



Australian Government

Department of the Prime Minister and Cabinet

# Senate Finance and Public Administration Legislation Committee Inquiry into the COAG Legislation Amendment Bill 2021

Submission

September 2021



# Overview of the COAG Legislation Amendment Bill 2021 (the Bill)

The Bill comprises three schedules. All schedules are consequential to the cessation of the Council of Australian Governments (COAG) and establishment of the new architecture for federal-state relations.

Schedules 1 and 2 propose amendments to a number of Acts to replace references to COAG and the COAG Reform Fund with updated terminology consistent with the new federal architecture.

Schedule 3 proposes amendments to a number of Acts to make clear that information of the National Cabinet and its committees is confidential in the same way as information of the Federal Cabinet and its committees.

## A new federal architecture – background

As outlined in the statement from the Prime Minister, Premiers, and Chief Ministers released by National Cabinet, the National Cabinet was established by the Prime Minister to respond to the COVID-19 global pandemic ([Attachment A](#)). All First Ministers agreed to the establishment of National Cabinet as the most appropriate way to provide a coordinated and responsive approach to the complex and fast moving policy and implementation challenges posed by COVID-19.

While the National Cabinet's first priority is to respond to the health and economic effects of the COVID-19 pandemic, it is also a platform for leaders to collaboratively address issues of national significance.

On 29 May 2020, the National Cabinet agreed to the cessation of the COAG, and to a revised architecture for federal relations. A principle feature of the new framework is the National Cabinet's ongoing role as the peak intergovernmental body to coordinate Australia's response to the COVID-19 pandemic and to set reform priorities. The National Cabinet will commission specific reform projects to be undertaken by the Council on Federal Financial Relations (constituted by the Treasurers from each jurisdiction) and the National Cabinet Reform Committees (of which there are currently five constituted by the relevant Ministers in each jurisdiction). The latter committees currently cover the subject matters of energy, health, infrastructure and transport, rural and regional, and skills.

The National Cabinet can establish additional committees as required. The committees may be temporary or ad hoc in nature, or standing forums to inform the deliberations of the National Cabinet.

The National Cabinet also agreed to the formation of the National Federation Reform Council (NFRC). The NFRC is a joint forum for the National Cabinet, the Council on Federal Financial Relations and the President of the Australian Local Government Association to consider priority national federation issues that fall outside of the National Cabinet's remit. The NFRC is supported by three taskforces on Women's Safety, Indigenous Affairs and Veterans' Wellbeing.

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A diagram of the new federal relations architecture is at [Attachment B](#).

On 26 June 2020, the National Cabinet commissioned Mr Peter Conran AM to lead a Review into the former COAG Councils and Ministerial Forums (the Conran Review). The objective of the Conran Review was to rationalise and reset the structure and work programs of the former COAG councils and ministerial forums to better align ongoing ministers' meetings with the revised federal relations architecture.

On 23 October 2020, the National Cabinet accepted the Conran Review's 33 recommendations, which included the rationalisation of the former COAG Councils and Ministerial Forums by maintaining and resetting certain ministers' meetings, making some time limited, and disbanding several ministerial forums (recognising ministers can still meet with their counterparts to consider one-off issues) (recommendation 1).

The Conran Review also recommended the Commonwealth should introduce legislation into the Parliament to amend outdated references to COAG, COAG Councils and ministerial forums, and a parallel process should take place in each of the States and Territories (recommendation 30). The purpose of Schedules 1 and 2 of the Bill is to implement this recommendation.

The States and Territories will progress any amendments to their legislation adopting amendments consistent with [the same approach] those proposed in the COAG Legislation Amendment Bill 2021. For instance, on 4 August 2021, the ACT Government introduced a bill with the same title into the ACT Legislative Assembly that updates references to COAG, and former COAG ministerial forums and councils in six laws (three Acts and three regulations).

## Terminology changes - Schedules 1 and 2 of the Bill

The Bill proposes key terminology changes in Acts to support the new federal architecture as set out below. The Bill does not otherwise change the operation of the Acts that are proposed to be amended.

- The *COAG Reform Fund Act 2008* would be renamed the *Federation Reform Fund Act 2008* (Schedule 1, Part 1), and references in other Acts to the 'COAG Reform Fund' would be replaced with the 'Federation Reform Fund' (Schedule 1, Parts 2 and 3).
  - The COAG Reform Fund Act establishes a mechanism for making grants of financial assistance to the states. The proposed new title speaks to that federated arrangement and gives effect to the cessation of COAG.
- References in Acts to COAG would be replaced with a generic term of 'First Ministers' Council' (Schedule 2, Part 1).
  - That term means a body that consists only of, or includes, the Prime Minister, State Premiers and the Territory Chief Ministers. Both the National Cabinet and the National Federation Reform Council fall within the definition of a 'First Ministers' Council'. The approach is intended to more flexibly support future title changes to intergovernmental

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bodies of this kind without legislative amendment.

- References to specific names of a Council (such the COAG Health Council or Australian Transport Council) would be replaced with a generic term of 'Ministerial Council' (Schedule 2, Part 1).
  - That term would be defined to mean a body that consists of the minister from each jurisdiction responsible, or principally responsible, for the matters relating to a particular portfolio issue. Existing references to 'Ministerial Council' would be amended to that effect. Similar to the approach to references to COAG, this approach is also intended to more flexibly support future title changes to intergovernmental bodies of this kind without legislative amendments.

It is anticipated that updates to delegated legislation, such as regulations which include references to COAG or a COAG Council, will be made following passage of this Bill.

## Amendments relating to the National Cabinet - Schedule 3 of the Bill

Schedule 3 of the Bill proposes amendments to fifteen Acts (with amendments to an additional two Acts contingent on the passage of legislation) where existing provision is made to protect confidential Federal Cabinet information from disclosure, to ensure that the same protections are afforded to National Cabinet information. These protection provisions take different forms, for instance:

- a power of a minister to issue a public interest certificate to prevent the disclosure of deliberations or decisions of the Cabinet or its committees
  - see for example, section 39B of the *Administrative Appeals Tribunal Act 1975* and items 1 to 4 of Schedule 3, section 14 of the *Administrative Decisions (Judicial Review) Act 1977* and item 5 of Schedule 3, and section 130H of the *Foreign Acquisitions and Takeovers Act 1975* and item 13 of Schedule 3,
- provision in the *Archives Act 1983* that a Cabinet notebook created after 1990 is in the 'open access period' within the meaning of that Act, 30 years after it is created
  - see section 22A of the *Archives Act* and item 6 of Schedule 3,
- provision in the *Freedom of Information Act 1982* (FOI Act) that Cabinet documents are exempt from disclosure
  - see section 34 of the *FOI Act* and items 14 to 16 of Schedule 3,
- a power of a statutory office holder to exclude Cabinet information for certain purposes including public reports
  - see for example subsections 29(2)-(5) and of the *Independent National Security Legislation Monitor Act 2010* and items 17 and 18 of Schedule 3, and section 149 of the *Law Enforcement Integrity Commissioner Act 2006* and items 19 to 21 of Schedule 3, and

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- provision in the *Public Interest Disclosure Act 2013* that requires a public official to consider a range of factors when determining whether to make an ‘external disclosure’ of alleged wrongdoing, including the principle that Cabinet information should remain confidential unless lawfully publicly available
  - see paragraph 26(3)(b) of the Public Interest Disclosure Act and item 30 of Schedule 3.

The purpose of the amendments in Schedule 3 is to provide that rules of this kind in Commonwealth legislation protect National Cabinet information from disclosure in the same way as Federal Cabinet information.

### National Cabinet as a committee of the Federal Cabinet

The Bill achieves that purpose by amending definitions of ‘Cabinet’ in relevant Acts to expressly provide that Cabinet includes the committees known as the National Cabinet and committees of the National Cabinet. The current committees of the National Cabinet are the Council on Federal Financial Relations and five National Cabinet Reform Committees.

This flows from a foundational operational rule of the National Cabinet, as established by the Prime Minister, and subsequently agreed by State and Territory First Ministers, that the National Cabinet is a committee of the Commonwealth Cabinet. As such, its operations and its conventions are the same in respect to the Commonwealth Cabinet.

On 17 September 2021, the Prime Minister announced all leaders had agreed on that day that National Cabinet had strengthened relationships between governments by facilitating regular discussions in the national interest, founded on the same principles of trust, confidence and collaboration which underpin State, Territory and Commonwealth cabinets. Members of the National Cabinet published a joint statement in support of that agreement ([Attachment A](#) refers).

Maintaining confidentiality over National Cabinet information and discussions is critical to its effective operation, and reflects the close relationship that National Cabinet has to the Federal Cabinet. Federal Cabinet has close oversight of issues to be considered by, and outcomes of, the National Cabinet. Federal Cabinet and its committees are briefed in advance on issues which are proposed for the National Cabinet. While it remains a matter for States and Territories how they manage information informing or endorsed by National Cabinet, the Department understands that State and Territory governments intend to have similar arrangements and relationships between their Cabinets and the National Cabinet, given the well accepted principle that National Cabinet does not derogate from State or Territory sovereign authority.

Maintaining the confidentiality of National Cabinet information is an essential part of maintaining the protection of Federal Cabinet information. The application of cabinet conventions over National Cabinet information supports full and frank discussions between leaders with a view to ensuring robust decisions in the interests of all Australians.

This does not mean there is no transparency of National Cabinet decisions. After each National Cabinet meeting the Prime Minister, as Chair of the National Cabinet, issues a statement summarising the outcomes of the decisions made.

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State and Territory leaders similarly address their constituents and respond to questions from the media following National Cabinet meetings.

The Commonwealth and the States and Territories, as appropriate, remain responsible for implementing outcomes agreed by the National Cabinet.

### Proposed amendments to the FOI Act: Administrative Appeals Tribunal decision in *Senator Rex Patrick and Secretary, Department of the Prime Minister and Cabinet*

On 5 August 2021, the Administrative Appeals Tribunal (AAT) overturned a decision of the Department of the Prime Minister and Cabinet to refuse access under the *Freedom of Information Act 1982* (FOI Act) to certain National Cabinet documents. The AAT held that the documents were not exempt under the Cabinet exemption in section 34 or the Commonwealth-State relations conditional exemption in s47B of the FOI Act. On 2 September 2021, in compliance with the AAT's decision, the Department provided the documents in issue to the FOI applicant, Senator Rex Patrick.

The existing definition of 'Cabinet' in the FOI Act expressly includes a committee of the Cabinet. As part of his decision, Deputy President, the Honourable Justice Richard White, determined that the Commonwealth had not established (as a matter of fact or law) that the National Cabinet was a committee of the Cabinet within the meaning of the FOI Act.

The Government's position has always been that National Cabinet information is confidential in the same way as Cabinet information under longstanding and well established conventions of Cabinet. Consistent with that original intention, the Bill confirms that position by proposing amendment to the definition of 'Cabinet' in the FOI Act to expressly provide that the Federal Cabinet includes a committee known as the National Cabinet and any committee of the National Cabinet.

The decision of the AAT is not considered to have precedential force beyond the facts and documents before it.

### Proposed amendments to the FOI Act: application provision

The effect of item 33 in Schedule 3 of the Bill is that the proposed amendments to the FOI Act will apply to requests to access a National Cabinet document where the request was made on, after or before the commencement of this Bill but only where the request is not finally determined on commencement of the Bill.

A request is not 'finally determined' unless all rights of review or appeal have expired or have been exhausted. For example, a request is not finally determined if, before commencement of this Bill:

- an agency makes a decision to refuse access to a National Cabinet document on the ground that it is exempt, and
- the FOI applicant is able to seek internal review, or has lodged a review application with the Australian Information Commissioner or the Administrative Appeals Tribunal that remains active.

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## Attachment A – Statement from the Prime Minister, Premiers, and Chief Ministers

### **The Importance of Confidentiality to Relationships between the Commonwealth and the States and Territories**

Under longstanding Cabinet conventions, it is understood that discussions and documents of Cabinet are considered confidential. The rationale for the protection of Cabinet confidentiality is that it is necessary to ensure the proper functioning of Cabinet. Cabinet confidentiality ensures that members of National Cabinet may exchange differing views and achieve outcomes together.

Effective working relationships between the Commonwealth and the States and Territories are central to Australia's public interest. The Commonwealth and State and Territory Governments share responsibility for, and must cooperate to achieve, the best outcomes for the Australian people. First Ministers agree that National Cabinet has strengthened these relationships by facilitating regular confidential discussions in the national interest, founded on the same principles of trust, confidence and collaboration which underpin State, Territory and Commonwealth Cabinets.

The National Cabinet was established by the Prime Minister to respond to the COVID-19 global pandemic. All First Ministers agreed to the establishment of National Cabinet as the most appropriate way to provide a coordinated and responsive approach to the complex and fast moving policy and implementation challenges posed by COVID-19.

Since its establishment on 13 March 2020, all members of National Cabinet have participated on the clear understanding that these meetings were conducted according to longstanding Cabinet conventions – most importantly, the confidentiality applied to discussions, papers and records of meetings. Consistent with this, meetings and operations of National Cabinet have been conducted in line with the process outlined in the Commonwealth Government's Cabinet Handbook.

The confidentiality of information and decision-making has been invaluable to National Cabinet, enabling issues to be dealt with quickly, based on advice from experts. The sharing of sensitive information and judgements in a forum that provides the ability for confidential discussions has been of great significance to effective decision making by the States, Territories, and the Commonwealth in the public interest throughout the course of the COVID-19 pandemic.

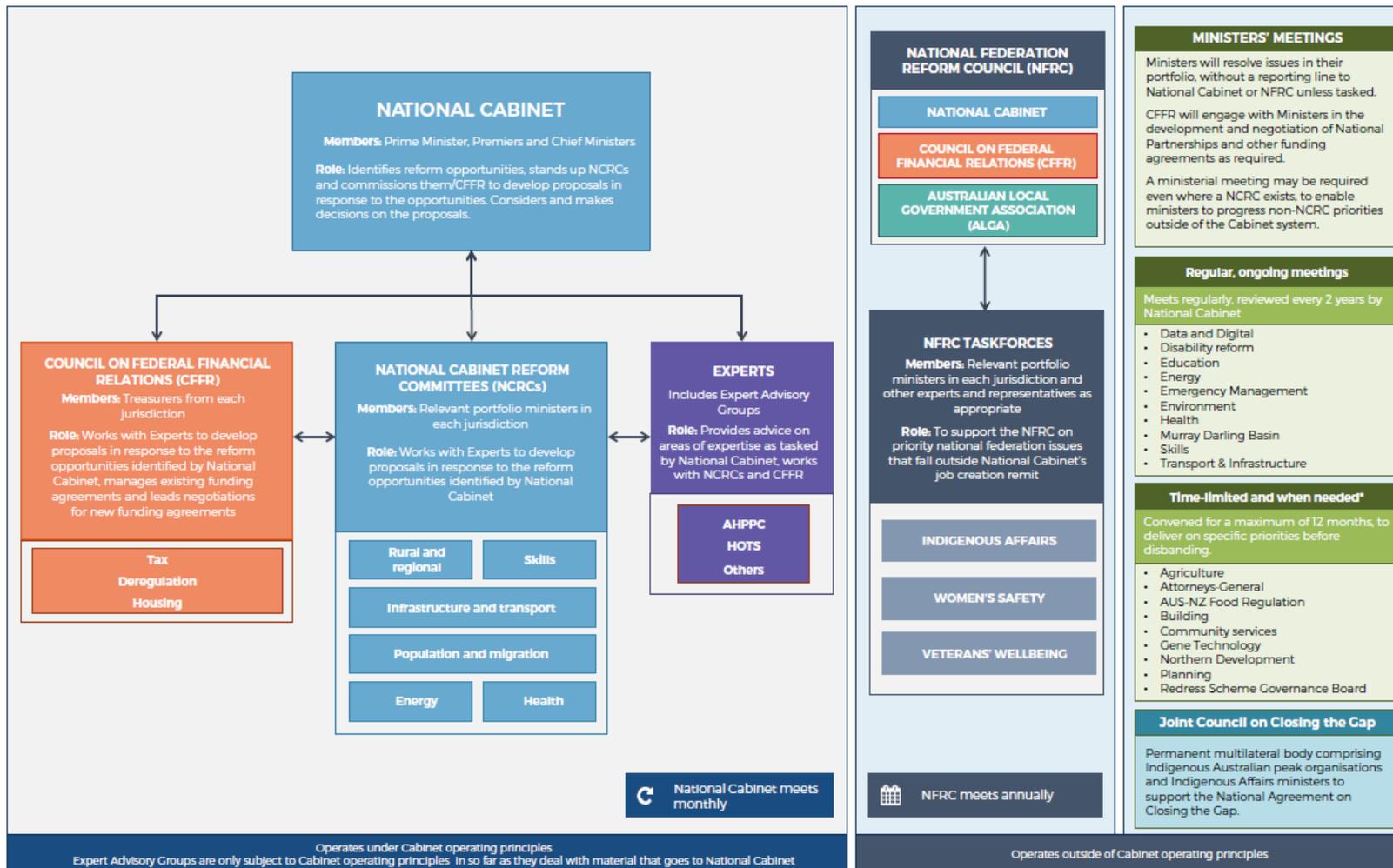
The disclosure of National Cabinet documents or discussions other than in accordance with the principles agreed by National Cabinet would undermine its effective operation and severely damage relations between the Commonwealth and the States and Territories. It would potentially expose negotiations and discussions before their conclusion and prevent the open flow of information between members of the National Cabinet. This would undermine the trust between the Commonwealth and the States and Territories and would prevent full and frank discussions that achieve the best outcomes for the Australian public. In turn this would lead to poorer outcomes and adversely affect all governments' abilities to consider and respond to issues urgently, and would undermine the key decisions needed to deliver outcomes in the public interest.

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The principles of Cabinet confidentiality which underpin National Cabinet deliberations have not prevented appropriate disclosure of outcomes. By agreement of National Cabinet members, meetings are, and will continue to be, followed by public statements that articulate decisions made by the National Cabinet. This approach is consistent with the conventions and operations of Cabinet and has been critical to building and maintaining public confidence in the National Cabinet without undermining the important principles of Cabinet confidentiality or the sensitivity of the content of the deliberations.

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