



D21/83871

5 October 2021

Senator Claire Chandler
Chair
Finance and Public Administration Legislation Committee
Parliament House

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

Dear Senator Chandler

Inquiry into the provisions of the COAG Legislation Amendment Bill 2021

I understand that the committee has sought my advice on two matters arising out of its inquiry into the COAG Legislation Amendment Bill 2021

Information-gathering powers

I have been asked how the passage of the bill would affect “the ability of the Senate and its committee to obtain information about the activities of National Cabinet and its subcommittees”.

As background, the National Cabinet, comprising the Prime Minister and the Premiers and Chief Ministers of the states and territories, was established at the onset of the COVID-19 pandemic and subsequently announced as a replacement for the Council of Australian Governments. Schedule 3 of the bill deals with a dozen or so Commonwealth Acts that provide for the confidentiality of the deliberations and decisions of the Federal Cabinet and its committees. Schedule 3 extends those provisions to the National Cabinet by incidentally defining it as a committee of Cabinet. One of the Acts affected is the *Freedom of Information Act 1982*.

Technically, the bill should not affect the Senate’s ability to obtain information at all. The Senate’s information gathering powers do not derive from Commonwealth statutes. They are among the bundle of “powers, privileges and immunities” inherited by each of the Commonwealth Houses at Federation under section 49 of the Constitution. They may also separately derive from the inherent powers of legislatures: *Odgers’ Australian Senate Practice*, 14th ed., pp. 78-9. As senators know, a person seeking to withhold information sought by the Senate or by senators in committees must raise a public interest immunity claim on established grounds, specifying the harm that might be occasioned by the disclosure. It is for the relevant committee, and ultimately for the Senate, to determine whether to accept that claim.

However, as the Senate Privileges Committee has observed, “officials well versed in freedom of information procedures will often – inappropriately – seek to apply these same procedures to decisions

about the disclosure of information to the parliament and to its committees”: 153rd report, paragraph 4.25. That practice persists, despite governments conceding as early as 1992 that it does not provide a legitimate basis for a claim of public interest immunity, and despite corrective Senate resolutions: *see* Odgers, 14th ed., pp. 669–70.

Senate practice recognises as a “potentially acceptable” ground for a public interest immunity claim the possibility that a document might reveal the deliberations of Cabinet: Odgers, 14th ed., p 665. The FOI exemption for Cabinet documents extends to a much wider range of material, including material submitted or intended to be submitted to Cabinet, and material created to brief ministers on Cabinet submissions. Given that the bill seeks to extend the FOI exemption to documents of the National Cabinet, it seems likely that the passage of the bill would lead to officials – and possibly ministers – purporting to invoke the extended statutory protection as a reason to withhold information sought by the Senate and its committees, rather than making properly-formulated public interest immunity claims.

In any case, the government has been invoking the confidentiality of Cabinet deliberations as a public interest ground for resisting production of documents connected to the National Cabinet since at least June 2020: COVID-19 Select Committee, Second interim report, December 2020, paragraphs 1.35-1.43, 1.55-1.62, 1.63-1.70. In adopting recommendations contained in that report, the Senate has rejected public interest immunity claims made on this basis. It is by the means of such resolutions that the Senate is able to accept or reject the expansion of public interest immunity claims into new areas.

Cabinet-confidentiality

I have also been asked how often in the Parliament information has been withheld from the Senate on the basis of a claim of cabinet-in-confidence.

There would be dozens of occasions during this parliament on which information has been withheld from Senate committees on the basis of a claim that its provision would reveal the deliberations of Cabinet. I expect that it occurs during each round of Senate estimates. This outcome has also been reported by several other committees during this Parliament, including in reports of the COVID-19 Select Committee, the Select Committee on Sports Grants and the Community Affairs References Committee in its inquiry into Centrelink’s Income Compliance Program.

Cabinet confidentiality has also been invoked in public interest immunity claims made by the government in response to numerous Senate orders for the production of documents during this Parliament, including:

No. 135—Drought reports, 17/9/2019

No. 173—Australia’s integration, employment and settlement outcomes for refugees and humanitarian entrants, 15/10/2019

No. 379—Community Sport Infrastructure Grant Program—Communications and advice, 5/2/2020

No. 385—Report on ministerial standards and sports grants—Order for production of documents, 5/2/2020

No. 430—Female Facilities and Water Safety program—Minister for Youth and Sports, 11/2/2020

No. 478—Ministerial standards and sports grants—Gaetjens report, 25/2/2020

No. 680—COVID-19—Government modelling, 17/6/2020

No. 692—Statutory review of the Environment Protection and Biodiversity Conservation Act, 18/6/2020

No. 695—Environment Protection and Biodiversity Conservation Act, 18/6/2020

Community Affairs References Committee recommendation: Income Compliance Program, 2/9/2020

Community Affairs References Committee recommendation: Income Compliance Program—Executive Minute, 2/9/2020

No. 873—Federal Court and Federal Circuit Court Fees—Consultation, 30/11/2020

No. 1028—Future Frigates, 24/2/2021

COVID-19 Select Committee Recommendations, 17/3/2021

No. 1200—Modern Manufacturing Initiative, 9 August 2021

No. 1208—Doherty Institute modelling, 10/8/2021

Community Affairs References Committee recommendation: Income compliance program, 12/8/2021

No. 1217—Urban Congestion Fund, 23/8/2021

[These numbers correspond to the identifier for the notice of motion initiating the order.]

More information about each of these orders and responses is available on the [Senate business pages](#) on the parliamentary website.

Please let me know if I can be of any further assistance.

Yours sincerely,

(Richard Pye)