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Committee Secretary
Senate Finance and Public Administration Committee

By email: fpa.sen@aph.gov.au

Dear Committee Secretary

Inquiry into the *COAG Legislation Amendment Bill 2021*

The Office of the Victorian Information Commissioner (**OVIC**) is pleased to provide a submission to the Senate Finance and Public Administration Committee's inquiry into the *COAG Legislation Amendment Bill 2021 (the Bill)*.

OVIC is also a signatory to a separate submission prepared by the Office of the Australian Information Commissioner in response to this inquiry. The present submission represents OVIC's views only.

OVIC is the primary regulator for freedom of information, information privacy and data protection in Victoria, administering both the *Freedom of Information Act 1982* (Vic) and the *Privacy and Data Protection Act 2014* (Vic). Given this remit, OVIC has a strong interest in promoting and ensuring transparency and access to information.

This submission focuses on the proposed amendments to the *Freedom of Information Act 1982* (Cth) (**FOI Act**) in Schedule 3 of the Bill. The amendments seek to 'make clear that where Commonwealth legislation makes provisions to protect from disclosure the deliberations and decisions of the Cabinet and its committees, these provisions apply to the deliberations and decisions of the National Cabinet'.¹

Preventing access to National Cabinet documents will decrease transparency, accountability and trust

The proposed amendments to the FOI Act will expand the current definition of 'Cabinet' to include National Cabinet and its committees. Consequently, the exemption in section 34 of the FOI Act will expand to deny access to documents submitted to National Cabinet for its consideration and documents which reveal National Cabinet deliberations or decisions unless the document, deliberation or decision has been officially disclosed or published.² These documents would be exempt from disclosure for 20 or 30 years until they reach the open access period under the *Archives Act 1983* (Cth).

The proposed amendments are contrary to the public interest as they would reduce government transparency and accountability in relation to important deliberations and decisions that affect all Australians. Given the nature of National Cabinet, this has the potential to reduce trust not only in the Australian government but in also in state and territory governments.

¹ Explanatory Memorandum, COAG Legislation Amendment Bill 2021; COAG Legislation Amendment Bill 2021, Schedule 3.

² Sections 34(3) and 34(5) of the Cth FOI Act. Further, section 34 does not have a public interest test or discretion which may permit the disclosure of the document. It is an absolute exemption, which means if a document meets the criteria outlined in the provision, the decision-maker must refuse access to the document.

This Bill comes at a time when Australia saw the biggest drop of any OECD country on the Transparency International *Corruption Perceptions Index* from 2012 to 2020.³ The section of the Transparency International report outlining key developments in the Asia Pacific region highlights Australia as a 'significant decliner'.⁴ Australia's ranking and public perception will not improve with the passage of laws that exempt more information from public scrutiny.

The broad application of the Cabinet exemption is not necessary

National Cabinet was established on 13 March 2020 and replaced the Council of Australian Governments (COAG), which ceased on 29 May 2020. It is relevant to highlight that before its cessation, documents of COAG and its committees were not subject to a specific exemption in the FOI Act. For the approximate 20 years that COAG operated prior to its cessation, existing exemptions in the FOI Act could be applied to deny access to COAG documents where appropriate and necessary.⁵ These existing exemptions continue to operate effectively to prevent disclosure of sensitive information in specific instances to protect public and private interests in a limited and appropriate way.

Characterising National Cabinet as a 'Cabinet' is inherently inappropriate

National Cabinet is appropriately characterised as an intergovernmental committee rather than a Cabinet.⁶ Extending the definition of 'Cabinet' to include National Cabinet and its committees is an inappropriate and deliberate scope creep to expand an exemption to a category of documents to which it simply should not apply.

Expanding the scope of the Cabinet exemption is contrary to the objects of the FOI Act

Section 3(2) of the FOI Act states that its object is to promote Australia's representative democracy by contributing towards increasing public participation in Government processes, with a view to promoting better-informed decision-making, and increasing scrutiny, discussion, comment and review of the Government's activities. Further, section 3(3) of the FOI Act highlights Parliament's intention to increase recognition that information held by the Government is to be managed for public purposes and is a national resource.

Expanding the scope of the Cabinet exemption is contrary to fundamental democratic principles

In addition to being contrary to the objects of the FOI Act, under the Bill, National Cabinet would be subject to extraordinary secrecy, which does not align with democratic principles of openness and accountability. Timely access to information about what government does, how it does it, and why, is essential to Australians' ability to participate in their democratic society.

Perhaps most importantly of all, no persuasive case has been publicly articulated that National Cabinet will produce better outcomes for all Australians if its deliberations are unconditionally hidden from scrutiny.

³ For example, Australia dropped from a score of 85 and a rank of 7 in 2012, to 77 and 11 respectively in 2021; Transparency International, *Corruption Perceptions Index 2020*, (2021) 2 available online at: https://images.transparencycdn.org/images/CPI2020_Report_EN_0802-WEB-1_2021-02-08-103053.pdf; Transparency International, *Corruption Perceptions Index 2012* (2012) 2 available online at: https://images.transparencycdn.org/images/2012_CPI_brochure_EN.pdf.

⁴ Transparency International, *CPI 2020: Asia Pacific* (web page, 28 January 2021) <https://www.transparency.org/en/news/cpi-2020-asia-pacific>.

⁵ For example, in 2016 the Australian Information Commissioner found that section 47B(a) of the FOI Act applied to documents relating to bilateral discussions agreed to by COAG and giving access to the documents at that time would be contrary to the public interest as they were obtained in confidence and related to ongoing bilateral discussions before being disclosed to New South Wales officials.

⁶ In *Patrick and Secretary, Department of Prime Minister and Cabinet (Freedom of Information)* [2021] AATA 2719 the Administrative Appeals Tribunal found National Cabinet did not fall within the definition of Cabinet in section 4 of the FOI Act. Further, National Cabinet is comprised of the Prime Minister, Premiers of the States, and Chief Ministers of the Territories.

Transparency is critical for accountability. Accountability builds trust. Without the people's trust, governments will find it harder to address the complex policy issues of the future.

Yours sincerely

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Information Commissioner