Law Council
OF AUSTRALIA

COAG Legislation Amendment Bill 2021

Senate Finance and Public Administration Legislation Committee

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The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

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- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
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The Chief Executive Officer of the Law Council is Mr Michael Tidball. The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful for the contribution of the Law Society of New South Wales to this submission, in addition to input provided by the Administrative Law Committee of the Federal Litigation and Dispute Resolution Section.

Introduction

1. The Law Council of Australia (**the Law Council**) appreciates the opportunity to provide a submission to the Senate Finance and Public Administration Legislation Committee (**the Committee**) inquiry into the COAG Legislation Amendment Bill 2021 (Cth) (**the Bill**).

2. The Bill proposes to amend multiple Commonwealth Acts to reflect administrative changes to the names and composition of several intergovernmental bodies, which variously comprise the First Ministers and portfolio Ministers of the Commonwealth and States and Territories. A key administrative change is the cessation of the body formerly known as the Council of Australian Governments (**COAG**) and the establishment of a new intergovernmental body known as the National Cabinet.[1] Schedules 1-3 to the Bill give effect to this and other administrative changes in three main ways, two of which are fairly described as technical, and one of which represents a significant policy shift.

Technical changes: Schedules 1 and 2

3. Schedule 1 to the Bill would amend Commonwealth federal financial relations legislation, replacing various statutory references to the 'COAG Reform Fund' (which is the vehicle for appropriating and delivering certain Commonwealth funding to States and Territories) with references to the renamed appropriation mechanism, the 'Federation Reform Fund'.[2] Secondly, Schedule 2 would replace references in legislation to 'COAG' with references to the generic concept of a 'First Ministers Council'. It would also amend the definition of the term 'Ministerial Council' as used in various legislation regulating areas of concurrent Commonwealth and State responsibility, such as education, health and transport, to capture the National Cabinet.[3] The measures in Schedules 1 and 2 generally appear to be technical and largely uncontroversial.

Substantive changes: Schedule 3

4. In contrast, Schedule 3 to the Bill proposes amendments to limit existing rights to access official information under multiple Commonwealth enactments. Specifically, it would expand existing Cabinet-related exemptions in Commonwealth information disclosure regimes to cover documents disclosing the deliberations and decisions of the National Cabinet, not merely the Cabinet of the Australian Government (comprising the Prime Minister and senior Ministers of the Commonwealth).

5. In particular, Schedule 3 proposes to amend freedom of information legislation, and the information-gathering and reporting powers of independent and parliamentary oversight bodies, to effectively deem the National Cabinet to be a committee of the Commonwealth Cabinet. This means that the documents of the National Cabinet would be covered by existing disclosure exceptions, or limitations on information-gathering powers or public reporting obligations, for Cabinet-related documents or information contained in such documents.[4]

6. This legislative 'deeming device' would directly overrule a recent decision of the Administrative Appeals Tribunal (**AAT**) in *Patrick v Secretary, Department of Prime*

[1] See, COAG Legislation Amendment Bill 2021 (Cth) (**the Bill**).
[2] Ibid sch 1; Explanatory Memorandum, Bill (**the EM**), 1.
[3] Ibid sch 2; EM, 1.
[4] Ibid sch 3 especially item 14; EM, 1 and 17.

Minister and Cabinet (5 August 2021) 2020/5875 & 2020/5876 (**'*Patrick*'**) concerning a request to access minutes of certain National Cabinet meetings under the *Freedom of Information Act 1982* (Cth) (**FOI Act**)**.** The Hon Justice Richard White (a Judge of the Federal Court of Australia, sitting as a Deputy Presidential member of the AAT) held that, on the basis of the evidence before the Tribunal, the entity known as the National Cabinet did not, in fact, constitute a committee of the Commonwealth Cabinet for the purpose of the 'Cabinet documents exemption' in section 34 of the FOI Act.

7. The legislative 'deeming device' proposed in Schedule 3 would also remove the need for the Commonwealth to rely on other 'conditional' exemptions under the FOI Act, which were considered in the alternative in *Patrick,* and require proof of harm as well as the application of a public interest test. In *Patrick,* White J further held that the documents at issue in that case were not conditionally exempt under section 47B of the FOI Act, on the basis that their disclosure was not reasonably likely to cause harm to Commonwealth-State relations. White J held that the evidence before the AAT (largely the opinions of senior public servants, as well as his Honour's independent inspection of the relevant documents) did not support a finding that the disclosure of the particular documents was reasonably likely to be harmful to intergovernmental relations, and tended to support a conclusion that their release would promote the objects of the FOI Act to facilitate transparency and scrutiny.[5]

Law Council position on the Bill

8. Whilst the Law Council acknowledges that there may be merit in pursuing measures that will encourage candour in the deliberations of National Cabinet, the Law Council does not support the proposed amendments in Schedule 3, and recommends it be omitted from the Bill.

9. However, should some form of tailored exemption from disclosure under the FOI Act be considered necessary for documents of the National Cabinet, a more nuanced approach should be taken so that any new exemption is not wider than is needed. Suggesting guiding principles to assist in this task are set out below at paragraph 35.

Detailed submissions on Schedule 3 to the Bill

Proposed 'deeming device'

10. Most significantly, the measures in Schedule 3 propose to include National Cabinet documents within the existing 'Cabinet documents' exemption to disclosure under section 34 of the FOI Act.

11. The effect of this proposed amendment is that documents of the National Cabinet would be unconditionally exempt from disclosure (see items 14-16 of Schedule 3 to the Bill). That is, there would be no requirement for the decision-maker to apply a public interest test, with the exemption enlivened only if the balance of public interest considerations favours non-disclosure (see section 11A of the FOI Act, and the structured requirements for applying public interest assessment under section 11B). Rather, these documents would be exempt solely by reason of their status as National Cabinet documents, without any requirement or discretion for the decision-maker (or reviewer, such as the FOI Commissioner or AAT) to assess the sensitivity, or otherwise, of the contents of the specific documents covered by an individual disclosure request.

[5] *Patrick,* [276].

12. Importantly, the Cabinet documents exemption in section 34 of the FOI Act applies far more broadly than the official records and any other documents recording the actual deliberations of the Cabinet at its meetings. It covers documents of the following kinds:

> *(a) both of the following are satisfied [in relation to the document]:*
>
> *(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.*

13. The proposed amendments in Schedule 3 to the Bill would operate by amending the definition of Cabinet in the FOI Act, so that the National Cabinet is covered, on the basis of being deemed to be a Committee of the Commonwealth Cabinet.

14. This means that the exemption in section 34 would apply to proposals of individual Ministers to place matters on an agenda of the National Cabinet (even if the matter ultimately never proceeds), briefings of Ministers on submissions and proposed submissions, and drafts of all of these documents. This is a much wider, and potentially indeterminate, class of documents than the specific, official meeting minutes that were the subject of the access request under review in *Patrick.*

Two key concerns in relation to Schedule 3

15. The Law Council does not support the proposed amendments to section 34 of the FOI Act in relation to National Cabinet documents, or the effective replication of this approach in the other Commonwealth information-disclosure laws proposed to be amended by Schedule 3. This is so for two reasons, namely:

- **Absence of meaningful justification for applying an absolute exemption based on the status rather than substance of information.** This includes an absence of any acknowledgement or justification of the combined impact of applying a comprehensive exemption for National Cabinet documents or information across a wide range of Commonwealth information access and disclosure laws in addition to FOI. (The latter laws comprise: the information-gathering powers and public reports of independent oversight agencies; the statutory right of affected individuals to obtain written reasons for administrative decisions which adversely affect them; and the protection of public officials against reprisals for making public interest disclosures of suspected wrongdoing); and
- ***Adequacy of existing FOI exemptions.*** There are already adequate conditional exemptions from disclosure under the FOI Act, which apply if it can be objectively established, on the basis of evidence, that disclosure of the particular document in question is reasonably likely to **cause** harm to specified national interests, and the further satisfaction of a public interest test (sections

11A and 11B).[6] The application of both a statutory harm-based threshold and a structured public interest test is particularly important, both at the point of the primary decision on an FOI request, and at the point of independent review of the primary decision by the Australian Information Commissioner and the AAT. The latter review bodies conduct merits review of the decision-maker's assessment of harm and the balance of public interest considerations and can inspect the relevant documents for that purpose. Their decisions on review are legally binding upon the Commonwealth.

Concern 1: lack of credible justification for an absolute, status-based exemption

16. Schedule 3 to the Bill proposes to significantly expand an existing and carefully calibrated exemption to a legally enforceable right of public access to information. The relevant exemption, in respect of Cabinet documents, is already extraordinary in that it attaches to the mere status of the documents (which far exceed the actual deliberations and decisions of the Cabinet) rather than substance of the information contained therein. The Law Council is concerned that the proposed expansion of the Cabinet documents exemption has the potential to significantly weaken transparency and accountability by undermining one of the key objects of the FOI Act, as set out in subsection 3(2). That is, to 'promote Australia's representative democracy' by contributing to increasing public participation in Government processes and increasing scrutiny, discussion, comment and review of the Government's activities.

17. Accordingly—and given the reliance that is evidently being placed on the National Cabinet to make decisions about matters of critical importance to the lives and livelihoods of all Australians in the context of the current COVID-19 pandemic—any reduction of the existing, legally enforceable rights of public access to information should not be undertaken lightly.

18. In contrast to Schedules 1 and 2 to the Bill, the measures in Schedule 3 are not straightforward technical amendments which are consequential to administrative changes in the naming and composition of various intergovernmental bodies established under the executive powers of the Commonwealth, States and Territories. Rather, the measures in Schedule 3 to the Bill represent a substantial policy shift, which would curtail the scope of existing rights to access official information—rights which are protected expressly by Article 19(2) of the *International Covenant on Civil and Political Rights*, as a component of the right to freedom of expression. Accordingly, the necessity and proportionality of any such reduction of these existing rights must be established convincingly, through the presentation of compelling and specific evidence of the actual harm to the national interest that has been sustained, or is reasonably likely to be sustained, if the existing right of access was not curtailed in the manner proposed by the Bill.

19. The Law Council is concerned that the extrinsic materials to the Bill offer only a brief explanation of the proposal to apply a far-reaching limitation upon a legal right to access information. The Explanatory Memorandum, at page 17, essentially states that, because the proposed amendments would legislatively deem the National Cabinet to be a Committee of the Commonwealth Cabinet, it follows that the same requirements for absolute confidentiality apply to all proceedings and documents of

[6] Importantly, section 11B of the FOI Act requires the decision-maker on a request (or the reviewer or a primary decision) to examine a range of prescribed statutory factors tending in favour of disclosure (such as the achievement of the objects of the FOI Act), and further expressly prohibits the consideration of other prescribed factors. (For example, the decision-maker cannot place reliance on the fact that disclosure would be likely to cause mere embarrassment to, or loss of confidence in, the government; the risk that members of the public could misunderstand or misinterpret the document; or that disclosure could enliven public debate that the decision-maker regards as 'unnecessary'.)

the National Cabinet, as this absolute degree of confidentiality is 'essential to enable full and frank discussions' of all matters of business placed before it.

20. However, the establishment and operation of intergovernmental decision-making bodies, whose membership variously comprises First Ministers and portfolio Ministers from all polities in the federation, has considerable precedent. In this context, it is striking that there are otherwise no wholesale, explicit exemptions to information-disclosure legislation for named intergovernmental bodies. For example, the Law Council is not aware of FOI legislation ever having contained an absolute exemption in favour of the former COAG, or the multitude of Ministerial Councils such as the former Standing Committee of Attorneys-General, or Ministerial Council on Police and Emergency Management, all of which have taken many highly significant policy and operational decisions on sensitive matters of national importance, and would inevitably have involved extensive 'full and frank' discussions between leaders.

21. Rather, any non-disclosure in response to applications made under the FOI Act would presumably have been reliant upon the establishment of exemptions which are based on the substance of the relevant information, and in some cases a public interest test. For example, unconditional exemptions are available for information whose disclosure is reasonably likely to cause harm to national security (section 33) or law enforcement operations or public safety (section 37), or documents whose release would disclose information in breach of existing statutory secrecy provisions (section 38), or documents subject to client legal privilege (section 42), or documents which contain material obtained in confidence (section 45). Conditional, public-interest exemptions are available for information whose disclosure would or is reasonably likely to cause damage to Commonwealth-State relations (section 47B) or reveal governmental deliberative processes (section 47C).

22. No evidence is provided in the extrinsic materials to the Bill of any harm having been sustained by the release of any documents containing information about the (non-publicly announced) deliberations or decisions of the predecessor bodies to the National Cabinet. Moreover, no evidence has been provided which suggests that the obligation on the Commonwealth to comply with the disclosure orders made by the AAT in *Patrick* have caused harm to Commonwealth-State relations.

23. Moreover, as recognised by White J in *Patrick*, the body known as the National Cabinet clearly is not a "Cabinet" in any ordinary sense, nor a committee of Cabinet. It does not have the collective responsibility to Parliament, the decision-making authority, or the strong traditions of solidarity and confidentiality, that a Westminster Cabinet has. It has no recognised existence as a legal entity or a part of the constitutional structure.

24. The provisions in Schedule 3 to the Bill proposing to deem the National Cabinet to be a committee of the Federal Cabinet thus erect a legal fiction, which reflects an apparent policy choice about the level of protection from disclosure that should be afforded to documents connected with National Cabinet's processes. But there is no clear reason why the Federal Cabinet is the appropriate model.

25. In this regard, the Law Council is concerned that the extrinsic materials to the Bill provide no explanation as to why alternative proposals have not been pursued, which would have been less restrictive on the right to seek and access official information than an absolute, status-based exemption for all National Cabinet-related documents. Less restrictive alternatives include, for example, making such documents subject to a conditional public interest-based exemption, in line with the structured assessment required under sections 11A and 11B of the FOI Act.

26. The Law Council notes that the effective removal of a conditional, public interest-based exemption, in favour of enabling the Commonwealth to rely upon an absolute exemption, is likely to mean that that the disclosure of information about the deliberations and decisions of the National Cabinet will be left to the unguided discretion of the executive government of the day, as to whether it wishes to pro-actively disclose particular information to the public on an *ad hoc* basis (for example, through post-meeting media statements).

27. The above risks are compounded further by other proposed amendments to complementary information-disclosure legislation in items 5 and 30 of Schedule 3 to the Bill. These measures would limit the ability of individual public officials to make public interest disclosures of information that is 'national cabinet information'; and would limit the statutory right of affected individuals to obtain written reasons for administrative decisions affecting them, so as to exclude all National Cabinet information from those statements of reasons. The Law Council is concerned that, when operating collectively, the measures in Schedule 3 would shut down the key legally enforceable avenues for public disclosure of the proceedings and decisions of National Cabinet, and thereby make transparency reliant on the beneficial exercise of *ad hoc* executive discretion in favour of disclosure.

28. Similarly, the measures in items 7, 17 and 18 of Schedule 3 to the Bill would limit the ability of the Parliament to inform itself about important matters, for the purpose of discharging its Constitutional function of holding the executive government to scrutiny and account, consistent with the doctrine of responsible government. These measures would operate to require the removal of any National Cabinet information from the reports of statutory oversight bodies which are required to be tabled in Parliament (which, as noted above, would cover far more than the actual proceedings of the National Cabinet at its formal meetings). This includes the reports of the Auditor-General (who is an officer of the Parliament and reports directly to the Parliament) and Independent National Security Legislation Monitor (whose unclassified reports the Attorney-General is required to table in Parliament).

29. Moreover, item 26 of Schedule 3 would limit the statutory powers of the Parliamentary Joint Committee on Law Enforcement to obtain, and include in its reports, information relevant to its functions, for the sole reason that the information is National Cabinet information (and not because of any specific sensitivities in the disclosure of the particular piece of information).

30. Further, independent Commonwealth oversight bodies, including the Commonwealth Ombudsman, Australian Human Rights Commission, and Australian Commission for Law Enforcement Integrity, would be exposed to the Attorney-General potentially issuing 'public interest certificates' which would override those agencies' information-gathering powers in relation to any National Cabinet information specified in those certificates. (See, for example, items 9, 21 and 25 of Schedule 3 to the Bill.) The Law Council has previously expressed significant reservations about the existence of these statutory non-disclosure certification regimes in their current form, because they are unacceptable impediments to the independence of statutory oversight bodies to obtain the necessary information to perform their statutory functions of inquiring into the actions of the executive government. The expansion of the grounds on which those certificates may be issued, at the pleasure of an individual Minister, would exacerbate these already significant concerns.

31. In addition, given that the proposed Commonwealth Integrity Commission would subsume the functions of the Australian Commission for Law Enforcement Integrity, it would be highly undesirable for the information-gathering and reporting powers of that new Commission to be fettered by a Ministerial public interest certification regime,

which could be applied to any or all information of the operations of the National Cabinet. The Bill appears to set a concerning precedent in this regard.

32. Further, there is no apparent reason the records of the National Cabinet ought to be subject to the status-based exclusion from the open access period for documents of the Commonwealth Cabinet ('Cabinet Notebooks') under the *Archives Act 1983* (Cth) as is proposed by item 6 of Schedule 3 to the Bill. The Law Council is concerned that the combined effect of the various exemptions will be to 'lock down' both contemporaneous and historical access to these documents.

33. Accordingly, the Law Council is concerned that the extrinsic materials to the Bill, and particularly the Human Rights Statement of Compatibility, do not acknowledge or seek to justify the cumulative impacts on public transparency and accountability of a wholesale, status-based exclusion of National Cabinet information across a range of Commonwealth disclosure and oversight-related legislation. This matter is essential to an accurate assessment of the proportionality of the proposals, and consequently their compatibility with the right to seek and access information in Article 19(2) of the *International Covenant on Civil and Political Rights*, as a component of the right to freedom of expression.

34. A further unaddressed issue in the extrinsic materials to the Bill is that the proposed amendments to the FOI Act in Schedule 3 may create interoperability issues with State and Territory FOI laws, which unless specifically amended, will not recognise the documents of the National Cabinet in the possession of those governments as subject to a complete exemption in favour of Cabinet documents. The proposed enactment of the FOI measures in Schedule 3 therefore has the potential to create confusion and inconsistency, as well as a potential risk of creating an undesirable precedent for corresponding amendments to State and Territory laws.

35. The Law Council submits that, if the Parliament is persuaded that some form of bespoke exemption from disclosure under the FOI Act is considered necessary for documents of the National Cabinet, then a more nuanced approach should be taken so that any new exemption from disclosure is not wider than is needed. Following are some guiding principles that may be of assistance in achieving proportionality.

- ***Sunset clause***—it is apparent that the National Cabinet has come into being in its current form to assist with a coordinated response to a particular crisis. If it continues beyond the pandemic it may have a different structure and significance. There would be merit in including a sunset provision, to ensure that the extent of the appropriate exemption from disclosure is revisited and the exemption does not continue longer than necessary.
- ***Duration of exemption***—it is not apparent that deliberations of National Cabinet need to be subject to a blanket form of secrecy for the same length of time as deliberations of a true Cabinet. It would be preferable if any specific exemption for National Cabinet documents were to expire, say, 5 years after the creation of a document (noting that, thereafter, it would be subject to the normal range of exemptions in the FOI Act).
- ***Scope of information covered—***accepting that there is merit in encouraging candid discussion in National Cabinet, it is not apparent that secrecy needs to extend to the topics discussed or the information presented to that body. That is because (unlike a true Cabinet) National Cabinet does not manage the budgets or policy agenda of a government and does not face the electorate every three-to-four years). This is another way in which it would be desirable for an exemption to be more carefully drawn.

- ***Exclusion of Committees of the National Cabinet***—even if the assimilation to Cabinet is retained – the extension of the exemption to Committees of National Cabinet seems unwarranted. That language seems likely to include specialist working groups (of for example, public health experts or lawyers) whose discussions may be purely technical. Documents pertaining to those working groups may be of immense value to the public—for example, in consideration and debate about preparations for the next pandemic—and the case for a blanket exemption from disclosure seems weak. Revelation of the advice given to political leaders may be awkward or embarrassing for them, but since the enactment of FOI legislation that has not been regarded as a legitimate basis for preventing disclosure.

Concern 2: adequacy of existing exemptions directed to substance rather than status

36. In addition to the absence of a compelling justification being documented in the extrinsic materials to the Bill, the Law Council further considers that there is no compelling case for the proposed expansion of the Cabinet exemption in section 34 of the FOI Act to the National Cabinet.

37. In particular, the FOI Act already contains an extensive range of conditional exemptions (that is, those exemptions which are subject to a public interest test) which appear adequate to protect information whose disclosure would demonstrably cause harm to important national interests. As noted above, this includes conditional exemptions for the disclosure of information that would or is reasonably likely to cause damage to Commonwealth-State relations (section 47B), and information whose disclosure would reveal the deliberative processes of government (section 47C).

38. No justification has been offered as to why such conditional exemptions are considered inadequate in relation to the non-publicly announced deliberations and decisions of the National Cabinet. It is notable that the abovementioned conditional exemptions would have been potentially available in relation to documents containing information about the non-public deliberations and decisions of the former COAG, and remain available with respect to documents and information about the deliberations of intergovernmental bodies other than the National Cabinet.

39. Indeed, as noted above, the decision of the AAT in *Patrick* explicitly rejected the alternative claims by the Commonwealth that particular documents of the National Cabinet (being minutes of specific meetings) were conditionally exempt under section 47B of the FOI Act. White J, sitting as a Deputy Presidential Member of the AAT, held that the Commonwealth had failed to discharge its legal onus to establish that disclosure would be reasonably likely to cause harm to Commonwealth-State relations.

40. Specifically, White J held that the opinion evidence of Commonwealth officials about apprehended harm arising from disclosure was not persuasive, because it comprised generalised and abstract claims of impediments to full and free discussion at National Cabinet meetings (to the same effect as the statements of opinion now made in the Explanatory Memorandum to the Bill). It was held that such claims could not reasonably be sustained from the actual contents of the documents under review in that case, being minutes of particular National Cabinet meetings, which were independently inspected by White J during the proceedings.[7]

[7] *Patrick,* [268] and [275]-[276]. See further, the reasoning on section 47B at [245]-[274].

41. In particular, White J identified the following matters as being determinative of his decision that the Commonwealth could not claim the conditional exemption:

- the contents of the relevant meeting minutes were very brief, revealing only 'the outcome of a collective decision-making process'. They did not record the individual participants, motions, proposals, objections or other contributions such as discussion preceding agreement on particular points, or the respective pros and cons of proposals under consideration.[6] On the basis of the nature of the particular documents in question, their disclosure 'would not affect the full and frank nature of discussions held by members of the National Cabinet and thus neuter its effectiveness', as the Commonwealth had argued;[8]
- the evidence before the Tribunal identified that the Prime Minister had adopted a practice of publicly announcing the National Cabinet's decisions after meetings and that there was an apparent expectation amongst participants that decisions would be announced publicly;[9]
- in any event, the public interest test tended in favour of disclosure, in that it would support the achievement of the objects of the FOI Act. In summing up, his Honour stated:

> *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).*[10]

42. The outcome in *Patrick* clearly reflects that, where it can objectively be established, on the basis of credible evidence, that the disclosure of particular information pertaining to specific proceedings, deliberations or decisions of the National Cabinet is reasonably likely to cause harm to Commonwealth-State relations (and further that the public interest in non-disclosure outweighs the public interest in disclosure) then those documents will be protected from disclosure under the FOI Act. However, generalised or 'class-based' claims to the theoretical prospects of harm if any documents pertaining to the operations of a particular intergovernmental body were released will not suffice.[11]

43. If the requisite, specific harm threshold cannot be established in relation to the disclosure of a particular document of the National Cabinet that is covered by an FOI request, the Law Council submits that section 47B of the FOI Act facilitates the correct result as a matter of policy. Namely, the information will be subject to the legally enforceable right of access conferred by the FOI Act, and a corresponding disclosure obligation is rightly imposed on the Government (provided that no other exemptions apply). That outcome should not be circumvented via the expansion of the unconditional exemption in section 34 for Cabinet documents, by legislatively deeming the body known as the 'National Cabinet' to be a committee of the

[8] Ibid [260].

[9] Ibid [267].

[10] Ibid [272].

[11] Ibid [230]-[243] especially [239] (explicit rejection by White J of a 'class-based' interpretation of the harm threshold in section 47B).

Commonwealth Cabinet. Moreover, the reasons of White J in *Patrick* set out, at length, the reasons that the National Cabinet did not, in fact, possess the requisite characteristics to be a committee of the Commonwealth Cabinet. That decision was based on evidence about the nature, composition and operations of the body known as the 'National Cabinet'. That finding should not be overridden via the legislative creation of a legal fiction, which would be the effect of Schedule 3 to the Bill, if it is passed.

44. For the reasons outlined above, the Law Council urges the Committee to recommend that Schedule 3 is omitted from the Bill, and further that the proposed measures contained in that Schedule should not proceed at any time in the future.