidence concerned the effect of disclosure on the public interest and the second concerned the prospect of disclosure causing damage to the security or international relations of the Commonwealth. Neither concerned an issue of the kind being addressed presently by the Tribunal. I do not regard either decision as supportive of the respondent's present submission.

205. Counsel accepted that the rule in *Browne v Dunn* (1893) 6 R 67 has no application in proceedings of the present kind, referring to *Re Minister of Immigration and Multicultural Affairs; ex parte Applicant S154/2002* [2003] HCA 60; (2003) 77 ALJR 1909 at [55]-[57]. He submitted nevertheless that, "as a matter of practical reality", the fact that the applicant had not sought to cross-examine the respondent and Ms McGregor meant that their evidence should be more readily accepted. That submission may have had greater force if the respondent and Ms McGregor had deposed to factual matters of which they had first-hand knowledge and had indicated that that is what they were doing. However, as already explained, the affidavits of the respondent and Ms McGregor are not of this kind. I repeat my earlier remarks concerning the requirements for proper evidence. Quite apart from the identified deficiencies, the evidence of the respondent and Ms McGregor is, in material respects, inconsistent with other evidence, including the facts which the respondent had agreed with the applicant. Accordingly, I do not regard this as a persuasive consideration.

206. As a final matter, I note that when s 34 was first enacted in 1982, it contained in subs (2) and (4) "conclusive certificate" provisions, that is, provisions that a certificate signed by the Secretary of DPMC certifying that a document was of a kind to which subs (1) referred would establish conclusively that, subject to the operation of Part VI, the document was an exempt document of the specified kind. Those provisions were repealed by the *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009* (Cth) (the 2009 Amendment). In the Second Reading Speech on the Bill which became the 2009 Amendment, the Minister said:

> The repeal of the power to issue conclusive certificates is an important step in achieving greater accountability in government decision making on access requests under the FOI Act and Archives Act.

> Conclusive certificates act as a bar to someone seeking access to a document under FOI. The effect of a Minister placing a conclusive certificate on a document is to limit the capacity for Administrative Appeals Tribunal (the AAT) to review the exemption claim underlying the certificate. Under the current Act, where a conclusive certificate applies, the AAT's jurisdiction is limited to determining if reasonable grounds exist for the exemption claim. But even if the AAT were to find that no reasonable grounds exist for the exemption claim, a Minister may continue to refuse to allow access to the document.
>
> Those limitations on external review should not be preserved ...

207. The Tribunal should keep this history in mind when considering the deference to be given to opinions of the present kind, when those submissions do not concern matters over which the deponents have any particular skill or experience.

208. In my view, the attempt by the respondent to have the Tribunal rely, in relation to the question of whether the National Cabinet is a committee of the Cabinet, on statements in the authorities concerning the value of statements of "responsible representatives" in the evaluation of claims for public interest immunity is misplaced. Specifically, I am not satisfied, with due respect to the respondent and Ms McGregor, that either has a relevant expertise or experience which can assist the Tribunal in the determination of this question. The weight to be given to their evidence in relation to s 47B and s 11A will be considered separately.

209. This conclusion makes it unnecessary for the Tribunal to address the submissions of counsel for the applicant concerning the non-compliance by the respondent and Ms McGregor with the Tribunal guidelines entitled "Persons Giving Expert and Opinion Evidence".

Conclusion concerning the Cabinet documents exemption

210. Having addressed several matters bearing on the question of whether the National Cabinet is a committee of the Cabinet, I have then sought to consider their collective effect. In my view, taken together they point persuasively against the National Cabinet being a committee of the Cabinet within the meaning of the statutory expression. At the very least, I am satisfied that the respondent has not discharged the onus of establishing that Mr Hupalo's decisions about these matters were justified or that the Tribunal should give a decision which is adverse to the applicant.

Conditionally exempt documents – damage to Commonwealth-State relations

211. As previously noted, s 11A(5) of the FOI Act requires an agency to give a person access to a document which is "conditionally exempt" at a particular time unless, in the circumstances, access to the document at that time would, on balance, be contrary to the public interest.

212. Division 3 of Pt IV of the FOI Act provides that specified documents will be "conditionally exempt" on public interest grounds. Section 47B, which the respondent invoked by way of additional defence to the application, provides:

> **47B Public interest conditional exemptions—Commonwealth-State relations etc.**
>
> A document is conditionally exempt if disclosure of the document under this Act:
>
> (a) would, or could reasonably be expected to, cause damage to relations between the Commonwealth and a State; or
>
> (b) would divulge information or matter communicated in confidence by or on behalf of the Government of a State or an authority of a State, to the Government of the Commonwealth, to an authority of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth or of an authority of the Commonwealth; or
>
> (d) would divulge information or matter communicated in confidence by or on behalf of an authority of Norfolk Island, to the Government of the Commonwealth, to an authority of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth or an authority of the Commonwealth; or
>
> (f) would divulge information or matter communicated in confidence by or on behalf of the Government of a State or an authority of a State, to an authority of Norfolk Island or to a person receiving the communication on behalf of an authority of Norfolk Island.
>
> Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).

213. The respondent invoked subs (a) only and did not invoke any other provision within Division 3 of Part IV.

214. Section 11B informs the determination of whether the grant of access to a conditionally exempt document would, on balance, be contrary to the public interest:

> **11B Public interest exemptions—factors**
>
> *Scope*

(1) This section applies for the purposes of working out whether access to a conditionally exempt document would, on balance, be contrary to the public interest under subsection 11A(5).

(2) This section does not limit subsection 11A(5).

Factors favouring access

(3) Factors favouring access to the document in the public interest include whether access to the document would do any of the following:

(a) promote the objects of this Act (including all the matters set out in sections 3 and 3A);

(b) inform debate on a matter of public importance;

(c) promote effective oversight of public expenditure;

(d) allow a person to access his or her own personal information.

Irrelevant factors

(4) The following factors must not be taken into account in deciding whether access to the document would, on balance, be contrary to the public interest:

(a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;

(b) access to the document could result in any person misinterpreting or misunderstanding the document;

(c) the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made;

(d) access to the document could result in confusion or unnecessary debate.

Guidelines

(5) In working out whether access to the document would, on balance, be contrary to the public interest, an agency or Minister must have regard to any guidelines issued by the Information Commissioner for the purposes of this subsection under section 93A.

215. In invoking s 11A and s 47B(a), the respondent did not distinguish between the individual documents comprising the subject documents. Instead counsel made his submissions by reference to the subject documents as a class, contending that the Tribunal should conclude that disclosure of any documents in the class of minutes of meetings of the National Cabinet would be damaging to relations between the Commonwealth and a State.

The statutory concepts

216. The word "damage" in s 47B is not qualified by any adjective as to extent or character. In context, it seems apt to refer to forms of intangible damage: *Diamond v Chief Executive Officer of the Australian Curriculum, Assessment and Reporting Authority* [2014] AATA 707 at [103]; *Re Maher and Attorney-General's Department* (1985) 7 ALD 731 at 742. It can also be taken to connote a less severe deleterious effect than "a substantial adverse effect", which is the expression used in the cognate provisions in ss 47D, 47E and 47J of the FOI Act.

217. On the other hand, s 47B(a) operates with respect to "damage", which would preclude adverse effects which cannot be characterised as such, for example, effects which do no more than cause relationships to develop in particular ways, without being damaging. The damage need not be generalised damage to the relationship between the Commonwealth and the State: damage to the relations in some particular respect would be sufficient: *Re Guy v Department of Transport* (1987) 12 ALD 358 at 363.

218. The term "relations between the Commonwealth and a State" in s 47B should not be understood as having a narrow conception. It is capable of encompassing the whole of the relationship between the Commonwealth, on the one hand, and a State or States (accepting that, in accordance with s 23(b) of the *Acts Interpretation Act 1901* (Cth), the singular "a State" may encompass two or more States). In *Arnold (on behalf of Australians for Animals) v Queensland* (1987) 73 ALR 607, Wilcox J said of the then s 33A of the FOI Act (the predecessor of s 47B):

> [T]he words 'relations between the Commonwealth and a State' refer to the total relationship between the Commonwealth and the relevant State. As is essential in a federation, there exists a close working relationship, over a wide spectrum of matters and at a multitude of levels, between representatives of the Commonwealth and representatives of each State. The word 'relations' includes all of those contacts.

219. The expression "could reasonably be expected to prejudice the future supply of information" in the former s 43(1)(c)(ii) of the FOI Act was considered by Bowen CJ and Beaumont J in *Attorney-General's Department v Cockcroft* [1986] FCA 35; (1986) 10 FCR 180. Their Honours said, at 190, that the expression required "a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or

ridiculous, to expect that those who would otherwise supply information of the prescribed kind to the Commonwealth or any agency would decline to do so if the document in question were disclosed under the Act". This meaning was applied to the former s 33A of the FOI Act in *Arnold v Qld*, by Wilcox J at 616 and by Burchett J at 628.

220. Cognates of the expression "could reasonably be expected to" have been considered in later authorities, resulting in some refinement of the reasons in *Cockcroft*. Perry J referred to these authorities in *Secretary, Department of Prime Minister and Cabinet v Summers* at [42]-[47]. In the view I take of the matter, it is not necessary to review those authorities presently. It is sufficient to indicate that I accept that the Tribunal is to proceed on the basis that s 47B(a) requires, in accordance with its terms, consideration of whether disclosure of the subject documents "would, or could reasonably be expected to" cause damage to relations between the Commonwealth and a State and that, if satisfied of either limb, the subject documents will be conditionally exempt.

221. It was not suggested that there is any relevant distinction between the terms "disclosure" in s 47B and "access" in s 11A(5).

Matters of approach

222. Mr Hupalo did not rely upon s 47B for either of his decisions. Reliance on the provision was raised for the first time in the affidavits filed by the respondent in relation to the current applications. The Tribunal is therefore in the position of primary decision-maker in relation to the application of s 47B(a) and s 11A. This was another consideration making appropriate the Tribunal's inspection of the documents.

223. Counsel for the respondent reminded the Tribunal that s 11B(5) required it, when working out whether access to a document would on balance be contrary to the public interest, to have regard to the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act. However, counsel did not identify any particular guideline to which the Tribunal should have regard, let alone make oral submissions concerning its application.

224. The prospect that disclosure of a document may cause damage to relations between the Commonwealth and a State does not of itself mean that the document need not be

disclosed. The document may still be disclosable even if the disclosure would, or could reasonably be expected to, cause such damage. The document need not be disclosed only if a further condition is established, that is, that access to the document at the time would, on balance, be contrary to the public interest. That is to say, the FOI Act does not contemplate that all documents which would or may cause damage to relations between the Commonwealth and a State will be immune from disclosure.

225. Accordingly, the Tribunal must consider two questions in the application of s 11A(5) and s 47B(1)(a):

(a) would disclosure of the subject documents cause, or reasonably be expected to cause, damage to relations between the Commonwealth and a State;

(b) if so, would access to the documents at this time, on balance, be contrary to the public interest.

226. If the first question is answered in the negative, then the documents are not conditionally exempt and the applicant will be entitled to access to them.

227. Both questions require the Tribunal to engage in a process of evaluation having regard, in particular, to the content and nature of the documents, such evidence as is available as to the effect of disclosure, to matters which may be inherent in the documents or in the disclosure, and to the general context.

228. Again, it is the respondent who has the onus of establishing that the Tribunal should give a decision adverse to the applicant (s 61(1)(b) of the FOI Act). However, unlike the question of whether the National Cabinet is a committee of the Cabinet, the status of the documents sought by the applicant as conditionally exempt, or otherwise, is to be assessed at the present time and by reference to the material now before the Tribunal. That is so for two inter-related reasons: s 47B does not contain either an explicit or implicit temporal limitation; and it indicates that the prospect of damage caused by disclosure is to be assessed at the time the disclosure will occur – see *Secretary, Department of Foreign Affairs and Trade v Whittaker* [2005] FCAFC 15; (2005) 143 FCR 15 at [26].

229. Likewise, the question of whether the grant of access to the documents would be contrary to the public interest is to be assessed at the present time, that is, at the time the access would occur.

Is a class claim available?

230. As previously noted, the respondent made his claims under s 47B and s 11B as a class claim. The consequence was that counsel did not make submissions by reference to the content of the individual subject documents. Nor did he submit that the disclosure of specific portions of the subject documents would cause damage to Commonwealth-State relations. Counsel submitted instead:

> [W]e say that if any of the information in any of the documents was released - no matter what it was - that would cause Members of the National Cabinet going forward to apprehend that their discussions would not be confidential, and there would be no assurance of that. And Your Honour can readily imagine why people coming to the National Cabinet to discuss important matters might raise things in a different way if they apprehended that what they said, or the position they took, could be released to the public pursuant to the Freedom of Information Act, than if they could be confident that would not occur.
>
> And so Your Honour doesn't need to get into the contents of the document. And, in truth, we submit, would be assisted little by doing so for this purpose. Because the damage to the Commonwealth State relations occurs by the undermining of the confidentiality that I've referred to.

231. Although counsel did not say so expressly, I took him to be invoking, by analogy, the approach stated by the majority (Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ) in *NLC High Court* at 616:

> The classification of claims for public interest immunity in relation to documents into "class" claims and "contents" claims has been described as "rough but accepted". It serves to differentiate those documents the disclosure of which will be injurious to the public interest, whatever the contents, from those documents which ought not to be disclosed because of the particular contents. Both upon principle and authority, it is hardly contestable that documents recording the deliberations of Cabinet fall within a class of documents in respect of which there are strong considerations of public policy militating against disclosure regardless of their contents.
>
> (Citations omitted)

232. There is, *prima facie*, a distinction in s 47B between subs (a) on the one hand, and subss (b), (d) and (f), on the other. The criterion on which the latter operates is the prospect that information communicated in confidence in particular contexts would be divulged, whereas subs (a) is concerned with an effect of the disclosure of the document itself. This

raises the possibility that the former requires consideration of the contents of the document in question, but that may not necessarily be so in the case of the latter.

233. However, an initial difficulty with counsel's submission is that it seemed to assume the validity of the minor premise, namely, that disclosure of minutes of the National Cabinet would, self-evidently, be damaging to Commonwealth-State relations. There is no reason for the Tribunal to start with that premise and there may be good reason to think that it should not. Were it otherwise, the Tribunal would be applying a rule or policy without regard to the circumstances of the particular case. Whether or not damage to Commonwealth or State relations may result from disclosure may depend on a number of fact-specific matters, for example, the time which has elapsed between the meeting in question and the time of the prospective disclosure, the subject matter of the minutes, and the attitude of other participants in the meeting in question when that is known. In saying this, I am not overlooking considerations which may point in favour of the minutes of the National Cabinet, as a class, being of a kind to which public interest immunity may apply. They are considerations of the kind referred to in the reasons of the majority in *NLC High Court* at 615-6 set out earlier in these reasons with respect to the public interest in the confidentiality of Cabinet documents.

234. However, s 47B(a) operates on a more confined criterion than the public interest which forms the basis of public interest immunity. It requires consideration of whether disclosure of the subject documents would, or could reasonably be expected, have the effect to which the provision refers. The public interest as a discrete matter is to be assessed in the second limb of the enquiry, that is, under s 11A(5).

235. It is also to be noted that the FOI Act makes a broad distinction between documents according to their class and their content. Some exemptions are class-based in that the exemption is expressed by reference to the class to which they belong. Section 34(1)(b) is an example. There are other examples in Division 3 of Part IV.

236. Other documents are made conditionally exempt because of the effect which disclosure of their content would have. Sections 47D-47J in Division 3 of Part IV are examples. These provisions do not refer explicitly to disclosure of the *contents* of the documents, only to their

disclosure. But it seems inherent that it is disclosure of the content of the documents which may give rise to the specified adverse effects. And it would be difficult to assess the prospect of those effects being caused without regard to the documents' contents.

237. Section 47C and, as noted s 47B(b), (d) and (f) do not refer expressly to an adverse effect of disclosure but they do seem necessarily to turn on an assessment of the evidence concerning the effect of disclosure of the content of the documents.

238. The respondent's submission that the conditionally exempt status of the subject documents be determined by reference to their class, rather than by reference to their individual content, does not seem consistent with this broad scheme in the FOI Act. As was noted by the Minister in the Second Reading Speech for the Freedom of Information Bill 1981 "only in some cases are the exempt documents defined by reference to the nature of the document itself, such as Cabinet and Executive Council documents".

239. The very nature of the criterion upon which s 47B(a) operates seems inconsistent with it having an application to a class of documents. It seems to contemplate a factual enquiry as to the effect of disclosure in the circumstances, rather than the application of some form of *a priori* reasoning by reference to a category of documents. Put slightly differently, a document is to be conditionally exempt because of the perceived effect of *its* disclosure: not the perceived effect of disclosure of the class of documents to which it belongs. A focus on whether disclosure of a class of documents would be damaging to Commonwealth-State relations would divert attention from the application of the statutory criterion in s 47B(a) to the document, that is to whether *its* disclosure would have, or be reasonably expected to have, the relevant adverse effect.

240. This view of the position is consistent with the common law relating to public interest immunity. The majority in *NLC High Court*, after referring to the classification of claims for public interest immunity as "class" claims, and "contents" claims, continued at 616:

> [W]hatever the position may have been in the past, the immunity from disclosure of documents falling within such a class *is not absolute*. The claim of public interest immunity must nonetheless be weighed against the competing public interest of the proper administration of justice, which may be impaired by the denial to a court of access to relevant and otherwise admissible evidence. As Gibbs ACJ said in *Sankey v Whitlam*:

> "I consider that although there is a class of documents whose members are entitled to protection from disclosure irrespective of their contents, the protection is not absolute, and it does not endure for ever. The fundamental and governing principle is that documents in the class may be withheld from production only when this is necessary in the public interest. In a particular case the court must balance the general desirability that documents of that kind should not be disclosed against the need to produce them in the interests of justice. The court will of course examine the question with especial care, giving full weight to the reasons for preserving the secrecy of documents of this class, *but it will not treat all such documents as entitled to the same measure of protection - the extent of protection required will depend to some extent on the general subject matter with which the documents are concerned.* If a strong case has been made out for the production of the documents, and the court concludes that their disclosure would not really be detrimental to the public interest, an order for production will be made."
>
> (Emphasis added and citation omitted)

241. In my opinion, the structure and terms of the FOI Act make it appropriate to apply this approach by analogy. Accordingly, even if the Tribunal did adopt the class-based approach for which counsel for the respondent contended, it would not relieve it of the obligation to assess the effect of disclosure of each individual document.

242. I also observe that counsel's submission is inconsistent with the approach stated by the Tribunal in *Re MacTiernan and Secretary, Department of Infrastructure and Regional Development* [2016] AATA 506 at [63]:

> ... What s 47B(a) of the FOI Act requires, and indeed what each of the other sections of the FOI Act which are at issue in this application (namely s 47B(b), s 47C(1) and s 47E(d) of the FOI Act) require, is a closer analysis of the nature of the information contained in each of the Contested Documents to determine whether a particular Contested Document is conditionally exempt under the section ...

243. For these reasons, I do not accept the submission that the present application may be determined by reference to the documents as a class, and without the Tribunal's consideration of the content of the documents. In this case, that will include the Tribunal's inspection of the documents.

244. This conclusion does not mean that the considerations which underpinned counsel's submission are not relevant at all. The prospect of damage being caused by disclosure of each document is to be assessed having regard, not only to the content of each document, but also by reference to the significance of the disclosure more generally.

The respondent's evidence as to the effect of disclosure of the minutes of 29 May 2020

245. I refer again to the extensive senior public service experience of the respondent. He deposed to having over 40 years' experience in Commonwealth and State public sectors and said that he had "developed a depth of knowledge across Commonwealth and State government Departments, including in the economic policy, cabinet and governance areas of public policy and administration". I accept that the respondent has held the positions and has had the experience to which he deposed.

246. In addition to deposing to aspects of his role as Secretary of DPMC, the respondent deposed:

> [5] As a central agency in the Australian public service, PM&C has a critical role in promoting the whole-of-government perspective that comes from our need to advise the Prime Minister as Chair of Cabinet and National Cabinet and to ensure policy coordination in our advice and on policy development and implementation. We provide a nationwide perspective that comes from our central advising role. Among other responsibilities, I chair the APS Secretaries Board, I attend all Cabinet meetings, and along with my State and Territory counterparts, and Commonwealth and state note takers, all National Cabinet meetings.

247. Further, at [11], the respondent deposed that DPMC is the Commonwealth department with administrative responsibility for inter-governmental relations and communications with State and Territory governments. With respect to the harm which he apprehended would result from disclosure of any minutes of National Cabinet meetings, the respondent deposed:

> [12] I consider that disclosure of any of the National Cabinet minutes would undermine the operation of National Cabinet, damage relations between the Commonwealth and the States, and be contrary to the public interest.
>
> [13] In my view, effective working relationships between the States and Territories and the Commonwealth are central to Australia's public interest. The Commonwealth and State and Territory Governments share responsibility and must cooperate to achieve optimal outcomes for the Australian people.
>
> ...
>
> [24] Since its establishment on 13 March 2020, all members of National Cabinet have attended and participated in National Cabinet meetings on the clear understanding that these meetings were conducted in accordance with Cabinet conventions - namely that the convention of confidentiality applied to discussions, submissions and the records of the meeting. This understanding is set out in Section 8 of the Cabinet Handbook, 14th Edition. Additionally, the Prime Minister, as Chair of National Cabinet, has publicly stated that National Cabinet meetings would be held

in accordance with Cabinet rules. An undermining of confidentiality which is central to those rules and conventions would be a serious shift to the basis on which the National Cabinet has been operating, and would have a significantly deleterious effect, for the reasons I outline below.

[25] In my view, the disclosure of National Cabinet minutes as a result of a request under the FOI Act would severely undermine the basis of the National Cabinet and its effectiveness. National Cabinet was founded on the clear understanding and expectation of confidentiality. If the members of National Cabinet are not assured of the ongoing confidentiality of records of the deliberations of the National Cabinet, this would undermine its effectiveness by:

- creating difficulty through exposing negotiations or discussions that are underway, including in the development of parallel policies,
- adversely affecting the continued level of trust or co-operation between the Commonwealth and the States and Territories, and
- impairing or prejudicing the open flow of information to and from the members of the National Cabinet, which would significantly hinder the participants willingness to participate in National Cabinet meetings with the same deliberative candour.

[26] In my view, there is a real prospect of damage to relations between the members of National Cabinet if official records of National Cabinet, such as the National Cabinet minutes, are disclosed. Such an outcome would be directly contrary to that shared understanding of confidentiality. In my view, such an intrusion into the confidentiality of the National Cabinet process would affect the full and frank nature of discussions held by members of the National Cabinet and thus neuter its effectiveness. In turn, and based on my earlier evidence that National Cabinet arrangements are superior to the former COAG arrangements, this will impact on the ability of the members of National Cabinet to work cohesively together and gain further benefits in the national interest compared to previous governance arrangements.

[27] The confidentiality of shared information as a decision-making platform between members of National Cabinet has been invaluable. Cooperation and sharing sensitive health data, projections and judgements, allowed for the best decisions to be made for the Australian people. Disclosure of National Cabinet documents and deliberations would likely impede and undermine that exchange of accurate and candid information and ideas between members by inviting caution about the possible implications if this information were publicly disclosed.

[28] The confidentiality of National Cabinet deliberations has not prevented disclosure of the outcomes of these deliberations. National Cabinet meetings are followed, by agreement of National Cabinet members, with public announcements and media releases by the Prime Minister and other State/Territory leaders. Those public announcements, by the Prime Minister and members of the National Cabinet, of its decisions have been critical to building public confidence in this body. Those announcements allow decisions which have been agreed by participants to be clearly articulated and responsibility for that implementation to be transparently acknowledged. This ongoing transparency has been critical to maintaining public confidence in the National Cabinet.

[29] I consider the release of National Cabinet deliberations and documents, other than by those formal decisions and announcements by the Prime Minister and members of the National Cabinet, would lead to an apprehension on the part of National

> Cabinet members and caution in their contribution to discussions. Such an outcome would in my view prejudice and weaken the ability of the National Cabinet to make decisions to achieve the best outcomes in the national interest.
>
> ...
>
> [37] In conclusion, it is my view that the undermining and breakdown of the confidentiality of National Cabinet material would be very damaging to Commonwealth-State relationships and would be contrary to the public interest.

248. In [30] and following, the respondent deposed to the agreement of the National Cabinet on 5 February 2021 to establish a Task Force to provide recommendations to the National Cabinet concerning the response to COVID-19. Counsel for the respondent acknowledged that the respondent's evidence about the establishment of the Task Force was not a significant part of the case in answer to the applicant's application, and, accordingly, it need not be detailed presently.

249. Ms McGregor expressed a strong view that confidentiality is important to the successful operation of the National Cabinet. She deposed:

> [44] It is my strong view that confidentiality underpins the successful operation of the National Cabinet. This is even more paramount in a Cabinet committee whose members are drawn from differing political parties across Australia. The agreement by all members that the National Cabinet operates in this way means that members are free to have wide ranging and without prejudice discussions where multiple perspectives on important matters can be brought to bear on an issue without the inevitable constraint that full public scrutiny and transparency would bring. While implementation of National Cabinet decisions remains a matter for States and Territories, the robust and confidential discussions which underpin those decisions have consistently remained confidential. As I set out earlier [at 39] there is an appreciation that absolute consensus is not required in the National Cabinet, but it remains the case that collective responsibility and solidarity are features of the National Cabinet that are adhered to by all its members, regardless of their political ideology.

250. As can be seen, this evidence of the respondent and Ms McGregor was directed to the contents of the minutes of meetings of the National Cabinet considered generally. It was not directed specifically to the content of the minutes which are the subject of the present application before the Tribunal, ie, the minutes of the meetings held on 15 March 2020 and 29 May 2020.

251. In their affidavits, the respondent and Ms McGregor did not differentiate between matters bearing upon the prospect of damage to Commonwealth-State relations for the purposes of

s 47B(a) and matters bearing upon the public interest for the purposes of ss 11A(5) and 11B. This is understandable as there is some overlap between the two considerations.

252. It may be observed, however, that not all of the evidence extracted above is directed to the prospect of "damage to relations between the Commonwealth and a State", being the criterion upon which s 47B(a) operates. Counsel for the applicant drew attention in this respect to the respondent's statement in his affidavit that the disclosure of the National Cabinet minutes pursuant to the FOI Act would "severely undermine the basis of the National Cabinet and its effectiveness", at [25]; that there is "a real prospect of damage to relations between *the members* of the National Cabinet", at [26]; that disclosure will "impact on *the ability of the members of National Cabinet to work cohesively together* and *gain further benefits in the national interest* compared to previous governments arrangements", at [26]; that disclosure will lead to "a apprehension on the part of National Cabinet members and caution in their contribution to discussions [which] would ... prejudice and weaken the ability of the National Cabinet to make decisions to achieve the best outcomes in the national interest", at [29]; and that disclosure would "*diminish the Australian community's certainty and confidence in Australia's response to COVID-19*", at [33] (emphasis added).

253. I accept the submission of counsel for the applicant on this topic. An undermining of the basis of the National Cabinet is not coterminous with damage to relations between the Commonwealth and a State or States. Likewise, the prospect of impairment in the achievement of "the best outcomes in the national interest" is not synonymous with damage to Commonwealth-State relations. Nevertheless, I consider that in the extracted passages set out above the respondent has deposed to some forms of damage to Commonwealth-State relationships which he apprehends would result from the disclosure of the minutes of the National Cabinet generally.

Consideration of the effect of disclosure of the minutes of 29 May 2020

254. In considering whether disclosure of the minutes of 29 May 2020 may cause damage to the relations between the Commonwealth and a State in the sense discussed above, it is appropriate to note at the outset some of their features, including matters which the minutes do not contain.

255. The minutes provided for the Tribunal's inspection differ from the form of minutes of meetings of many organisations. In common experience minutes of meetings usually have a heading identifying the document as a meeting of the entity, association or group held on a particular date and time and usually commence with an identification (by name or description) of those who were present at, or who participated in, the meeting. There may be a record of the apologies provided by those unable to attend. There will usually be a record that the minutes of the previous meeting were adopted (with or without modification), and that may be followed by a record of the discussion, or at least the decisions made, concerning matters arising from the minutes. In relation to the business of the meeting, there will usually be a record in relation to each item of the motions put, their movers and seconders, and of the fate of the motion.

256. The documents provided for the Tribunal's inspection by the respondent of the minutes of the meeting of 29 May 2020, do not follow this style or form. In particular, they:

(a) do not have a heading identifying the documents as minutes of a meeting of the National Cabinet held on 29 May 2020. Instead the heading is "Cabinet Minute" with a subheading "National Cabinet". The date 29 May 2020 is stated separately;

(b) do not record any of the participants in the meeting of the National Cabinet on 29 May 2020 and do not contain any reference to apologies;

(c) do not record an adoption of the minutes of the previous meeting of the National Cabinet;

(d) do not record motions made at the meeting, let alone the mover and seconder of motions, or the fate of motions;

(e) are for the most part in the nature of a record, in short point form, of outcomes, that is to say, a record of the matters upon which the National Cabinet agreed or which it endorsed. They do not record any of the discussion which preceded the agreement or the endorsement on each item, let alone views conveyed at the

National Cabinet meeting by the Prime Minister, a State Premier or a Territory Chief Minister;

(f) do not record any of the considerations, pro and con, bearing on each outcome or of the matters weighing on alternatives; and

(g) do not contain any reference to a proposal having been raised and discussed but not pursued with or without a resolution that no action be taken with respect to the proposal.

257. I note in passing that it may be that the minutes of the National Cabinet were prepared in accordance with the practice to which Professor Weller referred at 80-81 of the text to which reference was made earlier, namely, that they "be as short as possible and apart from the decision itself ... be limited to such explanations as is indispensable to render the decision intelligible".

258. In these circumstances, the submission of counsel for the respondent that participants in the National Cabinet "might raise things in a different way if they apprehended that what they said, or the position they took, would be released", pursuant to the FOI Act does not have a sound basis, at least with respect to those minutes. That evidence seems to be directed to minutes of the commonplace kind referred to above. The fact is that nothing of what was said by an individual member of the National Cabinet, or of the positions advocated by individual members, would be disclosed. Instead, all that would be disclosed would be the outcome of a collective decision-making process. If it was perceived publicly that the National Cabinet resolved on positions reached with a 100% consensus, then it could be inferred that each member supported the position resolved upon. But I have already referred to evidence is seemingly inconsistent with the National Cabinet having required 100% consensus for its decisions.

259. The content of the minutes of the 29 May 2020 meeting as described above also means that much of the evidence of the respondent and Ms McGregor as to the harm they apprehend would result from a disclosure of the minutes cannot be accepted. Their evidence as extracted above seems to have been based on an assumption that the minutes

have a different content. By way of example, the respondent's affidavit assumes that the disclosure of the minutes of 29 May 2020 would create difficulty "through exposing negotiations or discussions ... in the development of parallel policies" and would impair or prejudice "the open flow of information to and from members of the National Cabinet". That is a view which cannot reasonably be sustained having regard to the content of the minutes of 29 May 2020. Their disclosure would not reveal "negotiations or discussions", the "development of parallel policies" and would not impede "the open flow of information". I repeat that the minutes reveal only the matters finally resolved upon.

260. Similarly, the respondent's opinion that disclosure of the minutes would "affect the full and frank nature of discussions held by members of the National Cabinet and thus neuter its effectiveness" cannot be sustained when one has regard to the actual content of the minutes of 29 May 2020. Contrary to the respondent's evidence, disclosure of the minutes of 29 May 2020 will not result in the disclosure of the "exchange of accurate and candid information and ideas between members": it will result only in the disclosure of the formal outcomes of the discussion and deliberations without any revelation of the proposals or discussion which preceded it.

261. Instead of addressing the implications arising from the relatively limited content of the minutes of 29 May 2020, the evidence of the respondent and Ms McGregor is pitched at a reasonably high level of generality. As already noted, it can be said, reasonably, that their evidence is evidently directed to minutes with a different form and content. Accordingly, while giving due respect to their views, I do not regard them as persuasive.

262. Quite apart from the considerations just mentioned, an important matter bearing upon the assessment of whether disclosure of the minutes would, or could reasonably be expected to, cause damage to Commonwealth-State relations is the extent to which the matters contained in the minutes have already been disclosed publicly. In this respect, it is pertinent to note that, in several instances, the subject of the agreements and endorsements recorded in the minutes was announced publicly by the Prime Minister in the press conference which followed the meeting of the National Cabinet on 29 May 2020. The Prime Minister's announcements are too long to set out in these reasons. The following extract, which repeats some aspects set out earlier in these reasons, is sufficient, however, to give

an indication of the public disclosures made by the Prime Minister of the decisions of the National Cabinet made at the meeting on 29 May 2020:

> The other thing we agreed today is a major change in terms of how COAG will work in the future. And, if I can move to that chart, COAG is no more. It will be replaced by a completely new system and that new system is focused on the success that has been yielded by the operation of the National Cabinet. What we'll be doing is keeping the National Cabinet operating and particularly during the COVID period, we'll continue to meet on a fortnightly basis. In a normal year it will meet on a monthly basis. Wouldn't meet in person. One of the things we've learned over meeting so regularly is we can work effectively together as we get together using the telepresence facilities which means Premiers, particularly for those in the more remote states have been able to access that engagement on a far more regular basis and it has worked incredibly well. And so we will continue to meet on a monthly basis in an ordinary year and we'll continue to meet on a fortnightly basis as we work through the COVID period. Now, how it will be different to the way COAG worked, is the National Cabinet will be driven by a singular agenda, and that is to create jobs. It will have a job-making agenda. And the National Cabinet will drive the reform process between state and federal cooperation to drive jobs. It will drive a series of Ministerial Cabinet subcommittees, if you like, that will be working in each of the key areas, and this is an initial list of areas and that will be further consulted on with the states. So in rural and regional Australia, on skills as I was talking to the National Press Club just this week; on energy; on housing; transport and infrastructure; population and migration; and recognising the important role of health, in terms of having a healthy workforce and a healthy community to support a strong economy.
>
> The National Cabinet will continue to work with a laser-like mission focus on creating jobs as we come out of the COVID crisis and we work into the years into the future. The National Cabinet will work together with what is known as the Council on Federal Financial Relations, that is basically the meeting of Treasurers. They actually met today. Those treasurers will take responsibility for all of the funding agreements between the states and the Commonwealth. They will no longer be the province and domain of individual Ministerial portfolios, the Treasurers will bring ultimately those agreements together, consulting with the portfolio Ministers but being responsible for all of those agreements.
>
> And National Cabinet agreed today that one of the first jobs that the Council of Federal Financial Relations will need to do, is look at all of those agreements and how they can be consolidated and rationalised. Obviously, there are the large foundational agreements like the ones I've announced today, they will obviously continue in the form that they've been set out. Education is another which is already in place. But there are multiple other agreements that will be available to the council to be able to be looked at and consolidated and reviewed by the Treasurers to ensure we can get a more effective federation.
>
> ...
>
> Once a year, the National Cabinet will meet together with the Treasurers as well as the Australian Local Government Association in a new council which is focused on national federation reform. This agreement, this set of processes, the funding agreements, ensuring that we continue to get expert advisory support, both directly to the National Cabinet and each of those Ministerial areas, which won't be pursuing a shopping list of agenda items, they'll be pursuing the tasks that National Cabinet has set them to create jobs in our economy.
>
> ...
>
> So, that is an exciting new agenda for our federation. Federation reform issues and responsibilities between states and territories and the Commonwealth will be considered at the National Cabinet because we think that gives Australians confidence. And this really is

> a job of rebuilding confidence, right across the country. And that includes confidence in our governance and making sure that all governments are working closely together and in particular that we're doing so to get Australians back into work.
>
> The final details of which ministerial groups are set in this area, and as I said, the consolidation that takes place in the other areas, that will come in time. But we've agreed on the new structure and we think that will ensure for Australians that they'll get better government, more focused government, at both a state and at a federal level.

263. Plainly, the Prime Minister, at least, did not consider that the disclosure of these decisions would be causative of damage to relations between the Commonwealth and the States.

264. The extent of the disclosure to date makes it difficult for the Tribunal to conclude that disclosure of the formal agreements and resolutions by the National Cabinet, the effect of which was summarised by the Prime Minister in his public statements, would be causative of such damage.

265. The evidence before the Tribunal indicates that the practice of the Prime Minister holding a press conference after National Cabinet meetings in which he announced decisions of the National Cabinet was well established by 29 May 2020. I noted earlier the agreed fact concerning the respondent's statement in May 2020 concerning this practice. It is accordingly reasonable to infer that the Prime Minister and each Premier and Chief Minister participated in the National Cabinet meeting on 29 May 2020 with an awareness that the decisions they made in their meeting would, or at least may, be announced publicly. It can be inferred in turn that each conducted himself or herself in the meeting with that awareness.

266. I indicated earlier that it would be appropriate to take into account that the minutes are of a body engaged in high level public policy decision-making and that there are well recognised justifications for such minutes being kept confidential. However, this does not mean that the particular content of minutes in question can be put to one side.

267. In my view, when regard is had to the nature of the minutes of the National Cabinet meeting (including the matters which they do not contain), the Prime Minister's public statements concerning the decisions made at the meeting on 29 May 2020, and the apparent expectation of the National Cabinet participants that the Prime Minister would announce publicly the decisions made at the meeting, a finding that disclosure of the formal record of the decisions would cause damage to relations between the Commonwealth and a State

would be inappropriate. I emphasise that, in forming that view, I have taken into account that the minutes do not reveal the contribution of any individual participant, any debate which may have occurred regarding each item or the considerations taken into account in relation to each item. In that circumstance, there is no reason to suppose that any participant in the National Cabinet, acting rationally, would feel some inhibition in his or her contributions to the debate at the National Cabinet by reason of the formal disclosure of the minutes of 29 May 2020.

268. I conclude therefore that s 47B(a) of the FOI Act does not have the effect that the minutes of the National Cabinet made on 29 May 2020 are conditionally exempt.

The effect of disclosure of the minutes of 15 March 2020

269. The same conclusion may be reached even more confidently with respect to the minutes of the National Cabinet meeting of 15 March 2020 which are the subject of the application in AATA 5876/2020. Those minutes comprise two principal subject matters. Item 1 records the National Cabinet's agreement on its own Terms of Reference and for the establishment of the AHPPC and the National Coordination Mechanism (NCM) as sub-committees of the National Cabinet. Attachment A contains the Terms of Reference with content under the headings "Purpose", "Membership", "Operating principles", "Secretariat support" and "Meeting arrangements".

270. These minutes do not disclose the participants in the meeting, any motion, proposal, objection or contribution by an individual participant, nor any of the discussion concerning the Terms of Reference. They do not even disclose the genesis of the Terms of Reference.

271. Again, the evidence of the respondent and Ms McGregor is seemingly directed to minutes with a very different content than those concerning Item 1 in the minutes of 15 March 2020.

272. It could not be held reasonably, in my view, that disclosure of the formal record of the National Cabinet of its purpose and the manner in which it had resolved to conduct itself would be damaging to relationships between the Commonwealth and a State. Nor, contrary to the respondent's submissions, could it be reasonably held that a participant in the National Cabinet would feel some inhibition in contributing to the discussions at the

meetings by reason of the Terms of Reference upon which the National Cabinet had agreed being publicly available. On the contrary, the disclosure of minutes with this content is likely to assist in the achievement of the objects of the FOI Act, particularly that stated in s 3(2).

273. Items 8 and 10 in the minutes of 15 March 2020 concern only the agreement on the time of future meetings of the National Cabinet. It could not reasonably be held that disclosure now of those details would cause damage to the relations between the Commonwealth and a State.

274. Items 2-7 in the Minutes of the meeting on 15 March 2020 concern matters which are beyond the bounds of the applicant's second request for documents on 10 July 2020. The respondent drew attention in this circumstance to s 22 of the FOI Act which provides, in effect, for access to be given to an edited copy of the document, that is, edited so as to exclude the portions which are irrelevant to the applicant's request. I am satisfied that s 22 is applicable in this case so that the applicant may be provided with a copy of the minutes of 15 March 2020 comprising only Items 1, 8, 10 and Attachment A. Counsel for the applicant did not submit to the contrary.

275. In summary, I am satisfied that s 47B(a) does not apply to any of the subject documents. Accordingly, they are not "conditionally exempt" with the consequence that it is not necessary for the Tribunal to consider the application of s 11A.

Conclusion

276. For the reasons given above, I am satisfied that none of the subject documents is an official record of a committee of the Cabinet and accordingly exempt from production by reason of s 34(1)(b) of the FOI Act. I am also satisfied that none of the subject documents is, by reason of s 47B(a) of the FOI Act, a conditionally exempt document. At the very least, I am satisfied that the respondent has not discharged the onus of establishing that the decisions of Mr Hupalo refusing the applicant access to the documents were justified or that the Tribunal should give a decision adverse to the applicant.

Decision

277. The decisions under review, namely, the decisions of Mr Hupalo of 6 and 10 August 2020 respectively, are set aside. The Tribunal orders that the applicant be granted access to:

(a) the documents sought in his letter of request of 10 July 2020 which is the subject of AAT 2020/5875; and

(b) the documents sought in his letter of request of 10 July 2020 which is the subject of AAT 2020/5876, other than those sought in paragraph 1 of the letter and the Cabinet Handbook (it having already been provided to the applicant) and other than Items 2-7 in the Minutes of the meeting on 15 March 2020.

278. The respondent sought a stay of an order granting access so as to "avoid the operation" of s 44A(1) of the AAT Act pending an appeal to the Federal Court. As the parties did not make submissions with respect to that application, I will give them the opportunity to do so.

I certify that the preceding two hundred and seventy-eight (278) paragraphs are a true copy of the reasons for the decision herein of The Honourable Justice White.

.....**[SGND]**.....
Associate

Dated: **5 August 2021**

Date of hearing:	**19 May 2021**
Counsel for the Applicant:	**Mr G Watson SC** **Ms D Tang**
Counsel for the Respondent	**Mr A Berger QC** **Australian Government Solicitor**

ATTACHMENT SIX

NATIONAL CABINET DOCUMENTS

RELEASED TO SENATOR PATRICK

PROTECTED CABINET

Australian Government

SM20/0168/NATCAB
15 March 2020

CABINET MINUTE

NATIONAL CABINET

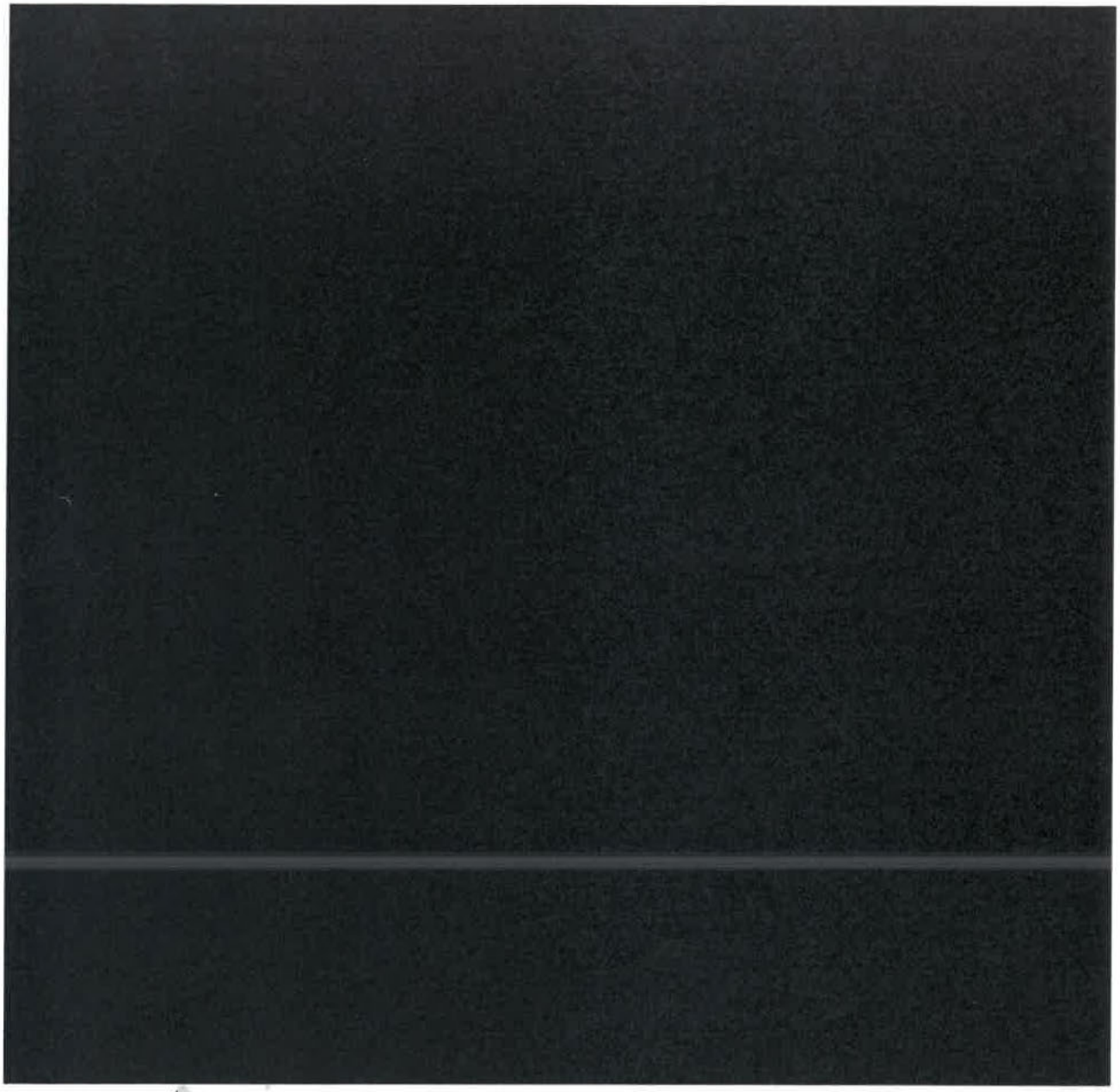
Other	**SM20/0168**	**NATIONAL CABINET FOR AUSTRALIA'S CORONAVIRUS RESPONSE**

The National Cabinet for Australia's Coronavirus Response ('National Cabinet') agreed to:

1. The Terms of Reference for the National Cabinet (Attachment A to this minute refers) and the establishment of the Australian Health Protection Principal Committee (AHPPC) and the National Coordination Mechanism (NCM) as sub-committees of the National Cabinet.

[redacted]

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8. The National Cabinet will meet again on 17 March 2020 to consider this AHPPC advice.

9. The NCM meet to:

   (a) coordinate arrangements for entry to and exit from remote communities, noting that the Northern Territory has commenced internal protocols that may be the basis for adoption by other jurisdictions and the NCM will obtain this information from the Northern Territory and share it as the basis for discussion

(b) coordinate a consistent position with respect to school closures based on existing practices in NSW and Victoria

(c) consider issues affecting access to supermarkets for elderly and vulnerable populations, including options for addressing these issues.

10. The National Cabinet will also meet again on 20 March 2020 to discuss issues relating to schools and any reports back from the NCM on key issues.

Cabinet Secretary

AAT 2020/5875 and 2020/5876

Attachment A

National Cabinet for Australia's Coronavirus Response

The Council of Australian Governments agreed on 13 March 2020 to establish a National Cabinet to coordinate Australia's Coronavirus Response across State and Territory Governments and the Commonwealth Government ('National Cabinet').

Purpose

The National Cabinet will consider and coordinate national Coronavirus preparedness and response measures to deal with the health, economic, societal and public safety impacts of the virus. It will aim to ensure agreed measures are implemented and communicated as consistently and effectively as possible nation-wide.

Membership

The National Cabinet will comprise the Prime Minister (Chair) and State and Territory First Ministers.

It will be supported by the Secretary of the Department of Prime Minister and Cabinet and his State and Territory counterparts.

The National Cabinet will provide strategic oversight of, and be supported by, the Australian Health Protection Principal Committee (AHPCC) and the National Coordination Mechanism (NCM).

Expert advisers will be co-opted as appropriate.

Operating principles

The National Cabinet will operate according to longstanding conventions of Cabinet government, including the guiding principles of collective responsibility and solidarity.

All proceedings and documentation of the National Cabinet will remain strictly confidential. To this end the National Cabinet will be constituted as a Cabinet Office Policy Committee, as provided for in the Australian Government Cabinet Handbook (13th edition).

The National Cabinet does not derogate from the sovereign authority and powers of the Commonwealth or any State or Territory government. The Commonwealth and the States and Territories, as appropriate, remain responsible for the implementation of responses to the Coronavirus.

For maximum effect, the decisions of the Committee should be endorsed by the Cabinet of each jurisdiction.

Formal Cabinet processes, including agendas, papers for consideration, note takers and minutes, will support the operation of the National Cabinet.

Secretariat support

The Commonwealth Cabinet Office will provide secretariat support to the National Cabinet, in collaboration with State and Territory Cabinet Secretariat support areas. Note takers will be the Commonwealth Cabinet Secretary, a senior official from the Department of the Prime Minister and Cabinet, and a senior official nominated by the States and Territories.

Meeting arrangements

The National Cabinet will meet weekly on Friday at 10.00am AESDT/AEDT by telepresence or in person. Ad hoc meetings will be convened by the Chair as required to respond to urgent developments.

Agendas will be developed between the Prime Minister and First Ministers, based on advice from the secretariat.

Agendas and papers will be circulated by the secretariat through an appropriately secure system accessible to both the Commonwealth and States and Territories.

Wherever possible, papers will be circulated and comments sought from all jurisdictions prior to the meetings of the National Cabinet. Comments will be circulated to all members in advance of meetings.

These arrangements may be varied if urgent operational requirements dictate.

PROTECTED CABINET

Australian Government

SM20/0266/NATCAB/16
29 May 2020

CABINET MINUTE

NATIONAL CABINET

Oral Update SM20/0266 CORONAVIRUS UPDATE

The National Cabinet:

1. Noted all jurisdictions have signed the National Health Reform Agreement and thanked Health Ministers and Treasurers for their work on the Agreement.

2. Noted the oral update by the Chief Medical Officer (CMO) on the latest epidemiological data.

3. Noted and agreed to the publication of:
   (a) the final 'Australian National Disease Surveillance Plan' for COVID-19
   (b) 27 May 2020 modelling by the Doherty Institute
   (c) 'Australian Health Protection Principal Committee (AHPPC) Statement on Tobacco use, E-cigarette use and COVID-19'
   (d) the 25 May 2020 update on the precedent conditions.

4. Noted:
   (a) the 'Pandemic Health Intelligence Plan (PHIP)' report for the period 11 to 24 May 2020
   (b) the advice that, while disease surveillance data indicate low levels of infection and decreasing trends, insufficient time has elapsed to be able to fully measure and assess the impacts of relaxing public health related measures.

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5. Agreed to the publication of the public-facing summary version of the PHIP report.

6. Noted the oral updates by:

   (a) all jurisdictions on progress implementing the Three-Step Framework for a COVID-Safe Australia

   (b) relevant jurisdictions on internal border restrictions.

7. Endorsed the 'Principles for COVID-19 Public Transport Operations' developed by the AHPPC and noted the updated AHPPC advice on 'The Use of Masks by the Public in the Community'.

8. Agreed States and Territories wishing to do so will commence charging international arrivals for mandatory quarantining, with jurisdictions responsible for implementation.

9. Noted all jurisdictions endorsed out-of-session the AHPPC paper entitled 'Updated advice on distancing requirements in Early Childhood and Learning Centres'.

10. Agreed:

   (a) AHPPC advice commissioned by National Cabinet will continue to be formally considered by National Cabinet prior to publication

   (b) AHPPC health advice initiated by the AHPPC or commissioned through other mechanisms will henceforth be considered by Senior Officials in Senior Officials' Meeting (SOM) meetings or out-of-session, with:

      (i) the Chair of SOM to recommend to the Cabinet Secretary that AHPPC advice be scheduled for formal consideration by National Cabinet where SOM agrees National Cabinet should review the health advice

      (ii) all other health advice being endorsed by SOM prior to publication.

11. Agreed National Cabinet will next meet on 12 June 2020 and will consider:
    (a) an economic update by the Secretary of the Commonwealth Department of the Treasury
    (b) AHPPC advice:
        (i) on the impacts of relaxing public health related measures and the timetable for future relaxation
        (ii) clarifying the specific measures for potential easing under Step 3 of the framework.

Original authorised by

Cabinet Secretary

AAT 2020/5875 and 2020/5876

Australian Government

SM20/0266/NATCAB/16_EXTRACT
29 May 2020

CABINET MINUTE

NATIONAL CABINET

Oral Update **SM20/0266** **CORONAVIRUS UPDATE**

The National Cabinet:

...

7. Endorsed the 'Principles for COVID-19 Public Transport Operations' developed by the AHPPC and noted the updated AHPPC advice on 'The Use of Masks by the Public in the Community'.

...

(Department of Infrastructure, Transport, Regional Development and Communications Extract: paragraph 7 only)

AAT 2020/5875 and 2020/5876

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PROTECTED CABINET

Australian Government

SM20/0266/NATCAB/16_EXTRACT/2
29 May 2020

CABINET MINUTE

NATIONAL CABINET

Oral Update **SM20/0266** **CORONAVIRUS UPDATE**

The National Cabinet:

8. Agreed States and Territories wishing to do so will commence charging international arrivals for mandatory quarantining, with jurisdictions responsible for implementation.

(Department of Home Affairs Extract: paragraph 8 only)

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Australian Government

SM20/0266/NATCAB/16_EXTRACT/3
29 May 2020

CABINET MINUTE

NATIONAL CABINET

Oral Update **SM20/0266** **CORONAVIRUS UPDATE**

The National Cabinet:

. . .

8. Agreed States and Territories wishing to do so will commence charging international arrivals for mandatory quarantining, with jurisdictions responsible for implementation.

. . .

(AGD Extract: Paragraph 8 only)

AAT 2020/5875 and 2020/5876

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Australian Government

SM20/0613/NATCAB
29 May 2020

CABINET MINUTE

NATIONAL CABINET

Oral Update	SM20/0613	FUTURE OF NATIONAL CABINET

The National Cabinet:

1. Noted the oral update and placemat provided by the Prime Minister on the Future of National Cabinet and reformed arrangements for the architecture of Federal-State relations.

2. Agreed:

   (a) National Cabinet has made an important contribution to minimising the health and economic impacts of COVID-19 and will continue to pursue reforms in the national interest beyond the pandemic

   (b) National Cabinet's agenda will remain confined to a limited number of issues at any one time to enable it to maintain focus and purpose

   (c) the initial focus of National Cabinet will be job creation as the economy emerges from the COVID-19 pandemic

   (d) National Cabinet will be able to establish and task National Cabinet Reform Committees to progress priority reform issues and those Committees will:

      (i) be led by a Commonwealth representative

      (ii) report directly to the National Cabinet

   (e) National Cabinet will continue to engage directly with experts relevant to the issue being considered, including existing Expert Advisory Groups such as the Australian Health Protection Principal Committee and Heads of Treasuries and additional groups as appropriate

A07020675 and 2020/5876

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(f) National Cabinet will continue as a Federal Cabinet Office Policy Committee operating under Cabinet rules, with National Cabinet Reform Committees also operating under Cabinet rules

(g) the Council on Federal Financial Relations (CFFR) will report to National Cabinet and will:

  (i) operate under Cabinet rules

  (ii) take responsibility for managing all Federal-State funding agreements, including National Partnership Agreements (NPAs)

  (iii) initiate a review of all NPAs with the intent of rationalising and decreasing the number of Agreements

(h) National Cabinet, together with CFFR and the Australian Local Government Association, will constitute the National Federation Reform Council (the Council), which will:

  (i) meet annually face-to-face

  (ii) be able to establish Taskforces to support the Council on priority national federation issues, such as Closing the Gap and Women's Safety

(i) existing Ministerial Forums and Ministerial Regulatory Councils will be reviewed and rationalised and, if retained, will be expected to resolve issues themselves and not have a direct connection with the National Cabinet

(j) all NPAs will be transferred to CFFR for management and future funding arrangements attached to issues addressed by Ministerial Forums and Regulatory Councils will be negotiated with and by CFFR

(k) National Cabinet will:

  (i) continue to meet every two weeks while it manages the impacts of COVID-19

  (ii) shift to monthly meetings at an appropriate time

  (iii) continue to meet via telepresence with at least one face-to-face National Cabinet meeting a year

  (iv) retain discretion to vary these arrangements as required

(l) to consider further:

(i) the number, focus and terms of reference of the National Cabinet Reform Committees referred to in paragraph 2(d) above

(ii) the reset of the Ministerial Forums and Ministerial Regulatory Councils referred to in paragraph 2(i) above

(iii) the National Federation Reform Council and related Taskforces.

Original authorised by

Cabinet Secretary

Agreed as Final by the Prime Minister

AAT 2020/5875 and 2020/5876

ATTACHMENT SEVEN

VARIOUS MEDIA ARTICLES

- Karen Middleton, "Cabinet Confidential", *The Saturday Paper*, 17 October 2020;
- Max Maddison, "Judge rejects PM's call on National Cabinet privilege", *The Australian*, 6 August 2021;
- Anne Twomey, "Nowhere to hide: the significance of national cabinet not being a cabinet", *The Conversation*, 6 August 2021;
- Verona Burgess, "PM&C has a lot of embarrassing questions to come", *The Mandarin*, 13 August 2021;
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- Cheryl Saunders, "The government is determined to keep National Cabinet's work a secret. This should worry us all", *The Conversation*, 15 September 2021.

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Cabinet confidential

Legal experts are questioning the basis on which national cabinet deliberations are deemed to be secret, and the issue has led to an Administrative Appeals Tribunal case.

Karen Middleton
is *The Saturday Paper*'s chief political correspondent.

Some of Australia's most eminent lawyers are questioning Prime Minister Scott Morrison's use of federal cabinet conventions to keep secret the proceedings of his Covid-19 national cabinet and the information given by the committee of doctors advising it.

High-profile barristers Bret Walker, SC, and Geoffrey Watson, SC, and University of Sydney law professor Anne Twomey variously describe the idea that Morrison's fortnightly consultation with state and territory leaders amounts to a cabinet as "inappropriate", "ludicrous" and "fundamentally flawed".

Next month, the Administrative Appeals Tribunal (AAT) will begin hearing a legal challenge to the claim that national cabinet is an offshoot of the federal cabinet and as such its deliberations should be kept secret.

The Office of the Australian Information Commissioner has indicated the prime minister may be required to take the witness stand to justify that position.

Independent senator Rex Patrick, formerly of Centre Alliance, mounted the case after the prime minister's department rejected two applications for documents under the Freedom of Information Act. Patrick sought a review from the Information Commissioner, who found the issues were complex, lacked legal precedent and should be referred to the AAT.

The government's secrecy claim relies on the national cabinet being an extension of the cabinet office policy committee, which Morrison created when he became prime minister in 2018. Morrison is the committee's only permanent member. Theoretically this allows him to define virtually any meeting he attends as a meeting of that committee, rendering it exempt from disclosure obligations. This is the arrangement he has used to cover national cabinet.

On that basis, the Department of the Prime Minister and Cabinet is also refusing to answer questions from the senate's Covid-19 committee about national cabinet operations.

The same argument is being used to block access to information from the Australian health protection principal committee (AHPPC), which has been the primary source of advice upon which national cabinet members have based decisions to impose Covid-19 restrictions on business and daily life. The government has argued that the AHPPC is an offshoot of national cabinet, so its advice is also protected. The designation only covers AHPPC material created after national cabinet's formation on March 13.

The government's definitions do not block all information from national cabinet. Morrison outlines its decisions at a news conference after each meeting and proposals often also appear in the media in advance.

A source familiar with national cabinet's operations has told *The Saturday Paper* that almost all of the group's discussions are made public through one of those two avenues.

It appears the prime minister's main reason for insisting on official secrecy is to ensure he is the one who determines what is disseminated, how and when.

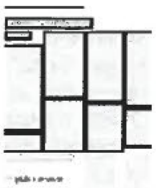
Anne Twomey, Bret Walker and Geoffrey Watson all argue the government's position is hard to justify. Each says that national cabinet is not a cabinet at all, because its members serve nine different parliaments.

"Historically, it was the advisers of a king who met in private in a small room that was known as a 'cabinet'," says Twomey. "The idea is certainly that they are responsible to a single parliament. I'm not aware of any case where you have a cabinet that is made up of people who are responsible to different

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The Saturday Paper. Melbourne

parliaments."

Twomey says intergovernmental bodies' discussions have always been subject to a degree of confidentiality, but not as much as cabinet.

"Changing the name of a body does not change the nature of its existence," she says. "... It is fundamentally flawed reasoning to suggest that the 'national cabinet' is itself a genuine cabinet that attracts cabinet conventions or, even worse, that it is a committee of the Commonwealth cabinet, requiring the premiers to be bound by [its] overriding decisions ... and responsible to the Commonwealth parliament."

Bret Walker, who served as Australia's first independent national security legislation monitor, notes that the cabinet convention carries an implied expectation of solidarity – of not publicly expressing dissent. Any member who cannot uphold that requirement is expected to resign. He says that can't apply to a group from different governments.

"It's a pity the word 'cabinet', with its established constitutional and political meanings, has been used for a group which is composed of leaders elected by different voters and from opposed parties, not in a coalition, so that notions of solidarity or resignation in the case of dissent are meaningless," Walker tells *The Saturday Paper*. "It is completely inappropriate."

He says some secrecy is necessary, but there are other ways to achieve it.

"The notion of confidentiality, Chatham House-style, in such a group is a different matter and has much to recommend it."

Geoffrey Watson, a director of the Centre for Public Integrity, says the bedrock concept of "responsible government" – that everybody is responsible to somebody – cannot possibly apply to national cabinet.

"The idea that you could take somebody from outside [the federal government], who is not responsible to the people or to the parliament, is just preposterous," he says.

He argues there is no solidarity when the prime minister is challenging other first ministers' decisions in public. "It evaporates the moment that he says the decisions made by members of cabinet are ones with which I disagree," Watson says.

The regular Council of Australian Governments' meeting (COAG) was renamed "national cabinet" on March 13, at Morrison's suggestion. On May 29, he made the change permanent.

The Saturday Paper understands Western Australian Premier Mark McGowan was the instigator, remarking that national cabinet functioned better as a streamlined, first-ministers-only body than its bloated predecessor, which had many spinoff groups.

Morrison returned with a proposal involving changing the COAG process so all agreements would go to treasurers and then national cabinet before finalisation. The restructure suited the premiers and chief ministers, many of whom were unhappy that their own portfolio ministers often committed to expensive agreements at COAG side meetings before consulting them.

They also agreed to exclude the Australian Local Government Association, which represents more than 500 local councils.

In the early months of the pandemic, national cabinet appeared to be a model of solidarity. This fractured most publicly on September 4, when some states refused to back Morrison's hotspots proposal for reopening internal borders.

After that, the prime minister announced national cabinet would work on majority rule going forward, rather than consensus, noting it was "a change in the way our federation works".

The cabinet helps Morrison retain a co-ordinating role in the pandemic, having sustained political damage during the summer's bushfires when he sheeted responsibility to the states, saying: "I don't hold a hose, mate." The rebadging of COAG has also given him control of the messaging.

Some are drawing parallels with his management as Immigration minister of Operation Sovereign Borders, when he refused to answer questions about "on-water matters".

As an institution, federal cabinet relies on convention because there is no statute defining its functions. Nor is it mentioned in the constitution. The only laws acknowledging cabinet are the Freedom of Information Act and the National Archives Act. This means the only way to clarify its role is to challenge decisions made under those laws.

Rex Patrick hopes his case will achieve that. "A national council is the arrangement the PM should have adopted," he tells *The Saturday Paper*. "Instead, he set up the national cabinet as he did, butchering the well-established doctrine of cabinet and overstepping secrecy boundaries which must be respected in a system of responsible government."

Patrick predicts the approach will be found to be unlawful.

But some legal experts warn he also

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risks it going the other way. A decision in Morrison's favour would allow him to apply his cabinet definition even more broadly.

Patrick has accused the government of hypocrisy for condemning Beijing's secrecy during the pandemic then employing the same tactics.

Morrison and his department have strenuously defended their approach.

"The statements from the prime minister and the outcomes of the decisions that are being taken by national cabinet have been the most transparent that I've ever seen," Phil Gaetjens, secretary of the Department of the Prime Minister and Cabinet, told the senate's Covid-19 committee. "... I see no hypocrisy in that whatsoever."

The case before the AAT begins on November 23. ●

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06 AUG, 2021

Judge rejects PM's call on national cabinet privilege

The Australian, Australia

Parliament of Australia
Department of
Parliamentary Services

Judge rejects PM's call on national cabinet privilege

MAX MADDISON

Previously secret national cabinet documents could soon become accessible under Freedom of Information laws, after independent senator Rex Patrick won a landmark case against the Morrison government.

In a judgment handed down by a Federal Court judge at the Administration Appeals Tribunal on Thursday, Richard White found in favour of Senator Patrick.

The finding could have major implications for other federal cabinet subcommittees that claim cabinet privilege.

The judgment found national cabinet could in no respect be found to be part of federal cabinet or a sub-committee. Justice White argued that the "fundamental requirement" was for any body seeking the privileges of cabinet to actually "be a committee 'of' the cabinet".

He criticised the establishment of national cabinet, saying Scott Morrison anointing the body as a "committee of the cabinet" for the "purposes of the FOI Act" was an "unsound" premise.

"Nor is there any evidence that the Prime Minister 'appoints' persons as members of the national cabinet," Justice White said.

"Another point of distinction is that unlike other cabinet committees, the national cabinet is not comprised, at least substantially, of ministers of the federal government. It is not even comprised of persons belonging to the same government, let alone the same political party."

He was also highly critical of the federal government's case, saying the evidence put forward "did not meet the standard suggested by the authorities".

Senator Patrick labelled the result "scathing", saying the judgment demonstrated that Mr Morrison couldn't just "make things up" to "suit his political interests and convenience".

It would have significant implications for the Morrison government moving forward, he said.

"This is a magnificent victory for transparency for accountability and for making sure that the Prime Minister operates within the rule of law," he said.

"We've had a ruse, a facade, put in place to prevent Australians from having access to information, to which it was duly entitled ... for Australians to see how the pandemic was to be handled, how the health of the nation was to be properly protected."

The South Australian senator called on the Prime Minister to "change the way he does business", saying he had "arrogantly laid out a secrecy blanket over a significant body of government, and he did so unlawfully".

With the federal government requesting a "stay of orders" for the next 28 days, it could still appeal the decision to a full Federal Court. Senator Patrick said while he didn't discount the possibility, he noted that the "strong" decision was "very carefully written".

Bill Browne, a senior researcher in the Australia Institute's democracy and accountability program, said because national cabinet did not have the "distinctive features" of a cabinet, it did not warrant the "same level of confidentiality".

"There has been a worrying trend towards government secrecy and lack of transparency in recent years, and this decision hopefully marks a return to openness and accountability," he said.

"Australian governments could learn from New Zealand, where cabinet papers are proactively released after 30 days."

A spokesman for Mr Morrison said the government would review the decision.

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THE CONVERSATION

Academic rigour, journalistic flair

Nowhere to hide: the significance of national cabinet not being a cabinet

August 6, 2021 5.32pm AEST

AAP/Mick Tsikas

Author



Anne Twomey
Professor of Constitutional Law, University of Sydney

When is a cabinet not a cabinet? When it is really an intergovernmental body that is pretending to be a cabinet so it can avoid transparency? Simply calling itself a "cabinet" is not enough to trigger an exemption in freedom of information legislation.

Justice Richard White this week so held in a proceeding before the Administrative Appeals Tribunal brought by Senator Rex Patrick.

What was the case about?

Patrick was seeking, through freedom of information (FOI), certain records of the "national cabinet" as well as documents concerning the formation and functioning of the cabinet. This would include its rules, how it makes decisions, whether any jurisdiction has a right of veto over its decisions, whether those decisions are binding, what conventions apply to it and whether its deliberations are recorded and transcribed.

The Department of the Prime Minister and Cabinet (PM&C) refused access to the records on the ground they were records of a committee of the federal cabinet and therefore exempt from disclosure.

Patrick successfully challenged this refusal in review proceedings before the Administrative Appeals Tribunal.

Read more: Morrison government loses fight for national cabinet secrecy

What is the 'national cabinet'?

The national cabinet was established in March 2020, at the beginning of the COVID pandemic, to replace the Council of Australian Governments (COAG). It is an intergovernmental body comprised of the political leaders of the Commonwealth, states and territories.

The national cabinet reaches agreed positions on matters of national and intergovernmental importance, so there can be some consistency and coordinated planning across the nation. But it leaves it to each jurisdiction to implement the agreed standards or principles in its own way.



Senator Rex Patrick successfully challenged the idea of the 'national cabinet' as having the protections of a standard cabinet. AAP/Lukas Coch

What is meant by the term 'cabinet'?

The Constitution does not refer to the cabinet or the prime minister, but it was always intended they exist. Their existence, however, is based on convention and an understanding of how the system of responsible government works.

Ministers advise the governor-general through the Federal Executive Council. But it is the cabinet (which at the federal level is a smaller group of senior ministers) that makes the important policy decisions.

Those decisions are given effect through the enactment of legislation or by formal acts of the governor-general (such as proclamations or regulations), or by public servants developing and administering the policies and programs of the government.

A critical element of a "cabinet" is that it derives its existence from, and is accountable to, parliament. This is a fundamental aspect of the principle of "responsible government". Ministers are responsible to parliament for their actions as ministers. The lower house can hold the government to account for cabinet's decisions by voting no confidence in it, forcing its resignation or an election.

Another important feature of a cabinet is that it makes collective decisions for which all members are equally responsible. To maintain this collective responsibility, records of who argued for and against a decision are kept strictly confidential for decades. Otherwise, ministers could absolve themselves of responsibility for government decisions by saying they did not support the decision at the time. If a minister fundamentally objects to a decision and is not prepared to support it publicly and be responsible to parliament for it, then he or she is, by convention, obliged to resign.

The convention of cabinet confidentiality applies to support this principle of collective ministerial responsibility.

Does calling something a 'cabinet' turn it into one?

Justice White rightly commented that the

> *mere use of the name 'National Cabinet' does not, of itself, have the effect of making a group of persons using the name a "committee of the Cabinet". Nor does the mere labelling of a committee as a "Cabinet committee" have that effect.*

He considered that a "committee of the cabinet" means a subgroup of the cabinet, and that the cabinet must be comprised of ministers who, according to the Constitution, must be members of parliament within three months of their appointment.

PM&C argued that any committee was a cabinet committee as long as the prime minister decided to establish it as such. Justice White called this argument "unsound". He did not think the prime minister could change the statutory meaning of a cabinet committee simply by giving a committee that name.

In any case, he also concluded that neither the prime minister nor the federal cabinet created the national cabinet. It was instead established by resolution of COAG on March 13 2020.

Why is the 'national cabinet' not a federal 'cabinet committee' under FOI?

First, a cabinet and its committees are comprised, at least substantially, of ministers responsible to the one parliament or government. National cabinet is comprised of ministers responsible to different parliaments, governments and political parties. Only the prime minister is a member of both the national cabinet and the federal cabinet.

Another feature of a federal cabinet committee is that the prime minister appoints its members. In contrast, Justice White found that the members of the national cabinet were not appointed by the prime minister. They are members of national cabinet because of the offices they hold.

Federal cabinet committees derive their powers from the federal cabinet, have their decisions endorsed or overridden by that cabinet, and are ultimately subject its powers and directions. The national cabinet does not meet this description. Its decisions do not have to be endorsed by the federal cabinet and the federal cabinet cannot overrule them. National cabinet also addresses matters over which the federal cabinet has no authority or control.

Read more: The national cabinet's in and COAG's out. It's a fresh chance to put health issues on the agenda, but there are risks

What are the consequences?

The Commonwealth has 28 days to initiate an appeal of the decision. No doubt it will – even though the decision seems to be plainly correct. If the decision stands, it means Rex Patrick will be able to gain access to the national cabinet's documents (unless other exemptions apply), increasing transparency about how it operates and the decisions it makes.

It will also remove a convenient method for the Commonwealth government to assert secrecy over anything it wants.

Finally, it should (but probably won't) put an end to the government's claims of cabinet confidentiality when parliamentary committees seek access to the documents of the national cabinet or any other dubiously established cabinet committees. If this were to happen, it would greatly enhance government accountability.

COAG Administrative Appeals Tribunal Federal cabinet National cabinet Rex Patrick

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PM&C has a lot of embarrassing questions to come

themandarin.com.au/165685-pmc-has-a-lot-of-embarrassing-questions-to-come

August 13, 2021



Justice White's written decision reveals shockingly slipshod work within PM&C, the very agency that is supposed to be the premier authority on government. (AAP Image/Lukas Coch)

The head of the Australian Public Service, Phil Gaetjens, and the head of his cabinet division, Leonie McGregor, have made fundamental errors of historical fact in a landmark Freedom of Information case.

In its ruling that the national cabinet is not a committee of cabinet, the Administrative Appeals Tribunal has also exposed parts of Gaetjens and McGregor's sworn evidence as based on assumptions and second-hand information.

The August 5 decision by Justice Richard White means the national cabinet does not enjoy the federal cabinet's legal exemption from FOI applications.

Nor can all its records be exempt as a class by arguing that their disclosure would, or could reasonably be expected to, damage federal-state relations.

The written decision reveals some shockingly slipshod work within the Department of the Prime Minister and Cabinet, the very agency that is supposed to be the premier authority on government.

Justice White accepted that confidentiality does attach to national cabinet deliberations and did not give *carte blanche* for the disclosure of all its proceedings, but the decision is a major blow to the government's love of citing cabinet confidentiality to justify secrecy.

It is a victory for independent senator Rex Patrick (the applicant), supported by his adviser, a political historian, former public servant and former journalist, Philip Dorling. Counsel was none other than Geoffrey Watson SC.

The government had refused Senator Patrick's original application for national cabinet minutes on the grounds of cabinet confidentiality, saying it was a committee of the federal cabinet.

In a nutshell, Justice White ruled on August 5 that, "The mere use of the name 'National Cabinet' does not, of itself, have the effect of making a group of persons using the name a 'committee of the cabinet'. Nor does the mere labelling of a committee as a 'cabinet committee' have that effect."

With a surgical turn of phrase that cuts to the bone, Justice White also debunked much of the affidavit evidence from Gaetjens (the respondent) and McGregor, neither of whom were called to be cross-examined.

For example, ".... The evidence of each tended to be generalised and conclusionary in form. In some respects, the evidence of each was inconsistent with documentary evidence and seemed to assume the truth of a matter to be decided by the tribunal (whether the National Cabinet is a committee of the cabinet), and in some respects both the respondent and Ms McGregor expressed opinions about the effect of disclosure of the minutes on a view of their content which is not borne out by an examination of the documents."

Not only that, but their evidence about when and how the national cabinet had been established was second-hand, since neither had witnessed the decision.

Justice White said, "It is unfortunate that the evidence which the parties and, in particular the respondent, have provided as to the establishment of the National Cabinet is secondary in nature, when primary evidence must be available."

Such primary evidence might have included an affidavit from the prime minister, Scott Morrison, but that was not provided.

Then there was the historical evidence.

Justice White said, "Ms McGregor seemed to recognise the difficulty which the composition of the National Cabinet posed for the respondent's case by deposing that the establishment of 'cabinets' with limited membership and with the inclusion of state premiers, or persons who were not ministers or even members of the Australian parliament, was not unprecedented. She deposed:

'Over time, cabinet committees have taken on many forms. For example, during times of national crisis, such as during World War II, special purpose cabinet committees were established. Prime Ministers Menzies and Curtin each established a war cabinet consisting of a limited selection of commonwealth ministers. On 4 February 1942 the state premiers were invited to and attended a Curtin government war cabinet meeting. On 27 August 1942 [Curtin] announced that "a leading member of the Opposition" Sir Earle Page would be appointed a member of the war cabinet, due to his experience. In the 1950s, a wide variety of cabinet committees were formed and officials regularly participated.' "

In turn, Gaetjens had said he agreed with the matters which McGregor had deposed.

Both wrong. If you're going to quote history in a legal case, you need to get it right especially if your opposite number is a highly qualified historian, as Dorling is.

Justice White said, "The evidence of Mr Dorling (which I accept) and the historical records concerning the matters to which Ms McGregor referred indicate:

"(a) all of the members of the war cabinets during World War II in the five governments led successively by Prime Ministers Menzies, Fadden and Curtin were ministers in the federal government at the time of their membership;

(b) persons who were not members (such as the chiefs of staff of the Australian Armed Services ... and other senior officials) did attend war cabinet meetings to provide advice when required, but none was a member ....

(c) State premiers attended by invitation one meeting of the war cabinet, namely the meeting on 4 February 1942, but not as members of [it].

(d) Sir Earle Page was not a member of the war cabinet in the government led by Prime Minister Curtin, and [Curtin] did not make the announcement on 27 August 1942 which Ms McGregor attributes to him. Rather, [he] invited [Page] to attend meetings of the war cabinet "in a consultative capacity". The documents indicate that [Curtin] issued this invitation having regard to the recent international experience of Sir Earle Page;

(e) for similar reasons, [Curtin] also invited [Page] to be a member of the Advisory War Council, but the council was not the war cabinet or even the cabinet. It was instead a body comprised of the Prime Minister, senior members of the federal government and senior members of the opposition;

(f) the members of the cabinet committees established by Prime Minister Menzies at the commencement of the 1950's were all ministers in his government;

(g) officials may have attended, and even participated in, cabinet committees but not as members of the cabinet or of cabinet committees."

Justice White said, "So far as the evidence provided to the tribunal reveals, there is no indication that, at the time of enactment of the FOI Act, a committee of the cabinet had comprised persons who were not themselves members of the cabinet or members of an 'outer ministry'. This militates against a conclusion that the expression 'committee of the cabinet' was intended to encompass a group of such persons."

You'd think PM&C would at least get the history right. How hard could it be to check the facts?

In essence, it was up to Gaetjens, as respondent, to prove the national cabinet was a committee of the federal cabinet; in this, he failed.

The government intends to appeal, although it's hard to see how this decision might be overturned.

Already, senate committees – rightly chafing from the arrogant snubs they have been receiving at the hands of some senior officials – are baying. Don't be surprised if PM&C faces a lot of embarrassing questions about this unprofessional work in the months to come.

By Verona Burgess

AUGUST 14 – 20, 2021 | No. 362

NEWS

A scathing rebuke in the Administrative Appeals Tribunal could have far-reaching consequences for Scott Morrison's secret committees. By *Karen Middleton*.

Legal loss a blow for Morrison secrecy

The prime minister may no longer be able to use a special one-man cabinet committee to so readily conceal government advice from public view, after a judge rejected it as a way to keep national cabinet's deliberations secret.

Contrary to the Department of the Prime Minister and Cabinet's insistence, a ruling by Justice Richard White in the Administrative Appeals Tribunal (AAT) confirmed that all working documents for the meetings of federal, state and territory leaders are accessible under freedom of information law.

The government cannot cover them retrospectively by taking them to federal cabinet either, because their legal status is based on their purpose when they are created.

The ruling potentially has implications beyond national cabinet because of the mechanism Prime Minister Scott Morrison used to extend federal cabinet's secrecy provisions. That mechanism is the cabinet office policy committee, or COPC.

Since creating it in 2019, Morrison has used this committee, of which he is the only permanent member, to extend cabinet confidentiality over anything he wants shielded from public view.

He simply declares particular meetings to be configurations of the policy committee and asserts cabinet secrecy over their deliberations. This is how he claimed cabinet secrecy when the old Council of Australian Governments was renamed "national cabinet" last year.

But Justice White ruled that simply calling national cabinet a federal cabinet committee did not make it one. He confirmed that a cabinet committee featured members of a single cabinet, from a single government and parliament. While he did not rule out external members, he found that having one federal cabinet minister was not enough.

It's expected the senate's Covid-19 inquiry will now seek to have numerous documents handed over, after various departments first refused access to them, citing cabinet secrecy via COPC.

Justice White was ruling on an application to the AAT by independent senator Rex Patrick, made after the prime minister's department rejected two freedom of information (FOI) requests last year.

COAG Legislation Amendment Bill 2021 [Provisions]
Submission 7 - Attachment 1

"Fundamentally, what he's done, is to create a device that he hopes will bring all these entities under the umbrella. But it is a device and it's an illusory device."

Patrick had applied to access minutes of one national cabinet meeting and documents that described its establishment from another. The department refused, saying they had the status of federal cabinet documents, which are protected for at least 20 years.

At the tribunal, it also argued that releasing the documents could damage federal–state relations – an argument it did not make in the initial refusal.

Having read the minutes, Justice White responded that not only were they unlikely to damage relations, they were also surprisingly perfunctory and lacked the required detail of ordinary minutes, including how decisions were reached. He found in favour of Patrick and granted him access, delayed for 28 days while the government decides whether to appeal.

Patrick calls it "a fantastic win for transparency and accountability".

The judge ridiculed the government's insistence that the prime minister could determine "what a cabinet committee is". He said that amounted to arguing that any committee could be a cabinet committee "merely because the prime minister of the day has purported to establish it as such".

"This premise is unsound," he wrote. "...A committee does not become a committee of the cabinet for the purposes of the FOI Act merely by being given that name." If that were the case, any group could be made a cabinet committee "merely by designation".

Former New South Wales Supreme Court judge Anthony Whealy, who now chairs the Centre for Public Integrity, suggests that is exactly what Scott Morrison has been asserting. He tells *The Saturday Paper* Justice White has exposed Morrison's construct as "a contrivance".

"Fundamentally, what he's done," Whealy says of the prime minister, "is to create a device that he hopes will bring all these entities under the umbrella. But it is a device and it's an illusory device."

The prime minister has used that device to shield the work of other bodies, designated as versions of COPC. Documents they produce and receive have been declared exempt from FOI access as a result.

These include the government's key Covid-19 pandemic health adviser, the Australian Health Protection Principal Committee. They also include the National Coordination Mechanism, a grouping of federal, state and territory ministers dealing with non-health-related aspects of pandemic management, and the former National Covid-19 Coordination Commission.

There have been meetings on naval shipbuilding and on the JobKeeper payment.

Energy Minister Angus Taylor is understood to have convened a group of colleagues using the COPC to discuss energy policy, which is being labelled as a subcommittee. And it appears that an as-yet-unpublished report by Energy Security Board chair Kerry Schott on proposed changes to the national electricity market was designated – before the AAT ruling – as headed for national cabinet, to protect deliberations on it from scrutiny.

The AAT ruling means the prime minister will now need to ensure other cabinet members are present at COPC meetings in order to claim cabinet secrecy over the various incarnations of his committee. Only future legal challenges to FOI refusals can determine if that is enough to keep them secret.

The Saturday Paper asked the prime minister's department for a full list of bodies tied to COPC. It indicated it was working on a reply, but then said the request had to go to the Prime Minister's Office.

A spokesperson for the prime minister provided only a description of the committee, which is publicly available in the government directory. It says that the committee "considers major policy issues on an as-needs basis" and

that this includes "early-stage consideration of strategic issues" and "specialist advice on nationally significant issues and rapidly evolving situations".

The spokesperson added that the prime minister's new cabinet taskforce on women's safety and economic security is also "constituted as a cabinet office policy committee".

But they refused to provide a full list.

"COPC meeting agendas are protected, cabinet-in-confidence, the same as cabinet, ERC [expenditure review committee] or NSC [national security committee] meetings," another spokesperson said.

Anthony Whealy describes White's ruling as "a very refreshing indicator" that courts and tribunals are not going to accept opinions from politicians or bureaucrats without subjecting them to scrutiny.

"Whether it's a one-person committee or whether it's a more-than-one-person committee, I think they will be prepared to scrutinise to ascertain the reality of the situation," Whealy says. "The reality is very clear in Justice White's view: that this in no way could be regarded as a policy committee of the cabinet."

Former Victorian Court of Appeal judge Stephen Charles calls it "a terrific judgement".

"It seems to me very well put together and virtually impossible to appeal," Charles tells *The Saturday Paper*. "It's very significant in terms of the very deep attempts this prime minister and this government are making to shroud their deliberations in secrecy as much as they can."

UNSW law professor George Williams calls it "an important and really significant judgement for accountability" that may reach beyond national cabinet.

"The implications may well be larger, because it's a very thorough judgement," Williams says. "It sets up a test as to whether other bodies might well be [affected]."

Williams says it's also a check on "ever-increasing cabinet secrecy".

"We're dealing with the most extreme uses of power we've seen in Australia since World War II," he says, "and that calls for more accountability, not less."

In parliament this week, Rex Patrick said it would be "improper" for the government to appeal the decision. He also said former attorney-general Christian Porter should be held accountable for endorsing the position.

"How did Mr Porter get this so wrong?" Patrick asked. "How was this unlawful construct initiated and then operated?"

Justice White was scathing about the evidence from the prime minister's departmental secretary and respondent in the case, Phil Gaetjens, and cabinet division head Leonie McGregor.

He noted that the department had initially given him the wrong documents and that their evidence had been factually incorrect and involved "circular reasoning".

White said the pair had held themselves as expert witnesses, which on this issue they were not. They had given second-hand testimony about national cabinet's creation and asserted that, because they weren't cross-examined on it for that reason, it should have more weight.

"Quite apart from the identified deficiencies, the evidence of the respondent [Gaetjens] and Ms McGregor is, in material respects, inconsistent with other evidence, including the [agreed] facts," Justice White wrote. "... Accordingly, I do not regard this as a persuasive consideration."

Sydney University law professor Anne Twomey says the criticism was deserved. She calls the department "disorganised, shambolic and disrespectful of the legal process".

"In days gone by, the department was full of extremely competent people – the traditional mandarins," she says. "Look what's coming out of it now."

Twomey agrees with Justice White's findings and says the claim that national cabinet was part of federal cabinet was a "ruse".

She says the judgement may have wider implications for other constructs of the cabinet office policy committee. "But the problem is, they always come back with some kind of exemption."

Even if it doesn't pursue a successful appeal, Twomey believes the government will find another way to withhold documents it doesn't want scrutinised.

"They will usually find some other ground to make sure that you can't get them," she says. "... I don't think the government will give up that easily. I don't think the game is over."

This article was first published in the print edition of The Saturday Paper on Aug 14, 2021 as "Legal loss a blow for Morrison secrecy".

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Karen Middleton is *The Saturday Paper*'s chief political correspondent.



A piece of legislation sitting in the parliament right now surely takes the cake for arrogance and it is dragging the Australian public with it all the way. (AAP Image/Lukas Coch)

The sheer audacity of the federal government should come as no surprise when it comes to ambit claims of secrecy.

Nor should anyone be surprised whenever ministers swear that black is white.

But a piece of legislation sitting in the parliament right now surely takes the cake for arrogance and it is dragging the Australian Public Service with it all the way.

The COAG Legislation Reform Bill 2021 (https://www.legislation.act.gov.au/b/db_64812/) seeks, among other things, to overturn the Administrative Appeals Tribunal of Australia's decision of August 5 in Patrick and Secretary, Department of Prime Minister and Cabinet (Freedom of Information) [2021].

That was the decision by federal court judge Richard White, who found, in a nutshell, that the so-called national cabinet is not a committee of the federal cabinet and, as such, does not enjoy automatic exemption from the FOI Act; nor can its proceedings be exempt as a class by arguing that disclosure would, or could reasonably be expected to, damage federal-state relations.

The decision also, embarrassingly, exposed PM&C secretary Phil Gaetjens and the head of the cabinet division, Leonie McGregor, for fundamental errors of historical fact and for basing their evidence in part on assumptions and second-hand information. In other words, the defence was hardly PM&C's finest hour, legally or historically.

The decision was a victory for independent senator Rex Patrick, albeit qualified, with Justice White accepting that confidentiality did attach to national cabinet deliberations.

But that was not enough for the government's passion for secrecy. In its wisdom, it decided to legislate that the national cabinet is a committee of the federal cabinet, along with any committee it says is a committee of the national cabinet, with all deliberations and proceedings designated cabinet-in-confidence.

The irony shouldn't be lost on anyone that the federal cabinet itself exists by convention and practice and is not defined in the Australian Constitution, but anyway.

Naturally, Senator Patrick is not amused and nor is the shadow Attorney-General, Mark Dreyfus, and nor should they be.

Broadly, the first two schedules of the bill seek to update relevant legislation with the new arrangements for the Council of Australian Governments announced last year, including renaming COAG the National Federation Reform Council.

It is the third schedule to the bill where the trouble lies for public disclosure.

Education minister Alan Tudge, who introduced the bill to the House of Representatives, promised "a new and exciting era for our federation". He even quoted a couple of Labor state premiers in support of the reform of COAG.

He did not, of course, mention the more recent federal-state discord, not least the derailment of Scott Morrison's "national road map" out of COVID, if you'll pardon the mixed metaphors.

Nor did he remind the House of the killer quote in the AAT decision: "The mere use of the name 'national cabinet' does not, of itself, have the effect of making a group of persons using the name a 'committee of the cabinet'. Nor does the mere labelling of a committee as a 'cabinet committee' have that effect."

The bill says the term "cabinet" includes "a committee of the cabinet (including the committee known as the national cabinet); and a committee (however described) of the national cabinet."

This flows to all relevant legislation, including the AAT Act 1975; the Administrative Decisions (Judicial Review) Act 1977; the Archives Act 1983; the Auditor-General Act 1997; the Public Interest Disclosure Act 2013; the Ombudsman Act 1976; the Migration Act 1958 and many more, including the FOI Act 1982. In other words, the whole kit and caboodle.

It is not clear why the government feels so impelled to draw the veil of secrecy further over the national cabinet. It's not as if COAG has bumbled along for decades with a desperate need for further secrecy (its decisions were normally expected to be made public within a week). Nor is it obvious that there have been any deep dark secrets that would imperil the national cabinet's operations if they were revealed.

Perhaps because the AAT decision did allow for national cabinet confidentiality, just not for blanket exemptions from FOI, the government evidently didn't dare appeal the decision.

It could, however, have simply put up a bill saying that the deliberations of the national cabinet were exempt from FOI – but it didn't. Instead, it took a sledgehammer to a mouse.

This feels like a piece revenge by Morrison and PM&C for being so humiliated in the AAT, a tit for tat, "Because I say so".

Perhaps it felt cathartic, especially after the embarrassing deficiencies in PM&C's evidence that suggest a whole other story about the winnowing out of public service expertise and depth of knowledge. But putting up a bill as a form of revenge doesn't even begin to approximate good government.

As senator Patrick himself told the senate on September 2, "I'd have to say that the prime minister is a sore loser. He was beaten fair and square in the Administrative Appeals Tribunal, but, having been found to have acted outside of and contrary to law, Mr Morrison now wants to change the law. He wants to stifle public scrutiny of his national cabinet .... If the national cabinet amendments in this bill are passed through the parliament, responsible cabinet government will be subverted. Key decisions will be able to be taken in secrecy, without those involved — the prime minister and chief ministers—being properly accountable to their respective parliaments."

Ironically, though, if it this skeletal bill passes the parliament, it might not end up being in the coalition's favour. It is certainly not in the public interest. None of the premiers or chief ministers have exactly rushed out to defend it, either.

The bill does not say that a national cabinet, as a committee of the federal cabinet, must consist only of federal, state and territory first ministers, even though that is the case currently. It doesn't say anything about its membership at all. And remember, the national cabinet was convened originally to guide federal and state responses to the COVID national emergency. The bill makes no reference to national emergency either.

Nor does it exclude the prospect that any unelected people might be included in it. It pretty much implies that the national cabinet can be anything the prime minister says it is. It doesn't even specify that there must be another member of the federal cabinet on it, which would satisfy the conventional minimal membership of a federal cabinet committee.

As the AAT said, "Another point of distinction is that, unlike other cabinet committees, the national cabinet is not comprised, at least substantially, of ministers of the federal government. It is not even comprised of persons belonging to the same government, let alone the same political party."

Even if the bill did define the membership, Morrison is already having enough trouble trying to herd the cats, with three powerful Labor premiers already going their own way or ganging up on him, depending on their own interests, as they continue to disrupt, if not up-end, the federal-state power balance. This guerrilla warfare is bound to intensify in the run-up to the federal election.

Imagine what might happen after a change of government, with a frustrated coalition in opposition trying to penetrate the secret proceedings of a national cabinet that might, as time goes on, consist entirely of Labor governments.

Or imagine a hand-picked national cabinet or sub-committee made up, for example, of some of the coalition's worst bete-noirs, such as the head of the CFMEU and other powerful union leaders and cronies, with their proceedings entirely protected by cabinet-in-confidence secrecy.

Can't you just hear the coalition screaming about a socialist dictatorship.

The bill now sits with the senate finance and public administration legislation committee, chaired by Tasmanian liberal senator Claire Chandler; submissions close on September 20. Don't hold your breath for the senate to pass it without amendment, but who knows in this crazy world.

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THE CONVERSATION

Academic rigour, journalistic flair

The government is determined to keep National Cabinet's work a secret. This should worry us all

September 15, 2021 6.52am AEST

Lukas Coch/AAP

Author



Cheryl Saunders
Laureate Professor Emeritus, Melbourne Law School, The University of Melbourne

Earlier this month, the Morrison government introduced a bill to parliament that would amend the Freedom of Information Act to allow meetings of the National Cabinet to receive the same exemptions from releasing information to the public as the federal cabinet.

The protection would be considerable. The bill would expand the definition of "cabinet" in the act to include the National Cabinet or one of its committees, and would redefine "minister" to include state ministers.

The exemption would also cover not only National Cabinet meetings themselves, but a host of other bodies associated with it under the convoluted architecture for intergovernmental relations in Australia. This chart shows just how confusing it gets.

The bill has been referred to a Senate committee, which is due to report on October 14. There is a lot at stake. The bill certainly should not pass in its present form.

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Read more: The national cabinet's in and COAG's out. It's a fresh chance to put health issues on the agenda, but there are risks

What's this all about?

The bill is a response to the decision of the Administrative Appeals Tribunal (AAT) in a case brought by Senator Rex Patrick to force the government to release certain National Cabinet records.

In that decision, the AAT rejected the government's claim that National Cabinet documents were exempt from release under the Freedom of Information (FOI) Act. The tribunal did so on the basis that a forum in which heads of Australian governments meet is a completely different kind of body to a cabinet.

Read more: Nowhere to hide: the significance of national cabinet not being a cabinet

A cabinet comprises ministers in the same government, who are elected to the same parliament, to which they are accountable and collectively responsible.

By contrast, a meeting of National Cabinet comprises the leaders of nine separate jurisdictions, with cabinets, parliaments and lines of accountability of their own.

The government decided not to appeal the AAT decision, but has moved to amend the FOI Act instead.

There have been meetings of heads of Australian governments since before federation. For around 100 years, these were known as the premiers' conference. In 1992, the name was changed to the Council of Australian Governments, or COAG.

COAG today has ceased to exist — National Cabinet has replaced it. It is, however, essentially the same body with a new name and some altered procedures to respond to the pandemic.



A rare, in-person press conference of National Cabinet in December. Lukas Coch/AAP

What the current bill would do

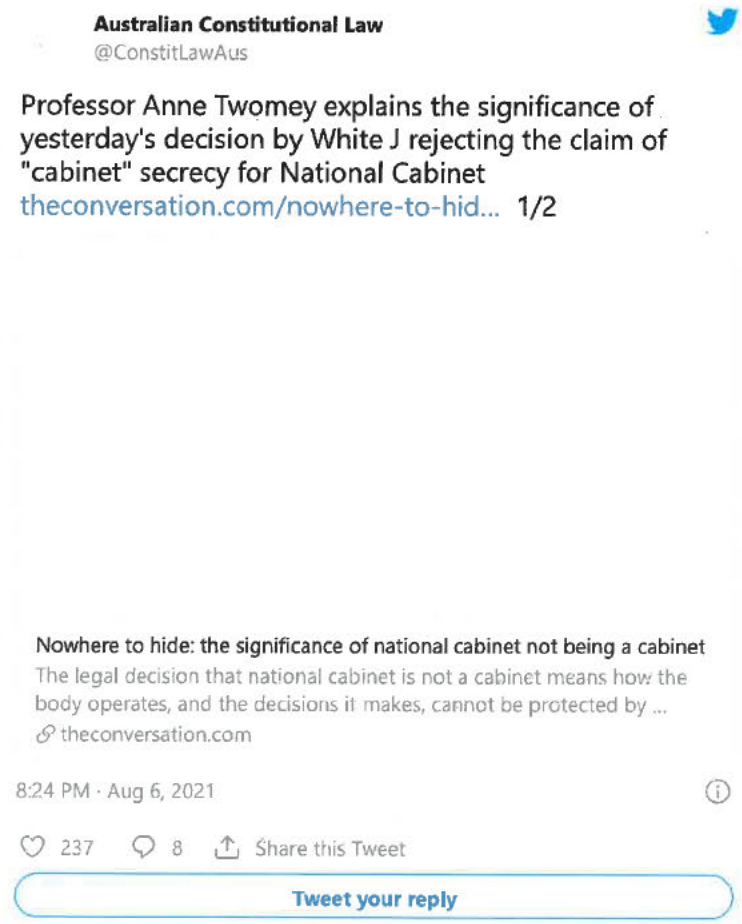
None of these bodies was set up by legislation. Over the almost 30 years of its existence, however, COAG came to be mentioned in passing in a lot of legislation dealing with federal, state and territory government relations.

This explains the title of the current bill: the COAG Legislation Amendment Bill.

Interestingly, the first two sections of the bill ("schedule one" and "schedule two") amend a host of acts referring to the old name, COAG. None of the amendments, however, uses "National Cabinet" as a substitute. Instead, for example, the COAG Reform Fund would become the Federation Reform Fund and references to COAG alone would become First Ministers' Council.

Against this background, the amendments in schedule three to the FOI Act — and many other acts — seem even more peculiar.

Here, National Cabinet is referred to by name, and the amendments define the federal cabinet to include "the committee known as the National Cabinet". This begs the question: known by whom? If the answer lies in the terminology used by the prime minister, what other bodies might this bill ultimately cover?



How confidential should National Cabinet be?

The bill raises an important question of the extent to which decisions of National Cabinet should be available to parliaments, the media and the public.

The need for transparency and accessibility is pressing. Over the course of the pandemic, the National Cabinet has made a host of significant decisions about how public power will be exercised, when and by whom. Its decisions have dramatically affected the lives of all Australians for almost two years.

In many ways, the National Cabinet's effectiveness relies on public cooperation and trust. The only publicly available information about its decisions, however, comes through bland press releases, discursive remarks at Prime Minister Scott Morrison's press conferences, and the occasional leak to selected journalists.

The lack of public knowledge about what goes on in National Cabinet cuts across all the principles and practices of representative democracy — at the Commonwealth level and in each of the states and territories.



There may well be a case for keeping some aspects of what goes on in National Cabinet confidential. The decisions are difficult and negotiations may be tense. Outcomes are sometimes unpredictable and public opinion can be febrile. It's also in the public interest to encourage frank exchanges between political leaders and innovative thinking about solutions.

These considerations suggest there may be a case for the confidentiality of some aspects of the National Cabinet and preliminary working documents.

There is no comparable rationale, however, for withholding information about the decisions that have been made, any finalised documents on which they are based and understandings about the action expected to be taken.

These matters would be exempt under the bill. They should be in the public domain.

Compounding the confusion

By enshrining the words "National Cabinet" in legislation, the bill also entrenches the foolish and inappropriate name that was adopted without apparent deliberation as the pandemic began to unfold.

Perpetuating this way of describing the a forum of heads of government puts at least two of our most basic principles of government at risk.

Read more: ***Will national cabinet change federal-state dynamics?***

One is federalism. It is bizarre to describe the meeting of heads of Australian government as a subcommittee of the cabinet of one of its members (the federal government).

This could be destructive to healthy relations between federal, state and territory governments in the future.

The second risk is to the idea of a "cabinet" itself — and, by extension, responsible government.

The concept of a cabinet is hard enough for people to understand. It depends almost entirely on constitutional convention, reinforced by the logic of the relationship between government and parliament.

No doubt the frequency with which the term is used gives observers some general understanding of what a cabinet does. But if the understanding is muddled by applying the term "cabinet" to a body of an entirely different kind, the potential for confusion is magnified.

This comes with considerable loss to our democracy, and no gain.

Transparency Cabinet Secrecy Freedom of Information Act Morrison government National cabinet Rex Patrick