

# Vanishing cabinet

## Submission on the COAG Legislation Amendment Bill

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Submission

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**September 2021**

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# Summary

The decision of Justice Richard White in the Administrative Appeals Tribunal (AAT), that the National Cabinet is not a “committee of cabinet”,<sup>1</sup> should be respected. To make the National Cabinet subject to cabinet confidentiality by fiat would deny the public of their right to know how decisions are made at the highest levels.

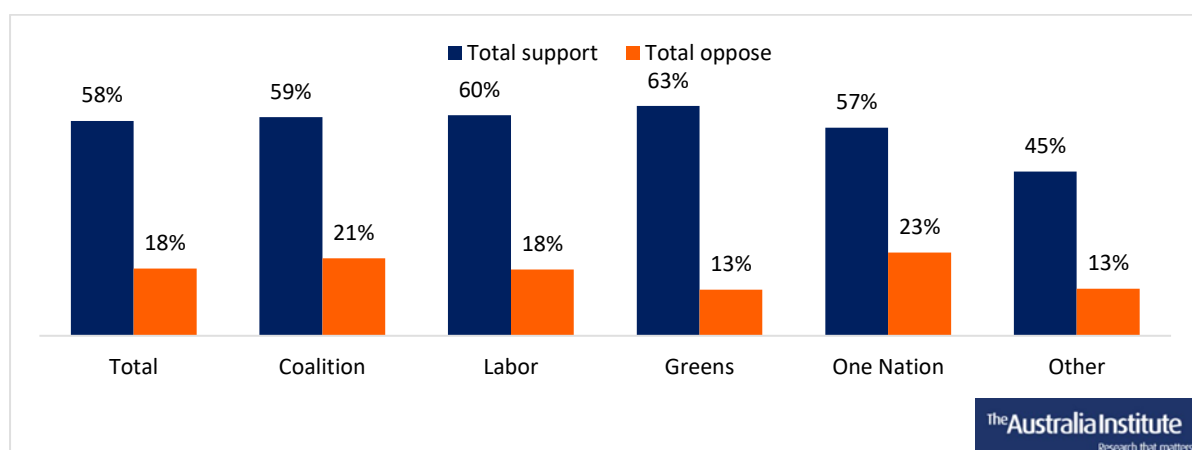
Cabinet confidentiality exists to ensure that ministers can honestly and vigorously express their position in cabinet meetings, then publicly support the final cabinet decision even if they privately argued against it. Without cabinet solidarity, National Cabinet members do not need the same level of confidentiality.

The Australian Cabinet is already too secretive, with “cabinet-in-confidence” used to justify refusing to release documents that were not prepared for cabinet. New Zealand demonstrates that cabinet papers and minutes can be released in a timely manner without undermining cabinet decision making.

Premiers and chief ministers are ultimately responsible to their own cabinets, parliaments and voters. They have to be able to explain themselves, which may include discussing the contents of National Cabinet deliberations.

The public agree that National Cabinet decisions should be more transparent. Three in five Australians (58%) say National Cabinet decisions should be subject to freedom of information requests, with only one in five opposed.

**Figure: National Cabinet documents to be accessible by FOI, by voting intention**



<sup>1</sup> White (2021) *Patrick and Secretary, Department of Prime Minister and Cabinet (Freedom of Information)*, [http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2021/2719.html?context=1;query=Patrick%20v%20Prime%20Minister;mask\\_path=au/cases/cth/AATA](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2021/2719.html?context=1;query=Patrick%20v%20Prime%20Minister;mask_path=au/cases/cth/AATA)

Instead of scrambling to maintain secrecy, the Australian Government should take this opportunity to reflect on National Cabinet: how it is structured, how it might be improved, and how it will operate after the COVID-19 pandemic has passed. This could include additions to National Cabinet’s membership, as well as a new – and more accurate – name.

# Introduction

Thank you for the opportunity to make a submission to the inquiry into the COAG Legislation Amendment Bill.

The Australia Institute's Democracy & Accountability Program was founded in 2021 to improve the quality of Australian governance and heighten public trust in politics and democracy. Although the program is new, the Australia Institute has written about democracy and accountability issues since it was founded in 1994.

This submission focuses on one aspect of the COAG Legislation Amendment Bill: the attempt to artificially identify National Cabinet as a committee of the federal cabinet for the purpose of laws regarding access to information (freedom of information, archives, oversight agencies, and so on).

# Cabinet confidentiality is for cabinets

In the second reading speech, Minister Alan Tudge only made a very limited argument in favour of the secrecy provisions contained in the bill:

And like the Commonwealth cabinet and its committees, the maintenance of confidentiality is essential to enable full and frank discussion between the representatives of all jurisdictions.<sup>2</sup>

Cabinet confidentiality has its origins in the unique norms of cabinets, particularly collective responsibility and cabinet solidarity. If all members of a cabinet are going to publicly stand by its decisions, then they need to be able to voice their concerns in confidence. Otherwise, ministers would be reluctant to speak candidly for fear of having their arguments used against them when they later supported the cabinet's decision.<sup>3</sup>

Despite its name, National Cabinet is not a cabinet. This was established beyond doubt by Justice White's exhaustive reasoning in his decision. National Cabinet is a successor to the Council of Australian Governments (COAG), and serves a similar purpose.

Minister Tudge also neglects to mention that freedom of information law already provides some protection for inter-governmental communications, under the exemption for Commonwealth–state relations.

National Cabinet's main advantage over COAG seems to be frequency, not secrecy. When the vaccine rollout was going poorly in April 2021, Prime Minister Scott Morrison suggested that National Cabinet meet twice a week.<sup>4</sup> For premiers, chief ministers and the prime minister to be able to meet often, even after the pandemic, would be sensible. They do not need to meet in secret.

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<sup>2</sup> Tudge (2021) *COAG Legislation Amendment Bill 2021: Second Reading*, <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F71296f1b-f2df-4894-803f-ba51397ab75a%2F0013%22>

<sup>3</sup> For more details, see Rodrigues (2010) *Cabinet confidentiality*, [https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/BN/0910/CabinetConfidentiality](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/0910/CabinetConfidentiality); Twomey (2021) *Nowhere to hide: the significance of national cabinet not being a cabinet*, <http://theconversation.com/nowhere-to-hide-the-significance-of-national-cabinet-not-being-a-cabinet-165671>

<sup>4</sup> Murphy & Karp (2021) *Morrison asks national cabinet to meet twice a week after Covid vaccine program flounders*, <http://www.theguardian.com/australia-news/2021/apr/14/morrison-asks-national-cabinet-to-meet-twice-a-week-after-covid-vaccine-program-flounders>



# Cabinets are already too secretive

Even cabinet confidentiality as it is currently practiced is too secretive and lacking in accountability.

The Government now uses cabinet confidentiality to justify not disclosing documents that have merely been presented to cabinet for deliberation. This is done for reasons of political expedience, not because it keeps cabinet debate confidential.

For example, the Government has refused to table a 2019 report from Boston Consulting Group on Australia Post despite an order for the production of documents from the Senate.

The Government made a public interest immunity claim on the grounds that the report “was used to inform Cabinet deliberations” and “It is a longstanding practice that information about the operation and business of the Cabinet is not disclosed publically [sic], as to do so would potentially reveal the deliberations of the Cabinet which are confidential.”<sup>5</sup>

This seems to be an overstatement of the extent of the cabinet confidentiality immunity.<sup>6</sup>

It is possible to keep cabinet confidentiality while radically increasing public access to cabinet documents. In New Zealand, the proactive release of cabinet material policy means most cabinet papers and minutes recording the decision are published within 30 business days of a final decision being taken.<sup>7</sup> This has not appeared to interfere with the ability of NZ cabinet ministers to robustly debate policy ahead of a decision being made.

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<sup>5</sup> Australian Government (2021) *Response to the Senate Environment and Communications Legislation Committee report: The Future of Australia Post’s Service Delivery*, [https://www.infrastructure.gov.au/department/ips/government\\_responses/government-response-future-auspost-service-delivery.aspx](https://www.infrastructure.gov.au/department/ips/government_responses/government-response-future-auspost-service-delivery.aspx)

<sup>6</sup> See the relevant sections in Laing (2016) *Odgers’ Australian Senate Practice*, pp. 645, 649, 665–666, [https://www.aph.gov.au/About\\_Parliament/Senate/Powers\\_practice\\_n\\_procedures/Odgers\\_Australian\\_Senate\\_Practice](https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Odgers_Australian_Senate_Practice)

<sup>7</sup> NZ Department of the Prime Minister and Cabinet (2018) *Proactive release of Cabinet material*, <https://dpmc.govt.nz/publications/proactive-release-cabinet-material>

# National Cabinet has not been thought through

Treating the National Cabinet like a cabinet (or committee of cabinet) is not only unfair to the public, who have a right to know what decisions have been made and based on what evidence, but also threatens the working of the National Cabinet itself.

Heads of governments (prime ministers, premiers and chief ministers) need to be able to explain their decisions to their own cabinets, parliaments and voters. At times, they need to make different decisions to those made by the National Cabinet as a whole. If National Cabinet is declared by fiat to be a committee of cabinet, heads of government lose the ability to explain themselves without risking disclosing cabinet deliberations and documents.

The scramble to create an alternative body to COAG has also caused confusion in National Cabinet's committees. The *Review of COAG Councils and Ministerial Forums* by Peter Conran, who had been Secretary to Cabinet under Prime Minister John Howard, found that energy ministers have regulatory functions that are incompatible with a National Cabinet structure. His first recommendation was to maintain the Energy Ministers Meeting.<sup>8</sup>

The objective of the National Cabinet restructure of COAG was to streamline decision-making across the Commonwealth and State jurisdictions, and to eliminate duplication. In the case of energy it literally resulted in duplication: COAG Energy Council was bifurcated into the Energy National Cabinet Reform Committee and the Energy Ministers Meeting.

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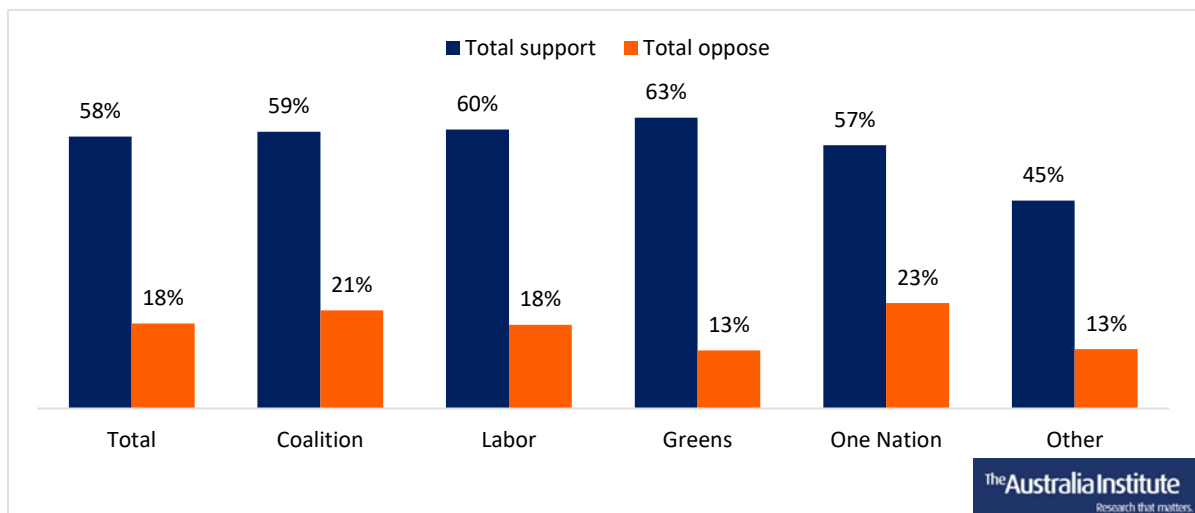
<sup>8</sup> Conran (2020) *Review of COAG Councils and Ministerial Forums*, pp. 5, 19–20,  
<https://www.pmc.gov.au/domestic-policy/effective-commonwealth-state-relations>

# The public supports an open National Cabinet

In May 2021, The Australia Institute surveyed a nationally representative sample of 1,006 Australians about the confidentiality of National Cabinet documents and whether these documents should be accessible through Freedom of Information (FOI) requests. At the time of polling, the AAT was yet to make a decision on Senator Rex Patrick's case.

- Three in five Australians (58%) support allowing National Cabinet documents to be accessible via FOI requests, including 23% who strongly support.
- One in five Australians (18%) oppose allowing National Cabinet documents to be accessible through FOI requests, with 5% strongly opposed.
- A majority of Coalition (59%), Labor (60%), Greens (63%) and One Nation (57%) voters support making National Cabinet documents accessible via FOI requests.

**Figure 1: National Cabinet documents to be accessible by FOI, by voting intention**



Full details are available in the polling brief attached to this submission. The polling research was first reported by Michelle Grattan in *The Conversation*.<sup>9</sup>

<sup>9</sup> Grattan (2021) *Morrison government loses fight for national cabinet secrecy*, <http://theconversation.com/morrison-government-loses-fight-for-national-cabinet-secrecy-165693>

## Other models are possible

In defending the idea that National Cabinet is conceivably a cabinet or committee of cabinet, senior public servants reached for analogies in other troubled times: specifically the War Cabinets that operated during World War II.

In fact, these cabinets did not admit *as members* those who were not ministers.<sup>10</sup> The Advisory War Council, however, did contain members of the opposition.<sup>11</sup>

In the United Kingdom, the war ministry of the 1940s did include both Conservative and Labour MPs. However, it did so by forming a coalition government, including a Conservative Prime Minister (Winston Churchill) and Labour Deputy Prime Minister (Clement Atlee).

These examples demonstrate that the cabinet model is not fixed in stone.

For example, the National Cabinet could be extended to opposition figures, including but not necessarily limited to Australia's nine opposition leaders. When the National Cabinet was founded, calls for Albanese to be invited to join the National Cabinet came from Deputy Opposition Leader Jim Chalmers, Cheryl Kernot and former advisor to John Howard Paula Matthewson.<sup>12</sup>

Bipartisanship experts Scott Hamilton and Stuart Kells argued that as well as Albanese the National Cabinet could include Kristina Keneally and Richard Marles, as well as respected former politicians like Julia Gillard and Mike Baird. Kernot suggested that other expert parliamentarians, such as the Independent Helen Haines (who has a public health background) could also be included.<sup>13</sup>

These examples show that alternative models are possible. An expanded, more open National Cabinet (perhaps renamed to "National Council" to better reflect its true nature) may prove more effective than National Cabinet or COAG.

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<sup>10</sup> White (2021) *Patrick and Secretary, Department of Prime Minister and Cabinet (Freedom of Information)*, sec. 99

<sup>11</sup> Campbell (2005) *The War Cabinet & Advisory War Council*, <http://john.curtin.edu.au/behindthescenes/cabinet/index.html>

<sup>12</sup> Hamilton & Kells (2020) *Opinion: Time for a real war cabinet — and one based on capability, not ideology*, <https://www.themandarin.com.au/128235-opinion-time-for-a-real-war-cabinet-and-one-based-on-capability-not-ideology/>; Matthewson (2020) *Coronavirus politicis: Morrison must reach out to Albanese*, <https://thenewdaily.com.au/news/politics/australian-politics/2020/03/20/coronavirus-paula-matthewson-war-cabinet/>

<sup>13</sup> Hamilton & Kells (2020) *Opinion: Time for a real war cabinet — and one based on capability, not ideology*

# Conclusion

National Cabinet is not a cabinet, or a committee of cabinet. It lacks the background, nature and customs that would make it a cabinet, and it lacks the norms like solidarity and collective responsibility that justify the existence of cabinet confidentiality.

Changing the definition in the *Freedom of Information Act* and other legislation will not change the fact that secrecy is unnecessary and inappropriate for an inter-governmental body. The National Cabinet's members are accountable to their own cabinets, parliaments and voters.

The Australian Government has revealed a worrying preference for secrecy over transparency. This is a mistake. The Government rushed the creation of National Cabinet and should re-consider how it is structured – and named – if it is going to be an enduring institution.