Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division: FREEDOM OF INFORMATION DIVISION

File Number: 2020/5875 & 2020/5876

Re: **Patrick**

APPLICANT

And **Secretary, Department of Prime Minister and Cabinet**

RESPONDENT

DECISION

Tribunal: **The Honourable Justice White**

Date: **5 August 2021**

Place: **Adelaide**

1. The decisions under review, namely the decisions of Mr Hupalo of 6 and 10 August 2020 respectively, are set aside.

2. The Applicant be granted access to:

   a. the documents sought in his letter of request of 10 July 2020 which is the subject of AAT 2020/5875; and

   b. the documents sought in his letter of request of 10 July 2020 which is the subject of AAT 2020/5876, other than those sought in paragraph 1 of the letter and the Cabinet Handbook and other than Items 2-7 in the Minutes of the meeting on 15 March 2020.

.....**[SGND]**.....
The Honourable Justice White

CATCHWORDS

FREEDOM OF INFORMATION – review of the refusals by the Department of Prime Minister and Cabinet to give access to documents to minutes of the National Cabinet – whether documents are exempt documents pursuant to s 34(1) of the *Freedom of Information Act 1982* (Cth) (the FOI Act) – consideration of the meaning of "committee of the Cabinet" – whether National Cabinet is a committee of the Cabinet – whether documents are conditionally exempt documents pursuant to s 47B of the FOI Act because their disclosure would or could reasonably be expected to cause damage to relations between the Commonwealth and a State – decisions set aside – order for access made.

LEGISLATION

Constitution ss 61, 62, 64
Acts Interpretation Act 1901 (Cth) s 23(b)
Administrative Appeals Tribunal Act 1975 (Cth) ss 37, 44A(1)
Evidence Act 1995 (Cth) s 130
Freedom of Information Act 1982 (Cth) ss 3, 4, 11, 11A, 11B, 15, 22, 24A, 31A, 31B, 33A, 34, 47B, 47C, 47D-47J, 54W, 57A, 58, 58E, 61, 93A
Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009 (Cth)
Migration Act 1958 (Cth) s 303
Freedom of Information Bill 1981

CASES

Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 CLR 129
Arnold (on behalf of Australians for Animals) v Queensland (1987) 73 ALR 607
Attorney-General's Department v Cockcroft [1986] FCA 35; (1986) 10 FCR 180
Browne v Dunn (1893) 6 R 67
Commonwealth of Australia v Northern Land Council (1991) 30 FCR 1
Diamond v Chief Executive Officer of the Australian Curriculum, Assessment and Reporting Authority [2014] AATA 707
Drake v Minister for Immigration and Ethnic Affairs (1979) 46 FLR 409

Egan v Willis and Cahill (1996) 40 NSWLR 650

FAI Insurances Ltd v Winneke [1982] HCA 26; (1982) 151 CLR 342

Fisse v Secretary, Department of the Treasury [2008] FCAFC 188, (2008) 172 FCR 513

Jaffarie v Director-General of Security [2014] FCAFC 102; (2014) 226 FCR 505

Jorgensen v Australian Securities and Investments Commission [2004] FCA 143, (2004) 208 ALR 73

McGrath v Director-General, National Archives of Australia [2020] AATA 1790

Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd (1987) 15 FCR 274

Re Guy v Department of Transport (1987) 12 ALD 358

Re MacTiernan and Secretary, Department of Infrastructure and Regional Development [2016] AATA 506

Re Maher and Attorney-General's Department (1985) 7 ALD 731

Re Minister of Immigration and Multicultural Affairs; ex parte Applicant S154/2002 [2003] HCA 60; (2003) 77 ALJR 1909

Re Toomer v Department of Agriculture, Fisheries and Forestry [2003] AATA 1301

Rogers v Home Secretary [1973] AC 388

Sankey v Whitlam [1978] HCA 43; (1978) 142 CLR 1

Secretary, Department of Foreign Affairs and Trade v Whittaker [2005] FCAFC 15; (2005) 143 FCR 15

Secretary, Department of Prime Minister and Cabinet v Summers [2019] AATA 5537

Shi v Migration Agents Registration Authority [2008] HCA 31; (2008) 235 CLR 286

Spencer v Commonwealth of Australia [2012] FCAFC 169; (2012) 206 FCR 309

State of Victoria v Brazel [2008] VSCA 37; (2008) 19 VR 553

The Commonwealth of Australia v Northern Land Council [1993] HCA 24; (1993) 176 CLR 604

Waubra Foundation v Commissioner of Australian Charities and Not-for-Profits Commission (2017) AATA 2424

Whitlam v Australian Consolidated Press Ltd (1985) 73 FLR 414

HEARING DATE

19 May 2021

SECONDARY MATERIAL

Killey I, *Constitutional Conventions in Australia*, (Australian Scholarly Publishing, 2012)

Bagehot W, *The English Constitution*, 1867

Macquarie Dictionary (8th Edition)

Constitutional Conventions in Westminster Systems, Controversies, Changes and Challenges, edited by Galligan B, and Brenton S (Cambridge University Press, 2015)

REASONS FOR DECISION

Justice White

5 August 2021

Introduction

1. The effect of s 34 of the *Freedom of Information Act 1982* (Cth) (the FOI Act), in conjunction with ss 31A and 31B, is to make records of the Federal Cabinet and its committees exempt from access under that Act.

2. On 10 July 2020, the applicant made two applications under the FOI Act to the Department of the Prime Minister and Cabinet (DPMC) for access to information concerning the National Cabinet established in March 2020 as part of the Governmental response to COVID-19.

3. By the first application, the applicant sought access to:

> All meeting notes/minutes taken from the meeting of the National Cabinet on 29 May 2020.

4. By the second application, the applicant sought access to a range of documents concerning the formation and functioning of the National Cabinet, being:

> 1. Any documents (including correspondence) that provide the formal notification to the Governor-General that the National Cabinet was/was being formed in March 2020.
> 2. The documents that outline/describe the rules that the National Cabinet is bound by. To clarify further, the documents might include rules or guidance on the following issues:
>
> a. How decisions of the National Cabinet are arrived at (e.g. majority, consensus etc.)
>
> b. Whether any jurisdiction has a right of veto over decisions of the National Cabinet.
>
> c. Whether decisions of the National Cabinet are binding on the Commonwealth and the States/Territories.
>
> d. Whether the National Cabinet operates within the conventions, policies and guidance set out in the Cabinet Handbook.
>
> e. Whether Premiers and Chief Ministers are bound by conventions of Cabinet solidarity and confidentiality.
>
> f. Who is to serve as the Secretary of the National Cabinet and how the National Cabinet's decisions are recorded and disseminated.
>
> g. What Federal, State and Territory officials are permitted to listen to and participate in National Cabinet discussions.
>
> h. Whether Cabinet note-takers take note of National Cabinet deliberations.
>
> i. Whether deliberations of the National Cabinet (including via teleconference and videoconference) are recorded and/or transcribed, and if not, what

measures are in place to ensure that National Cabinet discussions are not recorded and/or transcribed.

5. I will refer to the documents sought by the applicant collectively as "the subject documents".

6. On 6 August 2020, Mr Hupalo, an Assistant Secretary in the Cabinet Secretariat in DPMC, notified the applicant that the Department had identified five documents as relevant to his first request but said that he had decided to refuse access to them. Mr Hupalo asserted that each of the five documents, being minutes of the National Cabinet, is an official record of the Cabinet which s 34(1)(b) of the FOI Act makes exempt from production. He said that this was so because the National Cabinet is a committee of the Cabinet.

7. On 10 August 2020, Mr Hupalo notified the applicant that no documents had been identified as within the scope of part 1 of the second request and, accordingly, that pursuant to s 24A(1)(b)(ii) of the FOI Act, access to documents of that kind was refused. In relation to part 2 of the request, Mr Hupalo said that two documents had been identified as within the scope of the request, being (a) the Cabinet Handbook (13th Edition) and (b) "the minutes of the relevant National Cabinet meeting". Mr Hupalo did not identify the meeting which he regarded as "the relevant" meeting of the National Cabinet but, as will be seen later, it is the meeting of 15 March 2020. He granted the applicant access to the Cabinet Handbook (13th Edition) but refused access to the minutes. Again, he relied on s 34(1)(b) of the FOI Act, asserting that the National Cabinet is a committee of the Cabinet for the purposes of that provision.

8. The applicant sought review of both decisions by the Australian Information Commissioner, pursuant to Part VII of the FOI Act. However, acting pursuant to s 54W, a delegate of the Commissioner decided not to undertake the review, being satisfied that it was in the interests of the administration of the FOI Act that both of Mr Hupalo's decisions be considered by this Tribunal.

9. The applicant then commenced in the Tribunal the two applications for review with which this decision is concerned. He seeks access to all the documents which are the subject of his first request and to the minutes to which Mr Hupalo referred in responding to the second request.

10. The applications were heard together. At the hearing, the respondent, who is the Secretary of the DPMC, maintained the position that s 34(1)(b) of the FOI Act makes the subject documents exempt from access. He contended, in addition, that the subject documents are "conditionally exempt" from access, pursuant to s 47B of the FOI Act, and that, in the application of s 11A(5) of the FOI Act, the Tribunal should be satisfied that the disclosure of them would, on balance, be contrary to the public interest with the consequence that the applications for review should also be dismissed on this basis.

11. For the reasons which follow, I am satisfied that orders should be made granting the applicant access to each of the subject documents.

The review by the Tribunal

12. The applicant brings his applications to the Tribunal pursuant to s 57A(1)(b) of the FOI Act.

13. The Tribunal's powers on the review derive from s 58(1) of the FOI Act:

> (1) Subject to this section, in proceedings under this Part, the Tribunal has power, in addition to any other power, to review any decision that has been made by an agency or Minister in respect of the request and to decide any matter in relation to the request that, under this Act, could have been or could be decided by an agency or Minister, and any decision of the Tribunal under this section has the same effect as a decision of the agency or Minister.

14. Once a document is established to be an exempt document, the Tribunal may not decide that access be granted to it (s 58(2)).

15. The parties' submissions proceeded on the basis that the Tribunal's task on the review is to determine whether Mr Hupalo's decisions are the correct or preferable decisions on the material before the Tribunal: *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409 at 419 (Bowen CJ and Deane J) to which reference was made in *Shi v Migration Agents Registration Authority* [2008] HCA 31; (2008) 235 CLR 286 at [35] (Kirby J), at [98] (Hayne and Heydon JJ) and at [141] (Kiefel J). However, by s 61(1)(b) of the FOI Act, DPMC has the onus of establishing that Mr Hupalo's decisions are justified or that the Tribunal should give decisions which are adverse to the applicant. The standard of proof required is the balance of probabilities: *Jorgensen v Australian Securities and Investments Commission* [2004] FCA 143, (2004) 208 ALR 73 at [65]; *Fisse v Secretary, Department of*

the Treasury [2008] FCAFC 188, (2008) 172 FCR 513 at [30] (Buchanan J) and at [91] (Flick J).

The evidence

16. The evidence before the Tribunal is wholly documentary. It comprises:

(a) the documents provided to the Tribunal pursuant to s 37 of the *Administrative Appeals Tribunal Act 1975* (Cth) (the AAT Act);

(b) a Statement of Agreed Facts to which is annexed the Cabinet Handbook (14th Edition) (Exhibit A1);

(c) affidavits made by Dr Philip Dorling on 16 April, 7 May and 13 May 2021, tendered by the applicant;

(d) an affidavit of Ms Leonie McGregor made on 16 April 2021, tendered by the respondent;

(e) an affidavit of Mr Philip Gaetjens (the respondent) made on 16 April 2021, tendered by the respondent; and

(f) the Cabinet Handbook (13th Edition) (Exhibit A7).

17. Dr Dorling obtained a doctorate in Politics from Flinders University in 1996 and has considerable experience in politics and public administration. Between 1992 and 1994, he worked as a historian in the Department of Foreign Affairs and Trade; in 2003 he worked in the Department and Premier and Cabinet in Tasmania; and from 2003 to 2008 he worked in the Chief Minister's Department in the Australian Capital Territory. He has also worked as adviser to a number of politicians and is currently the political adviser to the applicant.

18. Mr Gaetjens has been Secretary of DPMC since 2 September 2019 and has more than 40 years' experience in the public sector. In particular, from August 2011 until July 2015, he was Secretary of the New South Wales Department of Treasury, from October 2015 to

June 2018 he was Chief of Staff to the Hon Scott Morrison MP, and from August 2018 to August 2019, he was Secretary of the Commonwealth Department of the Treasury.

19. Ms McGregor has been the First Assistant Secretary in the Cabinet Division of DPMC since May 2019. She had previous experience in that Division having held the position of Assistant Secretary from May to October 2013. Since 1992, Ms McGregor has worked in multiple departments, including the Department of Health, the Department of Finance, the Independent Parliamentary Expenses Authority and DPMC. She held the position of Deputy Director General of Health in the Australian Capital Territory between July 2018 and May 2019. All in all Ms McGregor has had a 29 year career in the public sector.

20. None of the deponents was required to attend for cross-examination.

21. Mr Dorling's evidence was mainly documentary, or derived from documents, as it provided evidence of statements made by the Prime Minister in media statements and press conferences, and documents directed to showing that certain statements of Ms McGregor regarding historical precedents were wrong. It was not suggested that Mr Dorling's evidence was unreliable. I accept his evidence.

22. The respondent's affidavit was directed to the issues of whether the National Cabinet is a committee of the Cabinet and to the effect of disclosure of the subject documents on Commonwealth-State relations. Ms McGregor's affidavit was directed to the same issues, albeit more of the former than the latter. The evidence of each tended to be generalised and conclusionary in form. In some respects, the evidence of each was inconsistent with documentary evidence and seemed to assume the truth of a matter to be decided by the Tribunal (whether the National Cabinet is a committee of the Cabinet), and in some respects both the respondent and Ms McGregor expressed opinions about the effect of disclosure of the minutes on a view of their content which is not borne out by an examination of the documents. As will be seen, I do not accept all their evidence.

Inspection of the subject documents

23. As the evidentiary material did not satisfy me at the commencement of the hearing on 20 May 2021 that the subject documents are exempt documents, I required the respondent

to produce them for inspection, exercising the power conferred by s 58E(2) of the FOI Act. I inspected the documents so produced by the respondent after the hearing had concluded.

24. It is appropriate to record a little about the documents produced for the Tribunal's inspection, but I will endeavour to do so in a manner which does not reveal at this stage matters of substantive content.

25. In an envelope marked "AAT 2020/5875" relating to the applicant's request for "[a]ll meeting notes/minutes taken from the meeting of the National Cabinet on 29 May 2020", the respondent initially produced five documents. The first purported to be a minute of the meeting of the National Cabinet of 24 March 2020. There was nothing on the face of this document, or in the other documents in the envelope, which indicated how it could reasonably be regarded as a minute of the meeting of the National Cabinet held on 29 May 2020. On the Tribunal's enquiry as to whether this document had been produced in error, the respondent's solicitor confirmed that that was the case and on 22 June 2021 provided a replacement document.

26. Three of the remaining four documents initially produced appeared on their face to be extracts of the minutes of the National Cabinet Meeting on 29 May 2020 held by the Attorney-General's Department, the Department of Infrastructure, Transport, Regional Development and Communications and the Department of Home Affairs respectively. In two cases, the extracts were of Item 8 only and in one case of Item 7 only. Somewhat curiously, the fourth document, the original of which has the notation "Original authorised by Cabinet Secretary" and "Agreed as Final by the Prime Minister", contained Items 1 and 2 only, that is, it did not include Items 7 and 8. No minutes were produced initially for Items 3 to 6 inclusive.

27. On the face of the documents initially produced, it was accordingly not apparent how they could, even when considered in combination, be regarded as constituting "all" the minutes of the meeting of the National Cabinet held on 29 May 2020 which the applicant had requested. However, the replacement document produced on 22 June 2021 seems on its face to be complete: it consists of Items 1-11 and concludes with the notation "Original authorised by Cabinet Secretary".

28. In an envelope marked “AAT 2020/5876” and relating to the applicant’s second request, the respondent produced a single document, with the heading “Cabinet Minute” and the subheading “National Cabinet”, being on its face the minutes of the meeting of the National Cabinet held on 15 March 2020, including an attachment to those minutes.

Statutory provisions

29. The FOI Act grants every person a legally enforceable right, subject to the Act, to obtain access, in accordance with the Act, to documents of an “agency”, other than an “exempt document” (s 11).

30. When a person makes a request in accordance with s 15(2) of the FOI Act for access to a document of the agency, the agency must give the person access to the document in accordance with the Act (s 11A(1) and (3)) but is not required to do so if the document is an “exempt document” (s 11A(4)). If the document is “conditionally exempt”, the agency must give the person access to it “unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest” (s 11A(5)).

31. The term “agency” is defined in s 4(1) of the FOI Act to include “a Department”. It was common ground that DPMC is an agency for this purpose.

32. The term “exempt document” is defined in s 4. It is subpara (a) of the definition which is pertinent presently:

> ***exempt document*** means:
>
> (a) a document that is exempt for the purposes of Part IV (exempt documents) (see section 31B); or
>
> …

33. The term “conditionally exempt” is defined in s 4(1):

> ***conditionally exempt***: a document is ***conditionally exempt*** if Division 3 of Part IV (public interest conditional exemptions) applies to the document.

34. Section 31B in Part IV of the FOI Act indicates the circumstances in which a document will be “exempt” and “conditionally exempt”:

31B Exempt documents for the purposes of this Part

A document is ***exempt*** for the purposes of this Part if:

(a) it is an exempt document under Division 2; or

(b) it is conditionally exempt under Division 3, and access to the document would, on balance, be contrary to the public interest for the purposes of subsection 11A(5).

…

35. Section 34 in Part IV provides that Cabinet documents are exempt:

34 Cabinet documents

General rules

(1) A document is an exempt document if:

(a) both of the following are satisfied:

(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.

(2) A document is an exempt document to the extent that it is a copy or part of, or contains an extract from, a document to which subsection (1) applies.

(3) A document is an exempt document to the extent that it contains information the disclosure of which would reveal a Cabinet deliberation or decision, unless the existence of the deliberation or decision has been officially disclosed.

Exceptions

(4) A document is not an exempt document only because it is attached to a document to which subsection (1), (2) or (3) applies.

Note: However, the attachment itself may be an exempt document.

(5) A document by which a decision of the Cabinet is officially published is not an exempt document.

(6) Information in a document to which subsection (1), (2) or (3) applies is not exempt matter because of this section if the information consists of purely factual material, unless:

(a) the disclosure of the information would reveal a Cabinet deliberation or decision; and

(b) the existence of the deliberation or decision has not been officially disclosed.

36. In resisting the present applications, the respondent relies on s 34(1)(b), contending that each of the documents sought by the applicant "is an official record of the Cabinet". For this purpose, he relies on the extended meaning of the term "Cabinet" in s 4(1):

> ***Cabinet*** includes a committee of the Cabinet.

37. Division 3 of Part IV of the FOI Act identifies the circumstances in which a document will be "conditionally exempt". I will return to it later.

The Cabinet documents exemption

38. It is convenient to address first the issue of whether s 34(1)(b) makes the subject documents exempt documents for the purposes of Part IV of the FOI Act. The applicant accepted that a finding that s 34(1)(b) has that effect would be determinative of his applications.

39. The hearing proceeded on the basis that each of the subject documents comprises formal minutes of meetings of the National Cabinet. My inspection of the documents confirms that characterisation, although, as indicated, in some cases the documents produced are extracts only. It may be accepted therefore that, if the National Cabinet is a committee of the Cabinet, each of the documents is "an official record" within the meaning of that term in s 34(1)(b) – see *Re Toomer v Department of Agriculture, Fisheries and Forestry* [2003] AATA 1301 at [74].

40. The critical question therefore is whether the subject documents are official records of "the Cabinet". The respondent contends, and the applicant disputes, that the subject documents are of this character because they are official records of a "committee of the Cabinet".

The meaning of the term "committee of the Cabinet"

41. The mere use of the name "National Cabinet" does not, of itself, have the effect of making a group of persons using the name a "committee of the Cabinet". Nor does the mere labelling of a committee as a "Cabinet committee" have that effect. That term has the meaning with which it is used in the FOI Act and, in order for s 34(1)(b) of that Act to be

applicable in the present case, the National Cabinet must come within that statutory meaning.

42. It is therefore necessary to construe the expression "committee of the Cabinet" in the definition of "Cabinet" in s 4(1). It is a composite expression and should be construed as such having regard to its text, context and purpose.

43. The overall purpose of the FOI Act is to give the Australian community access to publicly held documents and thereby to promote representative democracy. So much is stated in s 3 of the FOI Act:

> **3 Objects—general**
>
> (1) The objects of this Act are to give the Australian community access to information held by the Government of the Commonwealth, by:
>
> (a) requiring agencies to publish the information; and
>
> (b) providing for a right of access to documents.
>
> (2) The Parliament intends, by these objects, to promote Australia's representative democracy by contributing towards the following:
>
> (a) increasing public participation in Government processes, with a view to promoting better-informed decision-making;
>
> (b) increasing scrutiny, discussion, comment and review of the Government's activities.
>
> (3) The Parliament also intends, by these objects, to increase recognition that information held by the Government is to be managed for public purposes, and is a national resource.
>
> …

44. However, the entitlement to access to public documents is qualified by provisions which, in some cases, preclude access altogether to documents of identified classes and which, in other cases, preclude access to the documents whose disclosure would have particular effects.

45. As is apparent from the terms set out earlier in these reasons, s 34 operates to exempt altogether from access under the FOI Act a class of documents described broadly as "Cabinet documents". Subsections (1), (2) and (3) have the effect of making exempt from disclosure the documents to which they refer, simply because of their character as

documents within the class, and without differentiation according to their content or by reference to the effect, or likely effect, of their disclosure. It is reasonable to infer that s 34, although enacted before the decision in *The Commonwealth of Australia v Northern Land Council* [1993] HCA 24; (1993) 176 CLR 604 (*NLC High Court*), reflects the considerations to which the majority in that case referred, at 615-6:

> [I]t has never been doubted that it is in the public interest that the deliberations of Cabinet should remain confidential in order that the members of Cabinet may exchange differing views and at the same time maintain the principle of collective responsibility for any decision which may be made. Although Cabinet deliberations are sometimes disclosed in political memoirs and in unofficial reports on Cabinet meetings, the view has generally been taken that collective responsibility could not survive in practical terms if Cabinet deliberations were not kept confidential … Despite the pressures which modern society places upon the principle of collective responsibility, it remains an important element in our system of government. Moreover, the disclosure of the deliberations of the body responsible for the creation of state policy at the highest level, whether under the Westminster system or otherwise, is liable to subject the members of that body to criticism of a premature, ill-informed or misdirected nature and to divert the process from its proper course … The mere threat of disclosure is likely to be sufficient to impede those deliberations by muting a free and vigorous exchange of views or by encouraging lengthy discourse engaged in with an eye to subsequent public scrutiny. Whilst there is increasing public insistence upon the concept of open government, we do not think that it has yet been suggested that members of Cabinet would not be severely hampered in the performance of the function expected of them if they had constantly to look over their shoulders at those who would seek to criticize and publicize their participation in discussions in the Cabinet room. It is not so much a matter of encouraging candour or frankness as of ensuring that decision-making and policy development by Cabinet is uninhibited. The latter may involve the exploration of more than one controversial path even though only one may, despite differing views, prove to be sufficiently acceptable in the end to lead to a decision which all members must then accept and support.
>
> (Citations omitted)

46. So much was in any event confirmed by Minister Viner in the Second Reading Speech for the *Freedom of Information Bill 1981* on 18 August 1981:

> It is of the essence of Cabinet government that the deliberations of Cabinet and Executive Council should be protected from mandatory disclosure.

47. The purpose of the Cabinet documents' exemption informs the understanding of the expression "a committee of Cabinet". It implies a subgroup so closely related to the Cabinet that the considerations which make appropriate the exemption of documents of the Cabinet also make appropriate the exemption of its documents from disclosure.

48. The term “Cabinet” is not defined in the *Constitution* nor in any other legislation of the Australian Parliament. It is not given any recognition in the Constitution as a repository of executive power. Instead the Constitution provides that the executive power of the Commonwealth is exercisable by the Governor-General as the Queen’s representative (Constitution s 61) who is advised by the “Federal Executive Council” (s 62). Nevertheless, the Cabinet in the Australian governmental system has a well-recognised existence and function, even if the early development of the Cabinet system be obscure: *Commonwealth of Australia v Northern Land Council* (1991) 30 FCR 1 (*NLC Full Court*) per Black CJ, Gummow and French JJ at 16.

49. Bowen CJ, in *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274 at 279, described the Cabinet as a body which functions according to “convention”. This term is capable of a variety of meanings but I understand his Honour to be referring to a body of unwritten normative rules and practices generally observed and acknowledged but not legally binding: Killey I, *Constitutional Conventions in Australia*, (Australian Scholarly Publishing, 2012), at 10-11. Because these normative rules have their origins in underlying principle, they are more than mere practices or usages which happen to be observed.

50. The parties referred the Tribunal to a number of authorities concerning the nature, role and responsibilities of the Cabinet in our system of government. In *FAI Insurances Ltd v Winneke* [1982] HCA 26; (1982) 151 CLR 342 at 373-4, Murphy J described features of the Commonwealth Cabinet:

> [I]n theory, the Governor in Council, and in practice the Cabinet, is the highest political organ of the State. *The Cabinet*, which has no place in the formal Constitution, *is a committee of Ministers of the ruling parliamentary party or parties*. The Cabinet is responsible for all decisions of the Governor in Council, even if in practice the real decisions are left to several Ministers or (as often in regulation-making) to one Minister. The Cabinet decisions are collective decisions. It is well-known that the Ministers who attend and recommend the Council action (including the Minister in charge of the Department concerned) may on occasion disapprove of the action. A Minister making the recommendation for action by the Council may be of opinion that the action proposed is undesirable, contrary to good government or even unconstitutional; he may make a recommendation because a majority of his Cabinet colleagues decide otherwise (or occasionally because a majority of his parliamentary party think otherwise).
>
> (Emphasis added)

51. In *Whitlam v Australian Consolidated Press Ltd* (1985) 73 FLR 414, Blackburn CJ at 421 described the Federal Cabinet in the following way:

> Cabinet is a group of persons who have in common certain political aims. It has to make decisions which must command support in Parliament and, it is hoped, will command substantial support in the electorate … Each member of Cabinet has a personal responsibility to his conscience and also a responsibility to the government.

52. It has been said that the Cabinet stands at the apex of policy formulation (Peko-Wallsend at 279) and that it is "the repository of *de facto* decision-making power" (*NLC Full Court* at 20). In 1867, Bagehot in "The English Constitution" said at 10:

> The Cabinet, in a word, is a board of control chosen by the legislature, out of persons it trusts and knows, to rule the nation.

53. As seen earlier, in *NLC High Court* the majority used the expression "the body responsible for the creation of state policy at the highest level" with reference to the Federal Cabinet, at 615.

54. These authorities indicate that Cabinets derive their existence from, and are accountable to, the Parliament from which they are drawn. They have a collective responsibility to that Parliament for the administration of the affairs of government, and for its decision-making.

55. Although each of the authorities to which I have referred post-dated the enactment of the FOI Act (in the case of *FAI v Winneke* by about two months), it is reasonable to infer that the Parliament used the term "Cabinet" with the same understanding of its role in our system of responsible and representative government. Apart from anything else, this understanding derives support from the references to the proposals by, and briefing, of "Ministers" to which s 34(1)(a)(ii) and s 34(1)(c) respectively refer.

56. Counsel for the applicant emphasised that the Federal Cabinet is a committee of Ministers comprised of Ministers ordinarily drawn from the party or parties in Government (*FAI v Winneke* at 373) and that the Ministers who form the Executive Council cannot hold office as Minister for longer than three months unless they are or become a Senator or a Member of the House of Representatives (Constitution s 64). The effect is that persons who are not, or who cease to be, elected members of the Australian Parliament can be a member of the Executive Council for only a very short period. As the Cabinet is the *de facto* shadow of the Executive Council, the same position pertains with respect to it as a matter of convention. Counsel then submitted that the s 4 definition of "committee of the Cabinet" should be

construed with regard to this understanding. There is force in this submission, and I consider that it should be accepted.

57. The meaning of the term "Cabinet" in s 34(1)(b) of the FOI Act is not of course controlled by the statements of the Prime Minister of the day. However, statements by Prime Minister Morrison in the Cabinet Handbooks, 13th and 14th Editions, issued on 28 August 2019 and 16 October 2020 respectively, are consistent with these understandings of the term "Cabinet". In each Cabinet Handbook the Prime Minister described the Cabinet as "the primary decision-making body of government" and as "the council of senior ministers who are empowered by the Government to take binding decisions on its behalf".

58. This understanding of the term "Cabinet" assists in the construction of the composite term "committee of the Cabinet".

59. The term "committee" is defined in the *Macquarie Dictionary* (8th Edition) to mean "a person or a group of persons elected or appointed from a larger body to investigate, report, or act in special cases". This supports the view that a "committee of the Cabinet" is a reference to a subgroup of the Cabinet itself, as distinct from a group of persons who are extraneous to the Cabinet.

60. Moreover, the committee must be "of" the Cabinet. The preposition "of" is capable of a variety of meanings. In one sense it means "derivation, origin, or source". In another sense it means "belonging or possession, connection, or association" (*Macquarie Dictionary*, 8th Edition). The former sense seems more apt to the term "committee of the Cabinet". But on either meaning, the preposition suggests a committee derived from the Cabinet or belonging to it.

61. Ms McGregor deposed that there are, or have been, a number of committees of the Cabinet. Some have been standing committees and some ad hoc. She mentioned specifically the National Security Committee, the Expenditure Review Committee, the Productivity Committee, the Regional Australia and Regional Development Committee, the Social Policy and Social Inclusion Committee and the Naval Shipbuilding Enterprise Governance Committee. Ms McGregor did not give evidence about the formation, composition or functioning of these Committees, nor provide any other information about them which may

have informed the context in which the Parliament used the term "committee of the Cabinet" when enacting the FOI Act. However, I am willing to infer that they were established in the manner set out in the Cabinet Handbooks 13th and 14th Editions, albeit in earlier iterations of those Cabinet Handbooks:

> The Cabinet
>
> …
>
> 2. The Cabinet is a product of convention and practice. … Provided the guiding principles of a Cabinet system are met – collective responsibility and solidarity – *it is for the Prime Minister of the day to determine the shape, structure and operation of the Cabinet*.
>
> 3. …
>
> Cabinet Committees
>
> 4. Cabinet committees are usually established around either a subject area, such as national security, or around a general function of government, such as expenditure. Temporary or ad-hoc Cabinet committees may also be established by the Prime Minister to carry out particular tasks.
>
> 5. *Cabinet committees derive their powers from the Cabinet. Generally*, *Cabinet committee decisions are brought forward to the Cabinet for endorsement, so the Cabinet retains the ultimate power of decision*. While some Cabinet committees may make final decisions for security or practical reasons, *most Cabinet committee decisions are not acted on until they have been endorsed by the Cabinet*, or the Cabinet Secretary agrees that decisions can be implemented without the Cabinet's endorsement because they are urgent. In such cases, the Cabinet should be briefed on the Cabinet committee decision as soon as practicable. *The Cabinet may alter a Cabinet committee decision or ask a Cabinet committee to consider a matter further*.
>
> The Prime Minister
>
> 6. *The Prime Minister is responsible for the membership of the Cabinet and Cabinet committees, determines and regulates all Cabinet arrangements for the Government and is the final arbiter of Cabinet procedures*.
>
> (Emphasis added)

62. These provisions concerning Cabinet committees are consistent with the understanding of the term "committee of the Cabinet" set out above. On the assumption that the iteration of these provisions existed in the Cabinet Handbooks current at the time of enactment of the FOI Act, they support the view that the term "committee of the Cabinet" referred to a committee which derives its function and purpose from the Cabinet and is subordinate to the Cabinet.

63. So far as the evidence provided to the Tribunal reveals, there is no indication that, at the time of enactment of the FOI Act, a committee of the Cabinet had comprised persons who were not themselves members of the Cabinet or members of an "outer Ministry". This militates against a conclusion that the expression "committee of the Cabinet" was intended to encompass a group of such persons.

64. On the basis of the authorities and the material to which I have referred, and the conventions evident in the materials concerning the Cabinet and committees of Cabinet, I conclude that the term "committee of the Cabinet" in the s 4 definition encompasses a group of persons *derived from* the Cabinet and performing a function for, or on behalf of, the Cabinet or a group having such a connection or association with the Cabinet that the group can be said to *belong to* the Cabinet. A group which is not "of" the Cabinet will not be a committee of the Cabinet.

65. This does not mean that the inclusion of one or more persons who are not Cabinet members or not Ministers in a committee of Cabinet would be fatal to its characterisation as such. The fundamental requirement is that the committee be a committee "of" the Cabinet.

66. A number of matters bear on the question of whether the National Cabinet is in such a relationship with the Cabinet that it may properly be characterised as a "committee of the Cabinet" for purposes of the FOI Act. These include factual matters such as the manner by which it was established, its composition, its relationship with the Cabinet and the manner of its operation, as well as its place in the system of responsible and representative government established under the Constitution. I will address these in the following sections of these reasons.

The establishment of the National Cabinet

67. Counsel for the respondent submitted that "the one and only essential feature of a federal Cabinet committee is that it has been established as such a Cabinet committee by the Australian Prime Minister and this is how the National Cabinet was established". Counsel also submitted that the Prime Minister had the ability "to determine what a cabinet committee is" and that the ability of the Prime Minister to establish cabinet committees is a significant matter.

68. This seemed tantamount to a submission that any committee may be a “committee of the Cabinet” for the purposes of the FOI Act merely because the Prime Minister of the day has purported to establish it as such. This premise is unsound. For the reasons already given, the expression “committee of the Cabinet” has its statutory meaning and it is not possible for the Prime Minister to establish by designation a group of persons as a committee of the Cabinet and for s 34(1)(b) to apply to it, if the committee does not otherwise answer the statutory description. But in any event, as will be seen, the evidence does not support a conclusion that the Prime Minister “established” the National Cabinet.

69. All the evidence provided to the Tribunal concerning the establishment of the National Cabinet was secondary in nature. That is to say, the Tribunal did not receive evidence from any primary participant who could give first hand evidence of its establishment.

70. It is understandable that the applicant could not himself provide such evidence as he was not involved in its establishment. Nor was Dr Dorling who, as indicated, is employed by the applicant as his political adviser.

71. Although the respondent deposed that he attends all Cabinet meetings and all meetings of the National Cabinet, he did not depose to having attended the meeting of the Council of Australian Governments (COAG) held on 13 March 2020 at which, it seems, the decision was made to establish the National Cabinet. In fact, he did not depose to having attended any meetings of COAG. Ms McGregor, who is the First Assistant Secretary, Cabinet Division in DPMC, did not claim to have attended the COAG meeting on 13 March 2020 or even the meetings of the National Cabinet which have occurred subsequently.

72. The Prime Minister and any of the other persons who resolved to establish, or witnessed the establishment of, the National Cabinet are persons who could have provided detailed and first hand evidence of the establishment of the National Cabinet but an affidavit from such a person was not provided.

73. It is very evident that it was the need for urgent action to address the COVID-19 pandemic which was the impetus for the establishment of the National Cabinet.

74. The first source of the secondary material provided to the Tribunal is the Statement of Agreed Facts. It records that, at the press conference on 13 March 2020 which followed the COAG meeting held that day, the Prime Minister announced that the "Commonwealth, State and Territory Governments had resolved to form the "National Cabinet"". The T documents included a transcript of the Prime Minister's statement in making that announcement:

> As a result of the advice which was pulled together today by the [A]HPPC, *what we have resolved to do is form a National Cabinet* to deal with the national response to the Coronavirus. The National Cabinet will be made up of the Premiers, Chief Ministers and myself. We will be meeting on a weekly basis to ensure that we get a coordinated response across the country to the many issues that relate to the management of the Coronavirus.
>
> First and foremost, that is about the health and wellbeing of Australians and managing the health response.
>
> …
>
> And so the members of that Cabinet is who you see before you here today and we are going to be working very closely together to ensure there's a consistency of response, that there's a coordination of response. ….
>
> The National Coordinating Mechanism, which I referred to before, will be feeding up to the National Cabinet every week, issues that can then be coordinated between States and Territories. … Each and every State and Territory that is represented here is completely sovereign and autonomous in the decisions that they make. But what we've agreed to do together is to work together and be unified and to be as consistent and coordinated as possible in our national response. …
>
> *[W]e have agreed today to join together in a National Cabinet*. A National Cabinet for an emergency response to these issues that enables us to manage this on a day to day, week to week basis … And the National Cabinet working together with each of the constituent governments, their Cabinets will continue to do all of their jobs.
>
> (Emphasis added)

75. Although the Prime Minister did not say expressly that the decision to establish the National Cabinet had been made at the COAG meeting, that seems to be the natural inference arising from the fact that he made the announcement in the press conference in which he announced the COAG outcomes. That inference is supported by other evidence (albeit also of a secondary kind). As is apparent, the Prime Minister did not say that he himself, or the Federal Cabinet, had decided to establish the National Cabinet, or that either had established the National Cabinet. He referred instead to a joint resolution to do so.

76. Also on 13 March 2020, the Prime Minister, the federal Minister for Health and the Commonwealth Chief Medical Officer issued a media release, which is the second source of secondary evidence. The media release stated (relevantly):

> A new National Cabinet, made up of the Prime Minister, Premiers and Chief Ministers has been set up and will meet at least weekly to address the country's response to the Coronavirus, COVID-19.
>
> The AHPPC, led by the Commonwealth's Chief Medical Officer and comprising the Chief Health and Medical Officers from each jurisdiction, together with the National Coordination Mechanism convened by the Department of Home Affairs will be the primary bodies that will advise the National Cabinet. The National Coordination Mechanism will work across all jurisdictions, industry and key stakeholders to ensure a consistent approach to managing the impacts of this pandemic beyond the immediate health issues.

77. AHPPC is the acronym for Australian Health Protection Principal Committee.

78. The Statement of Agreed Facts includes agreement that the DPMC had, in a public statement in May 2020, confirmed that it was COAG which had made the decision to establish the National Cabinet:

> On 13 March 2020 COAG decided to establish a National Cabinet, comprising the Prime Minister, Premiers and Chief Ministers, to coordinate Australia's response to COVID-19 across State and Territory Governments and the Commonwealth Government.

79. The Addendum to the Cabinet Handbook issued by the Department of Premier and Cabinet in Tasmania, which Ms McGregor annexed to her affidavit (the Tasmanian Cabinet Handbook), states:

> [11.1.1] The National Cabinet was established by the Council of Australian Governments 48th Meeting to deal with the national response to the Coronavirus pandemic (COVID-19) …

80. All this material suggests that it was COAG on 13 March 2020 which resolved to establish the National Cabinet and which did establish it. However, there is some other evidence which suggests that the decision to establish the National Cabinet was not made by COAG or at the COAG meeting. In her affidavit, Ms McGregor deposed with respect to the establishment of the National Cabinet:

> [26] The establishment of the National Cabinet was agreed to by the Prime Minister and State and Territory Premiers/Chief Ministers at a meeting held *after* the Council of Australian Governments (COAG) meeting on 13 March 2020.
>
> (Emphasis added)

81. Ms McGregor's statement (which is at least a second hand account) that the decision to establish the National Cabinet was made *after* the COAG meeting is not supported by any other evidence. In particular, it appears to be inconsistent with the inferences arising from the reports of the Prime Minister's statements set out above and inconsistent with the statement issued by DPMC in May 2020, to which reference has just been made.

82. In his affidavit at [14], the respondent deposed that "[t]he Prime Minister, with the agreement of State and Territory leaders, established National Cabinet". This evidence implies that it was the Prime Minister, albeit with the agreement of the Premiers and Chief Ministers, who established the National Cabinet, rather than it being established by the collective decision at COAG or by the COAG participants. There are obvious shortcomings in the manner in which this evidence was given, including:

    (a) the respondent does not claim to have been at the COAG meeting on 13 March 2020, or any other meeting, or to have been present on any other occasion when the decision was made to establish the National Cabinet. His evidence is plainly of a secondary kind; and

    (b) the conclusionary manner in which the respondent expressed the evidence, that is, without deposing to any primary facts.

83. Moreover, there is an absence of primary evidence to support the respondent's statement and it is inconsistent with Ms McGregor's statement that the national Cabinet was established by joint agreement.

84. It is unfortunate that the evidence which the parties and, in particular the respondent, have provided as to the establishment of the National Cabinet is secondary in nature, when primary evidence must be available. In many respects, a claim that a document is exempt from access under the FOI Act is similar to a claim that a document should not be produced on discovery, or adduced into evidence, on the grounds of public interest immunity, whether at common law or pursuant to s 130 of the *Evidence Act 1995* (Cth). The authorities with respect to such claims have emphasised the need for proper supporting evidence. By way

of example, in *State of Victoria v Brazel* [2008] VSCA 37; (2008) 19 VR 553 at [68], the Court of Appeal in Victoria said:

> … The claim for immunity must be articulated with rigour and precision, and supported by evidence demonstrating the currency and sensitivity of the information, so as to constitute a compelling case for secrecy. Anything less will be unlikely to suffice.

85. To similar effect, Flick and Perram JJ stated in *Jaffarie v Director-General of Security* [2014] FCAFC 102; (2014) 226 FCR 505 at [26]:

> The "*weight*" to be given to the reasons expressed in support of a claim to privilege will, obviously enough, depend upon the facts and circumstances of each individual case and the persuasiveness of the reasons advanced. Less "*weight*", it may be expected, will be given to reasons expressed as mere assertions and conclusions than the "*weight*" to be given to a course of reasoning, soundly based upon such facts as it is possible to disclose, consistent with the maintenance of the privilege. Some claims may be more susceptible to explanation than others. But those making a claim for privilege, including claims for public interest immunity privilege founded upon concerns as to national security, should be forever conscious of the need to explain the basis upon which the claim is made as fully and as openly as possible – always also conscious of the need to not disclose the very information for which the privilege is claimed. In some cases, perhaps, little information can be publicly disclosed and a court may of necessity have to receive affidavit evidence in confidence. But the confidence and reliance that a court can place upon reasons advanced in support of claims for privilege depend to a very great extent upon the care with which those reasons have been advanced.
>
> (Emphasis in the original)

86. The evidence in this case did not meet the standard suggested by these authorities.

87. On the evidence provided, I am not willing to accept Ms McGregor's evidence insofar as it suggests that the National Cabinet was established *after* the COAG meeting. That assertion is not supported by any other evidence and is inconsistent with the inferences naturally arising from the agreed facts. Nor am I willing to accept the respondent's evidence, given its identified shortcomings and given its inconsistency with the weight of the other evidence. I find that the National Cabinet was established by a collective decision of COAG on 13 March 2020. This, ultimately, was the submission of counsel for the respondent.

88. While it may be accepted that the agreement of the Prime Minister as one of the COAG participants was necessary for the establishment of the National Cabinet, it was not the Prime Minister who established it. I am also satisfied that the Federal Cabinet did not establish the National Cabinet.

89. My conclusion as to the establishment of the National Cabinet, and my rejection of the evidence of Ms McGregor and the respondent to the contrary, is supported by my inspection of the attachment to the minutes of the meeting of the National Cabinet on 15 March 2020.

The composition of the National Cabinet

90. The evidence to which I have already referred indicates that the National Cabinet is comprised of the Prime Minister, the Premiers of each of the States, and the Chief Ministers of the two Territories. Although the evidence indicates that other persons do attend meetings of the National Cabinet, there was no evidence to the effect that they do so as *members*. The evidence suggests instead that these other persons attend in order to assist the individual members or the National Cabinet as a whole. I am therefore satisfied that it is the Prime Minister, the Premiers and the Chief Ministers who comprise the National Cabinet. That is to say, of the nine persons who comprise the National Cabinet, the Prime Minister is the only one who is also a member of the Cabinet.

91. The evidence also indicates (and I find) that the Prime Minister acts as the convenor of the National Cabinet.

92. It is evident that each person is a member of the National Cabinet by reason of the office he or she holds, being Prime Minister, Premier or Chief Minister, as the case may be. They are not chosen by the Prime Minister. That is to say, and as put by counsel for the applicant, the selection of the members of the National Cabinet is not at the discretion of the Prime Minister. Nor is there any evidence that the Prime Minister "appoints" persons as members of the National Cabinet. These matters immediately differentiate the National Cabinet from the committees of the Cabinet to which reference was made earlier, as the Prime Minister is responsible for the membership of those committees and determines and regulates all Cabinet arrangements for the Federal Government.

93. Another point of distinction is that, unlike other Cabinet committees, the National Cabinet is not comprised, at least substantially, of Ministers of the Federal Government. It is not even comprised of persons belonging to the same government, let alone the same political party.

The reliance on historical precedents

94. Ms McGregor seemed to recognise the difficulty which the composition of the National Cabinet posed for the respondent's case by deposing that the establishment of "Cabinets" with limited membership and with the inclusion of State Premiers, or persons who were not Ministers or even members of the Australian Parliament, was not unprecedented. She deposed:

> [19] Over time, Cabinet committees have taken on many forms. For example, during times of National crisis, such as during World War II, special purpose Cabinet committees were established. Prime Ministers Menzies and Curtin each established a War Cabinet consisting of a limited selection of Commonwealth Ministers. On 4 February 1942 the State Premiers were invited to and attended a Curtin Government War Cabinet meeting. On 27 August 1942, Prime Minister Curtin announced that 'a leading member of the Opposition' Sir Earle Page would be appointed a member of the War Cabinet, due to his experience. In the 1950s, a wide variety of Cabinet committees were formed and officials regularly participated.

95. Ms McGregor did not provide any other examples to support her claim that the Federal Cabinet or its committees have in the past comprised (as members) persons who were not Ministers in the Government of the day.

96. In his affidavit, the respondent said that he agreed with the matters to which Ms McGregor had deposed.

97. Counsel for the respondent sought to rely on [19] in Ms McGregor's affidavit by submitting in his written outline of submissions:

> Whilst Cabinet committees have usually consisted of Federal Ministers, this has not always been the case (*McGregor affidavit [19]*)

98. The implication in the evidence and the submission seemed to be that the term "committee of the Cabinet" should be construed in the light of this historical experience. However, apart from any other consideration, the respondent's submission breaks down at the evidential level.

99. The evidence of Mr Dorling (which I accept) and the historical records concerning the matters to which Ms McGregor referred indicate:

(a) all of the members of the War Cabinets during World War II in the five governments led successively by Prime Ministers Menzies, Fadden and Curtin were Ministers in the Federal Government at the time of their membership;

(b) persons who were not members (such as the Chiefs of Staff of the Australian Armed Services, the Secretary of the Department of Defence Coordination and other senior officials) did attend War Cabinet meetings to provide advice when required, but none was a *member* of the War Cabinet.

(c) State Premiers attended by invitation one meeting of the War Cabinet, namely the meeting on 4 February 1942, but not as *members* of the War Cabinet.

(d) Sir Earle Page was not a member of the War Cabinet in the Government led by Prime Minister Curtin, and Prime Minister Curtin did not make the announcement on 27 August 1942 which Ms McGregor attributes to him. Rather, Prime Minister Curtin invited Sir Earle Page to attend meetings of the War Cabinet "in a consultative capacity". The documents indicate that Prime Minister Curtin issued this invitation having regard to the recent international experience of Sir Earle Page;

(e) for similar reasons, Prime Minister Curtin also invited Sir Earle Page to be a member of the Advisory War Council, but the Council was not the War Cabinet or even the Cabinet. It was instead a body comprised of the Prime Minister, senior members of the Federal Government and senior members of the Opposition;

(f) the members of the Cabinet committees established by Prime Minister Menzies at the commencement of the 1950's were all Ministers in his government;

(g) officials may have attended, and even participated in, Cabinet committees but not as members of the Cabinet or of Cabinet committees.

100. In his oral submissions, counsel for the respondent accepted that Ms McGregor's affidavit "would be better worded if [in relation to Sir Earle Page] the words 'appointed a member of' were struck through and replaced with the words 'asked to attend'". Counsel thereby

accepted that the attendances of Sir Earle Page at the War Cabinet meetings were not as a member of that Cabinet.

101. Whilst counsel did not say so expressly, he did not contest the appropriateness of the propositions set out above concerning the membership of Cabinet committees and seemed implicitly to accept that the statement in his written outline of submissions set out above could not be sustained.

102. In any event, counsel did not point to any evidence other than Ms McGregor's [19] as supporting his submission that the committees of the Cabinet have not comprised Federal Ministers.

103. It follows that I reject the evidence of Ms McGregor and the respondent about these matters. As indicated earlier, the context in which the FOI Act was enacted seems to have been that Cabinet committees would be comprised of members of the Cabinet or at least of the outer Ministry.

The discretion of the Prime Minister of the day

104. In addition to emphasising Ms McGregor's statement in [19] that, over time, Cabinet committees have taken on many forms, counsel for the respondents referred to the statement of Gleeson CJ in *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 660:

> [R]esponsible government … is a concept based upon a combination of law, convention and political practice. The way in which that concept manifests is not immutable.

One may accept that that is so, but the Chief Justice's statement can hardly be regarded as supportive of the proposition for which the respondent contends presently.

105. Counsel also referred to the Chapter written by Professor Patrick Weller in "*Constitutional Conventions in Westminster Systems, Controversies, Changes and Challenges*", edited by Galligan B and Brenton S (Cambridge University Press, 2015), entitled "*Cabinet Government*". Professor Weller expressed the view that "all the Cabinet rules, handbooks, guidelines and codes of conduct are essentially the Prime Ministers' prerogative to change, alter and interpret" and that:

> Cabinet is valuable because of its flexibility. Prime ministers can adjust the working and the forums in the way that they see best. They do not have to ask if the procedures are somehow right, but rather whether they work in reaching a properly informed decision.

106. As is evident, Professor Weller seems to have been speaking at a level of considerable generality. There is no indication that he was expressing views with respect to circumstances like those presently under consideration. In particular, there is no indication that Professor Weller was intending to suggest that the features of a Cabinet and Cabinet Government discussed in the authorities to which reference has already been made are not applicable. In any event, the Professor's views cannot alter the meaning of the statutory expression "committee of the Cabinet", as properly construed.

107. In my view, it may be accepted that the Prime Minister of the day does have a discretion in the establishment of Cabinet committees, including as to their composition, number, terms of reference, relationship with the Cabinet and so on. It should also be accepted that the Parliament intended the term "committee of the Cabinet" should accommodate that flexibility. However, as indicated, the evidence does not provide a single example of a cabinet committee whose membership comprised persons who were not Ministers in the Government of the day, let alone not members of the Australian Parliament. More pertinently to the present case, it does not provide evidence of a single instance of a committee of the Cabinet comprised substantially of persons who are not even members of the Australian Parliament. The characterisation of such a committee as a committee of the Cabinet would be inconsistent with entrenched conventions of responsible government, including that the Cabinet is comprised of Ministers who are responsible and answerable to the Parliament. Counsel for the applicant referred to these conventions as "120 years of practice". It is reasonable to infer that the FOI Act reflects these understandings.

108. Counsel for the respondent sought to diminish the significance of the applicant's reference to "120 years of practice" by submitting that, before the appointment of the Hon Julia Gillard as Prime Minister, there had been 109 years of "convention and practice" that females could not be appointed as Prime Minister of Australia and that, until the Hon Kenneth Wyatt MP was appointed to the Federal Cabinet, there had been a "practice and convention" of Indigenous persons not being appointed to the Federal Cabinet. I regard the issue raised by this submission as a diversion which it is not necessary to address in detail. I indicate,

however, that I do not regard the submission as meritorious. It is a logical fallacy to suppose that the occurrence for the first time of an event in political or governmental life is an indication that there has hitherto been a convention (in the sense of an acknowledged norm) that it should not, or may not, happen.

109. I note again that the inclusion of a few persons in a committee otherwise established as, and having the character of, a committee of the Cabinet may not be fatal to its status as such. It is not necessary for the purposes of this decision to resolve that question. It is sufficient to state my view that the circumstance that the nine member National Cabinet comprises only one person who is a member of the Cabinet is a significant matter pointing against the National Cabinet being a "committee of the Cabinet" for the purposes of the FOI Act.

Control of membership by the Prime Minister?

110. It is convenient to refer at this point to the submission of counsel for the respondent that the Prime Minister has complete control of the membership of the National Cabinet:

> [22] The Respondent's evidence clearly demonstrates (i) the Prime Minister established the National Cabinet and (ii) the Prime Minister could, if he wished to do so, change its membership by, for example, deciding that one or more Premiers or Chief Ministers would no longer belong to it (*McGregor affidavit [22] – [32]*). Contrary to the applicant's submissions … the Prime Minister therefore has the ability to exert complete control over membership of the National Cabinet.

111. Contrary to counsel's claim, [22]-[32] of Ms McGregor's affidavit do not support his submission. In [22]-[25], Ms McGregor deposed to matters bearing upon Cabinet committees generally:

> [22] The Prime Minister determines the membership, chair, deputy chair, and terms of reference of each Cabinet committee. Cabinet committees are usually established either around a subject area, such as national security, or around a general function of government, such as expenditure. Temporary or ad-hoc Cabinet committees may also be established by the Prime Minister to carry out particular tasks.
>
> [23] Historically, in Australia there have been both (i) ad hoc committees of Cabinet, which were established at the direction of the Prime Minister to handle a specific question and ceased to exist when conclusions were reached on this question and submitted to the Cabinet and (ii) more permanent, standing committees of Cabinet. For instance, even going back to the 1976 Cabinet Handbook, there was clear guidance that ad hoc committees of Cabinet would be 'established from time to time and the Prime Minister will indicate the membership of each committee'.

[24] This establishment of Cabinet committees has sought to assist successive governments to efficiently and effectively respond to government priorities. Whilst some Cabinet committees, such as the National Security Committee and Expenditure Review Committee are regularly established by Prime Ministers, other Cabinet committees have been established to respond to particular issues or priorities that emerge from time to time.

…

[25] As detailed further below, I consider the decision of the Prime Minister to establish the National Cabinet to respond to the COVID-19 pandemic and its consequences, is consistent with these principles.

112. Then, under the heading "National Cabinet" and the subheading "*Establishment*", Ms McGregor deposed:

[26] The establishment of the National Cabinet was agreed to by the Prime Minister and State and Territory Premiers/Chief Ministers at a meeting held after the Council of Australian Governments (**COAG**) meeting on 13 March 2020.

[27] Terms of Reference for the National Cabinet were agreed to by the National Cabinet on 15 March 2020 and set out the working arrangements, including that the committee would be established as a committee of the Commonwealth Cabinet, specifically as a Cabinet Office Policy Committee and that its deliberations would remain confidential.

[28] Cabinet Office Policy Committees consider major policy issues on an as needed basis, including early stage consideration of strategic issues, specialist advice on nationally significant issues and rapidly evolving situations.

[29] The National Cabinet is responsible for coordinating national actions in Australia in response to Australia's coronavirus pandemic, including coordination of Australia's health response and the ongoing recovery from both economic and broader societal impacts of the pandemic.

[30] In establishing the National Cabinet, consideration was given to the importance of the sovereignty of States and Territories, and the Commonwealth, and it was agreed that both the Commonwealth and States and Territories would utilise their existing Cabinet processes as and when appropriate. In practice this means that leaders are able to determine which of the matters before National Cabinet may require endorsement or agreement in their own jurisdiction, prior to any final decisions being agreed.

[31] The National Cabinet held its first meeting on 15 March 2020 when it formally agreed that for the purposes of decision making in relation to the pandemic, Australian Health Protection Principal Committee (**AHPPC**) and the National Coordination Mechanism (**NCM**) would be the National Cabinet's primary advisory bodies.

[32] On 15 March 2020, the Prime Minister announced that National Cabinet 'has now been established formally under the Commonwealth government's cabinet guidelines'. The Prime Minister stated that National Cabinet 'has the status of a meeting of Cabinet that would exist at a federal level' …

113. I will return to Ms McGregor's references to a "Cabinet Office Policy Committee" in the next section of the reasons.

114. For the moment, I note that, contrary to counsel's submission, Ms McGregor did not depose that the Prime Minister established the National Cabinet. As previously noted, she deposed instead that the establishment of the National Cabinet *was agreed to* by the Prime Minister and the State and Territory Premiers/Chief Ministers at a meeting held on 13 March 2020 *after* the COAG meeting, at [26].

115. In relation to the submission that the Prime Minister could, at his discretion, change the membership of the National Cabinet and had the ability "to exert complete control over [that] membership", it is true that Ms McGregor deposed that it is the Prime Minister who determines "the membership, Chair, Deputy Chair, and terms of reference of each Cabinet committee", at [22]. However, that can be taken to be applicable to the National Cabinet only if it be accepted that the National Cabinet is a Cabinet committee. This is the very matter in issue. Counsel's submission involved therefore a form of "boot straps" or circular reasoning. There is, in any event, no evidence that the Prime Minister could decide unilaterally that one or more Premiers or Chief Ministers would no longer be a member of the National Cabinet. In fact, Ms McGregor's evidence (again secondary in nature) seems to be to the contrary as she deposed in [33] that "the precise structure, shape and operation of the National Cabinet *are matters for its members*" (emphasis added).

116. Ms McGregor's evidence that the National Cabinet determined its own shape, structure and operation is confirmed by later events, namely, the decision made by the National Cabinet on 4 September 2020, on which the respondent replaced reliance in a different context. I will return to that decision later in these reasons.

117. As will be seen, the term "shape, structure and operation" used by Ms McGregor is that used in the Cabinet Handbook (13th Edition) in relation to the Cabinet itself. However there is one important difference. In the case of the Cabinet, the Handbook specifies that it is the Prime Minister of the day who determines its "shape, structure and operation", whereas Ms McGregor deposed that the "precise structure, shape and operation of the National

Cabinet" are matters for its members. She seemed thereby to draw a significant distinction between it and the Cabinet.

118. The submission that the Prime Minister exercises complete control over the membership of the National Cabinet is also contra indicated by the Tasmanian Cabinet Handbook which, with respect to the National Cabinet, states in [11.2.1]:

> The Premier is Tasmania's representative on the National Cabinet. The Premier may delegate another Minister to represent Tasmania on the National Cabinet as needed.

119. It seems reasonable to infer that the other Premiers and Chief Ministers may also delegate another Minister to represent their State or Territory, as the case may be, in the National Cabinet. There is no primary evidence indicating that they may do so only with the permission of the Prime Minister or that the nomination of a delegate by a Premier or a Chief Minister to the National Cabinet is subject to some form of ratification, approval or veto by the Prime Minister. Given the character and purpose of the National Cabinet, the existence of such a requirement seems improbable. In fact, it is probable that the Premiers and Chief Ministers would be surprised to hear that their membership of the National Cabinet is entirely at the discretion of the Prime Minister and that, to use the expression of counsel for the respondent, it is the Prime Minister's "gift".

120. For these reasons, I am satisfied that the composition and membership of the National Cabinet points against it being a committee of the Cabinet.

The relationship of the National Cabinet with the Cabinet

121. The inter-relationship between the National Cabinet and the Cabinet is an important consideration in determining whether the National Cabinet is a committee of Cabinet.

122. As to this relationship, counsel for the respondent submitted:

> Cabinet committees' roles [are] to assist the federal cabinet, when we are talking about the federal level, to make decisions. The evidence reveals historically, there have been a range of diverse committees established to assist Cabinet to make decisions. And so rather than the National Cabinet being something that needs to sit at the apex of decision-making in a single polity to be a committee of cabinet, it needs to be considered in the historical and conventional context of being something to assist the federal cabinet to make appropriate decisions. And that's entirely what the National Cabinet does, in our submission.

123. The logic of the syllogism implicit in this submission does not need to be addressed. As will be seen, the evidence does not in any event support a conclusion that the role of the National Cabinet is to assist the Federal Cabinet, let alone that that is its entire function and purpose. In fact, the evidence that it exists to assist the Federal Cabinet to make appropriate decisions is scant.

The relevant time

124. I commence by stating my view that the Tribunal is to consider whether the National Cabinet was a committee of the Cabinet at the time of the meetings to which the subject documents refer. In the case of the first application, that is 29 May 2020. In the case of the second application, it is the time of the meeting or meetings to which the minutes refer. Although, as previously noted, Mr Hupalo did not identify the date of the meeting(s), Ms McGregor deposed (and I accept) that the minutes are those of the National Cabinet meeting which took place on the 15 March 2020.

125. In relation to this issue, counsel for the respondent drew attention to *Shi*. In that case, the High Court held that the review by the Tribunal for the purposes of s 303 of the *Migration Act 1958* (Cth) of whether a person is a fit and proper person to give migration assistance was to be made by reference to the state of affairs at the time of the Tribunal's own decision, and not that pertaining at the time of the decision under review. However, as the reasons of all members of the Court reveal, the presence of a temporal limitation in the subject matter of the decision under review may indicate that the Tribunal is to carry out its review by reference to circumstances at an antecedent time. By way of example, Kiefel J (with whom Crennan J agreed on this issue), after noting at [141] that the task of the Tribunal was to reach its own conclusion as to the correct decision by conducting an independent assessment and determination of the matters necessary to be addressed and that its exercise of power was not dependent upon the existence of any error in the original decision, continued:

> [142] In considering what is the right decision, the Tribunal must address the same question as the original decision-maker was required to address. *Identifying the question raised by the statute for decision will usually determine the facts which may be taken into account in connection with the decision*. The issue is then one of relevance, determined by reference to the elements in the question, or questions, necessary to be addressed in reaching a decision. It is not to be confused with the Tribunal's general procedural powers to obtain evidence. The issue is whether

> evidence, so obtained, may be taken into account with respect to the specific decision which is the subject of review.
>
> [143] Where the decision to be made contains no temporal element, evidence of matters occurring after the original decision may be taken into account by the Tribunal in the process of informing itself. Cases which state that the Tribunal is not limited to the evidence before the original decision-maker, or available to that person, are to be understood in this light. *It is otherwise where the review to be conducted by the Tribunal is limited to deciding the question by reference to a particular point in time*.
>
> (Emphasis added and citations omitted)

126. It is trite to say that a record of a committee will be an official record of a committee of the Cabinet only if the committee had that status at the time of the proceeding recorded in the document. This requires necessarily that the circumstances pertaining at that time be considered. Accordingly, a temporal limitation of the kind to which Kiefel J referred is implicit in s 34(1)(b) of the FOI Act.

127. In *Waubra Foundation v Commissioner of Australian Charities and Not-for-Profits Commission* (2017) AATA 2424, this Tribunal considered the application of *Shi* in the review of a decision concerning a legislative provision in which a temporal limitation was also implicit – see [56]-[88]. It is not necessary to repeat the reasoning contained therein. I also note that, as was the case in *Waubra*, the conclusion that the Tribunal was to carry out its review by reference to the facts and circumstances pertaining at an antecedent time does not mean that it is confined to considering only that evidence which was in existence at that time.

128. My conclusion as to the relevant time means, amongst other things, that it is the 13th Edition of the Cabinet Handbook, and not the 14th, which is pertinent presently to the assessment of the relationship between the Cabinet and its committees. The 14th Edition of the Handbook, which commenced on 16 October 2020, will be probative only insofar as it sheds light on the position at the antecedent time.

The evidence

129. Again the evidence provided to the Tribunal concerning the relationship between the National Cabinet, on the one hand, and the Federal Cabinet, on the other, is mainly of a secondary kind. Much of it comprised statements of the Prime Minister about the

functioning of the National Cabinet. I will set out below some relevant extracts. I will also refer to the evidence suggesting that the National Cabinet has the status of a "Cabinet Office Policy Committee".

130. However, it is appropriate to note first that, with few exceptions, none of the public statements of the Prime Minister in evidence concerning the National Cabinet contain any explicit reference to it having some inter-relationship with the Federal Cabinet or that its function is to assist that Cabinet to make appropriate decisions.

131. In the press conference following the first National Cabinet meeting on 15 March 2020, the Prime Minister said (amongst other things):

> I want to thank the Premiers and the Chief Ministers for their support in bringing together this National Cabinet. *It has now been established formally under the Commonwealth government's cabinet guidelines. And it has the status of a meeting of Cabinet that would exist at a Federal level, as does the meetings of the AHPPC and the National Coordinating Mechanism, which is feeding up into those arrangements.*
>
> … The National Cabinet ensures that we have some coordination, but ultimately States and Territories will make their own decisions.
>
> (Emphasis added)

132. The Tribunal has not been provided with any primary evidence indicating how it was that the National Cabinet had been "established formally" under the Commonwealth Government's cabinet guidelines, evidencing such establishment or indicating the basis upon which the Prime Minister asserted that it has "the status of a meeting of the Cabinet that would exist at Federal level". On one view, the statement of the Prime Minister may be no more than a statement of his belief, and not a statement of fact. Alternatively, the statement may indicate no more than that it had been agreed that the National Cabinet was to operate in accordance with the Cabinet guidelines. In this respect, it may be pertinent that the Prime Minister did not say that the National Cabinet was a committee of the Cabinet, or that it operated under the Cabinet, or even that it stood in any particular relationship with the Cabinet.

133. It is also to be noted that the Prime Minister referred to the role of the National Cabinet in promoting coordination of action amongst the States and Territories while stating that it was

for the States and Territories to make their own decisions, with the implication that they were not bound to act in accordance with decisions of the National Cabinet.

134. At the press conference following a meeting of the National Cabinet on 24 March 2020, the Prime Minister stated:

> [I]n taking these decisions, *States and Territories are very aware of their responsibilities of how they need to take actions to enforce these measures*. So I'll refer you to them about how they will achieve that. But they haven't taken these decisions – *and I want to stress, these are decisions that are being taken by the State and Territory Premiers and Chief Ministers with myself as the Prime Minister who convenes the National Cabinet, these are not decisions being made by the Federal Cabinet* and instructed to the States and Territories. That's not how the National Cabinet works. These are decisions being taken together, heads of governments, to form these views. And in these areas in particular, it is the States and Territories that have the lead and the primacy and so they are coming together and setting these in place.
>
> (Emphasis added)

135. As is apparent, in these statements the Prime Minister seemed to emphasise that the decisions of the National Cabinet (which were announced publically) were not decisions of the Federal Cabinet, and were made independently of it, with the implication that the Federal Cabinet did not have responsibility for them. Further the Prime Minister conveyed that it was for the States and Territories to implement the decisions and not the Commonwealth. Thus, the Prime Minister distinguished between the National Cabinet and the Federal Cabinet in a way which did not suggest that the National Cabinet was a committee of the Cabinet.

136. The position described by the Prime Minister seems consistent with that stated in the addendum to the Tasmanian Cabinet Handbook at [11.1.3]:

> Each State and Territory that is represented on the National Cabinet is *completely sovereign and autonomous*. However, States and Territories have agreed to work together and be unified *and to be as consistent and co-ordinated as possible* in our national response.
>
> (Emphasis added)

137. Following a meeting of the National Cabinet on 29 April 2020, the Prime Minister stated in a press conference:

> So we are looking at what the bigger picture of success is when it comes to COVID-19 and we're working to all of that together as a National Cabinet, *our own Cabinet here at a Commonwealth level* will be meeting again today as we do every week to ensure that we are focused on all elements of the recovery and road back.

(Emphasis added)

138. At the press conference following the meeting of the National Cabinet on 5 May 2020, the Prime Minister stated:

> Well, I can't pre-empt decisions of Friday. The National Cabinet, *particularly on these issues where the Commonwealth has no direct authority at all*, our job here is to try and ensure as much consistency across State and Territory jurisdictions as possible. …. And so what you can expect on Friday is that, again, [we] will seek to have as consistent a national position as possible. *But ultimately, each State and Territory are the arbiters of their own position*. But I have no doubt they will seek to do that in as consistent way as possible.
>
> (Emphasis added)

139. This statement made plain the Prime Minister's view that the National Cabinet was addressing some matters over which the Federal Cabinet did not have direct responsibility. There is no indication in the evidence before the Tribunal that this understanding by the Prime Minister was incorrect. The differences in the responsibilities of the National Cabinet and the Cabinet seem inconsistent with a view that the National Cabinet was a committee of Cabinet whose function was to provide assistance to the Cabinet. The statement also seemed to imply that, whatever decision the National Cabinet made, it was still for each State and Territory to decide whether it would act in accordance with the agreed position.

140. At the press conference following the National Cabinet meeting on 29 May 2020, the Prime Minister announced the agreement of the National Cabinet to end COAG, saying:

> The other thing we agreed today is a major change in terms of how COAG will work in the future. And, if I can move to that chart, COAG is no more. It will be replaced by a completely new system and that new system is focused on the success that has been yielded by the operation of the National Cabinet. What we'll be doing is keeping the National Cabinet operating and, particularly during the COVID period, we'll continue to meet on a fortnightly basis. In a normal year it would meet on a monthly basis.
>
> …
>
> Now, how it will be different to the way COAG worked, is the National Cabinet will be driven by a singular agenda, and that is to create jobs. It will have a job-making agenda. And that National Cabinet will drive the reform process between State and Federal cooperation to drive jobs. It will drive a series of Ministerial Cabinet sub-committees, if you like, that will be working in each of the key areas, and this is an initial list of areas and that will be further consulted on with the States …

141. In his affidavit, the respondent deposed that the National Cabinet had agreed at the meeting on 29 May 2020 that it would replace COAG as the peak intergovernmental body. Without reference to the minutes themselves, I would regard it as improbable that the National

Cabinet as "the peak intergovernmental body", and with the status of such a body, intended that it be a committee of the Cabinet of one governmental entity and, implicitly, subordinate to it. In the interests of not disclosing for the time being anything concerning the content of the minutes of the meeting of 29 May 2020 with respect to the agreement which the respondent attributed to the National Cabinet. I will not detail my conclusion that the respondent's evidence is not supported by the documents.

A Cabinet Office Policy Committee

142. Earlier, I set out [27]-[28] from Ms McGregor's affidavit. In [27], she deposed that the National Cabinet had agreed on 15 March 2020 to be "established as a committee of the Commonwealth Cabinet specifically as a Cabinet Office Policy Committee". In [28], Ms McGregor deposed that "Cabinet Office Policy Committees consider major policy issues on an as needed basis, including early stage consideration of strategic issues, specialist advice on nationally significant issues and rapidly evolving situations".

143. The Addendum to the Tasmanian Cabinet Handbook includes the following statement:

> The National Cabinet is constituted as a Cabinet Office Policy Committee, as provided for in the 'Australian Government Cabinet Handbook' (13th Edition).

144. The Statement of Agreed Facts includes agreement that DPMC had made a public statement in May 2020 which included:

> By the agreement of all members, the National Cabinet is constituted as a Cabinet Office Policy Committee and operates according to longstanding conventions of Cabinet government, including the guiding principles of collective responsibility and solidarity.

145. I do not regard it as an inappropriate disclosure of the content of the subject documents for me to record that the Terms of Reference for the National Cabinet attached to the minutes of the meeting on 15 March 2020 record the National Cabinet as having agreed:

> All proceedings and documentation of the National Cabinet will remain strictly confidential. To this end the National Cabinet will be constituted as a Cabinet Office Policy Committee, as provided for in the Australian Government Cabinet Handbook (13th Edition).

146. I note, however, that there is no reference in the Cabinet Handbook (13th Edition) to "Cabinet Office Policy Committee". It appears therefore that both the Addendum to the Tasmanian

Cabinet Handbook and the Cabinet minute were prepared on the basis of a misapprehension as to the content of the Cabinet Handbook.

147. It may be inferred that, when the Prime Minister referred at the press conference following the first National Cabinet meeting on 15 March 2020, to the National Cabinet having "now being established formally under the Commonwealth Government's Cabinet Guidelines", he was referring to the agreement of the National Cabinet that it be constituted as a Cabinet Office Policy Committee.

148. This evidence, together with that set out above, was the extent of the evidence before the Tribunal as to the relationship between the National Cabinet and the Cabinet.

Assessment of the evidence

149. Earlier in these reasons I set out [2], [4], [5] and [6] of the Cabinet Handbook (13th Edition) from which inferences as to the relationship of the Cabinet with its committees may be drawn. Putting to one side for the moment the evidence concerning a Cabinet Office Policy Committee, the following conclusions are appropriate on the evidence concerning the relationship of the National Cabinet and the Cabinet:

(a) unlike the Cabinet (and, it may be inferred, Cabinet committees), the Prime Minister does not determine the shape, structure and operation of the National Cabinet – cf [2] of the Handbook. There is no evidence at all of the Cabinet, or even the Prime Minister, delegating to, or entrusting the National Cabinet with, any particular function, or even requesting that it provide assistance to the Cabinet;

(b) the National Cabinet does not derive powers from the Cabinet – cf [5] of the Handbook. At the least, there is no evidence that it does so;

(c) decisions of the National Cabinet are not taken to the Cabinet for endorsement – cf [5] of the Handbook. Again, there is no evidence that this occurs;

(d) the Cabinet does not retain the ultimate power of decision over matters decided at the National Cabinet – cf [5] of the Handbook. The Prime Minister's public

statements concerning the nature of the decisions of the National Cabinet is inconsistent with the Cabinet having this power;

(e) decisions of the National Cabinet may be, and are, acted upon by the States and Territories without being endorsed by Cabinet – cf [5] of the Handbook;

(f) there is no evidence that the Cabinet is briefed on the decisions of the National Cabinet – cf [5] of the Handbook. There is not even evidence that copies of the minutes of the National Cabinet are provided to the Cabinet;

(g) the Prime Minister is not responsible for the membership of the National Cabinet – cf [6] of the Handbook;

(h) there is no evidence that the Cabinet may alter a decision of the National Cabinet or ask it to consider a matter further – cf [5] of the Handbook;

(i) decisions of the National Cabinet are not equivalent to, and do not have effect as, decisions of the Cabinet;

(j) the National Cabinet has addressed matters over which the Commonwealth Government had no, or only indirect, legislative authority or responsibility; and

(k) a principal focus of the National Cabinet has been that of promoting the maximum possible coordination and consistency of approach in addressing COVID-19 in particular.

150. The evidence concerning the National Cabinet being established as a Cabinet Office Policy Committee is unfortunately scant. Paragraph [28] of Ms McGregor's affidavit implies that there is more than one such committee but Ms McGregor does not give any further evidence concerning them.

151. On one view, the name "Cabinet Office Policy Committee" implies a committee of the Cabinet office, rather than a committee of the Cabinet itself (otherwise the inclusion of the word "Office" is otiose). I infer, however, that there are committees said to be committees

of the Cabinet which are known as “Cabinet Office Policy Committees”. However, whether these are committees of the Cabinet depends on whether, as a matter of substance, they are within the statutory expression “committee of the Cabinet”. I note again that a committee does not become a committee of the Cabinet for the purposes of the FOI Act merely by being given that name. Were it otherwise any group of persons could be made a committee of the Cabinet merely by designation. Hence the significance of the Tribunal not having been provided with evidence generally concerning the establishment, composition, reporting lines and so on of the Cabinet Office Policy Committees.

152. Three things do seem clear. First, while it may have been open to the National Cabinet to describe itself as a Cabinet Office Policy Committee, it could not by itself constitute itself as a committee of the Cabinet for the purposes of the s 4 definition.

153. Secondly, the respondent has not provided any evidence of action taken after the meeting of 15 March 2020 to give effect to the decision of the National Cabinet that it be constituted as a Cabinet Office Policy Committee. That is to say, even if there had been an intention that the National Cabinet be a Cabinet Office Policy Committee, there is no evidence before the Tribunal to indicate that effect was given to that intention.

154. Thirdly, the evidence before the Tribunal suggests that the National Cabinet was much more than a policy committee for the Federal Cabinet. As the Prime Minister noted, a primary purpose of the National Cabinet is the promotion of a coordinated approach amongst the States and Territories and the addressing of matters over which the Commonwealth does not have direct responsibility.

155. In my view, the references to the National Cabinet being constituted as a Cabinet Office Policy Committee do not point persuasively to it being a committee of the Cabinet.

The Cabinet Secretary

156. The Cabinet Handbook indicates that the Cabinet Secretary is the person “appointed by the Prime Minister to manage the day-to-day procedural and operational matters of the Cabinet and any Cabinet committees”, para [11]. The importance of the Cabinet Secretary in the

functioning of the Cabinet and of Cabinet committees is indicated, amongst other things, by the following provisions in the Cabinet Handbook:

> 12. The Cabinet Secretary attends all meetings of the Cabinet and Cabinet committees.
>
> 13. Through delegations from the Prime Minister, the Cabinet Secretary has the authority to:
>
> (a) provide authority to ministers to bring items forward for consideration by the Cabinet or a Cabinet committee
>
> (b) finalise the Cabinet and Cabinet committee agendas
>
> (c) maintain and enforce the integrity of Cabinet rules and processes
>
> (d) working with Ministers and the Department of the Prime Minister and Cabinet (PM&C) to uphold the quality and timeliness of documents coming forward for the Cabinet's consideration
>
> (e) recording deliberations of Cabinet and Cabinet committee meetings and authorising Cabinet minutes
>
> (f) approve absences of Cabinet ministers
>
> (g) deal with practical issues regarding the co-option of non-Cabinet ministers and assistant ministers, and the attendance of officials.
>
> 14. The Cabinet Secretary is also responsible for advising the Prime Minister on:
>
> (a) appointments made by the Cabinet, including Board appointments and appointments of Government, and other appointments as required; and
>
> (b) the forward programme of the Cabinet and Cabinet committee meeting dates.
>
> …
>
> 82 The Cabinet Secretary, in consultation with the Prime Minister, approves the agenda for each Cabinet or Cabinet committee meeting. The Cabinet Division issues agendas to Ministers as early as possible and at least one week in advance of a meeting. The agenda advises the matters to be considered, the Minister responsible for each item and any co-opting arrangements.

157. Quite apart from the references to the Cabinet Secretary in the Cabinet Handbook (both the 13th and 14th Editions), the existence of the office is confirmed by Ms McGregor who deposed in [5] of her affidavit that the Cabinet Division in DPMC exists to support, amongst others, "the Cabinet Secretary". Mr Hupalo made statements to like effect in his letters of 6 August 2020 and 10 August 2020 to the applicant. The minutes of the meetings on 15 March 2020 and 29 May 2020 both contain the notations "Cabinet Secretary" in a manner suggesting that he or she had played some role in their preparation or authorisation.

158. The respondent, who identified himself in his affidavit as Secretary of DPMC (and not as Cabinet Secretary), made no reference at all to the role and function of Cabinet Secretary, let alone to the inter-relationship between the Cabinet Secretary and the National Cabinet. Nor, with the exception of the reference above, did Ms McGregor.

159. I will refer shortly to the evidence concerning the administrative support provided by DPMC to the National Cabinet. For the moment, however, I note that there is no evidence of the Cabinet Secretary, or any other person differently titled, carrying out *in relation to the National Cabinet*, the functions of the Cabinet Secretary stated in [11]-[14] and [82] of the Cabinet Handbook.

Conclusion on the relationship between the National Cabinet and the Cabinet

160. The matters reviewed in this section of the reasons concerning the relationship between the National Cabinet and the Cabinet do not support a conclusion that the former is a committee of the latter.

The manner of operation of the National Cabinet

161. Both the respondent and Ms McGregor provided some evidence as to the manner in which the National Cabinet operated. The respondent deposed that, in addition to attending all Cabinet meetings, he attends all meetings of the National Cabinet. However, the respondent also deposed that he does so along with his State and Territory counterparts and the "Commonwealth and State note takers", at [5].

162. In her affidavit, Ms McGregor deposed to the administrative support which DPMC provides to the National Cabinet, saying:

> [8] Since May 2019 I have had direct responsibility for the operations of the Cabinet including attending Cabinet meetings and preparing minutes (or decisions) of Cabinet meetings. Between May 2019 and 6 March 2021, for example, I have personally attended 81 Cabinet or Cabinet committee meetings as a note-taker for the meetings and I have overseen the lodgement of 2,667 documents to Cabinet and its committees, including National Cabinet. I have also had personal involvement in the development, review and compliance checking of 2,881 Cabinet minutes, including National Cabinet minutes.

163. The manner in which this paragraph of Ms McGregor's affidavit is expressed seemed to imply that there is no relevant distinction between her role and function in relation to preparation for, attendance, and the minute taking at, Cabinet meetings and National Cabinet meetings. It also seemed to assume the truth of the proposition that the National Cabinet is a committee of the Cabinet by referring to the committees of the Cabinet "including National Cabinet". However, counsel for the respondent acknowledged at the hearing that Ms McGregor does not attend meetings of the National Cabinet, whereas Ms McGregor's affidavit indicates that she does attend meetings of the Cabinet and Cabinet committees. Moreover, it seems implicit in this paragraph of Ms McGregor's affidavit that she is not the person who prepares the minutes of the National Cabinet, even if she has some unparticularised "personal involvement" in their "development, review and compliance checking".

164. Ms McGregor's affidavit did not indicate whether she has been solely responsible for the distribution of documents to members of the National Cabinet. For that matter, her evidence does not disclose the means by which documents are distributed to the National Cabinet.

165. However, Section 8 of the Cabinet Handbook (14th Edition) issued by the Prime Minister on 16 October 2020 includes the following statements:

> [160] The Commonwealth Cabinet Office provides secretariat support to the National Cabinet, *in collaboration with State and Territory support areas*.
>
> [161] Note takers will be the Commonwealth Cabinet Secretary, a senior official from the Department of Prime Minister and Cabinet, and a senior official nominated by the States and Territories.
>
> [162] The notebooks remain the property of the Secretary of PM&C and are protected from early public release under the *Archives Act 1983* and cannot be sought under the *Freedom of Information Act 1982* (FOI Act).
>
> …
>
> [167] To allow adequate time for members to be properly briefed on and consider the matters being brought forward:
>
> (a) National Cabinet Papers and Presentations should be lodged as final with the Secretariat four business days before consideration;
>
> (b) Papers and Presentations should be circulated to all members of the National Cabinet at least two business days before a meeting.
>
> …

[169] National Cabinet minutes are circulated to all members of the National Cabinet by the Secretariat.

166. Although there is no express evidence to this effect, I am willing to infer that the arrangements described in these paragraphs of the Cabinet Handbook (14th Edition) also pertained during the currency of the Cabinet Handbook (13th Edition) and, accordingly, were in force in March, April and May 2020. Thus, I accept that there is objective evidence of the administrative support by the Cabinet Division in DPMC of the National Cabinet. It is understandable that, within the Commonwealth Government, it is DPMC which has been entrusted with this responsibility, given its similarity to its existing responsibilities. In this respect, Ms McGregor deposed:

[14] PM&C is the Commonwealth Department with administrative responsibility for Cabinet matters. As set out in the Cabinet Handbook, the Cabinet Division of PM&C maintains the collection of Cabinet documents for the current government and preserves the Cabinet records of previous governments. PM&C is also the Commonwealth Department with administrative responsibility for intergovernmental relations and communications with State and Territory Governments.

167. Earlier, I referred to the Prime Minister's statement on 15 March 2020 that the National Cabinet "has now been established formally under the Commonwealth Government's Cabinet Guidelines". It may also be pertinent on the present issue to note the Prime Minister's announcement on 13 March 2020 that the principal advising body to the National Cabinet would be the AHPPC, that is a body of medical officers and not, say, DPMC or any Minister in the Federal Government**.**

168. Finally, of relevance to the manner of operation of the National Cabinet, Ms McGregor deposed:

Notebooks and Systems

[48] The Cabinet Division within PM&C supports the National Cabinet as it does the Cabinet and other Cabinet committees, by providing continuity and impartial support for its operations. Further details of the support the Cabinet Division provides the National Cabinet is set out on pages 30-32 of the Cabinet Handbook.

[49] The Secretary of PM&C is the formal custodian of National Cabinet records. The Cabinet Handbook dictates that members may nominate a senior official to be note takers at National Cabinet meetings, however the notebooks remain the property of the Respondent and are protected from early public release under the *Archives Act* 1983 and cannot be sought under the FOI Act.

> [50] National Cabinet meetings and material are stored in the PM&C maintained document system CabNet. This ensures that authoritative documents are maintained as a record of the National Cabinet.
>
> [51] CabNet is a whole-of-government IT system that facilitates the flow of protected Cabinet information in a secure manner, and supports the running of Cabinet and committee meetings. The minutes for National Cabinet are finalised in CabNet, the same as they are for other Cabinet committees. National Cabinet minutes are circulated outside of CabNet to the States and Territories First Ministers and First Ministers' Departments with relevant protective markings.

169. I accept the evidence given by Ms McGregor in [48]-[51] of her affidavit, while at the same time noting that Ms McGregor deposed to provisions in the 14th Edition of the Cabinet Handbook which was not issued until 16 October 2020, that is, after the relevant time for the purposes of the present issues. I infer, however, that the same arrangements applied during March, April and May 2020.

170. The evidence reviewed in this section of the reasons warrants the conclusion that the Cabinet Division in DPMC provides the *administrative* support for the National Cabinet considered as a whole. I accept that this is consistent with the National Cabinet being a committee of the Cabinet, but do not regard it as a strong indicator that that is so.

Confidentiality of the National Cabinet deliberations

171. Counsel for the respondent emphasised that the deliberations of the National Cabinet are subject to obligations of confidentiality in the same way as are the deliberations of Cabinet. Counsel for the applicant submitted that the claims of confidentiality were belied by the frequent public statements of the Prime Minister and occasionally by others concerning the decisions made by the National Cabinet.

172. However, as counsel for the respondent submitted, there is a relevant distinction between announcement of the outcomes of National Cabinet meetings, on the one hand, and disclosure of the deliberations which culminated in those outcomes, on the other. The disclosure of the decisions reached is not inconsistent with maintenance of the confidentiality of the discussions within the National Cabinet. The examples which the applicant gave which were said to belie the claims of confidentiality were of the former kind.

173. While I accept that confidentiality does attach to the National Cabinet deliberations, I do not regard it as a particularly strong indicator that it is a Cabinet committee. The National Cabinet is likely to have wished (and to have agreed) that its deliberations be confidential whether or not it has the status of a committee of the Cabinet. That is evident in the agreement of the members of the National Cabinet on 15 March 2020 that their deliberations would be "strictly confidential".

Sub-committees of the National Cabinet

174. One matter, perhaps minor, pointing against the National Cabinet being a committee of the Cabinet is that it can and does appoint its own sub-committees. By way of example, in his press conference on 4 September 2020 the Prime Minister referred to the National Cabinet Sub-Committee on Energy. I note also that Section 8, entitled "The National Cabinet", which was incorporated into the Cabinet Handbook for the first time in the 14th Edition (issued on 16 October 2020) provides expressly for sub-committees of the National Cabinet. The Statement of Agreed Facts also identifies some sub-committees of the National Cabinet.

175. There was no evidence suggesting that committees of the Cabinet do establish sub-committees. Whether they may do so and, if so, the status of a sub-committee for the purposes of the FOI Act are not matters which need be addressed presently. However, the ability of the National Cabinet to establish, at its own discretion, sub-committees does suggest a difference between it and other Cabinet committees.

176. As there is no evidence that the National Cabinet had established any sub-committee as at the earlier dates of 15 March 2020 or 29 May 2020, this is not a matter to which I attach weight for present purposes.

Collective responsibility and solidarity

177. The system of responsible government underpins our constitutional system: *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 146 (Knox CJ, Issacs, Rich and Starke JJ). Counsel for the applicant submitted that the National Cabinet has characteristics which are inconsistent with basic precepts of Cabinet responsibility. He

referred to aspects of the system of Cabinet government, in particular, the concepts of collective responsibility and Cabinet solidarity.

178. The Cabinet Handbook (13th Edition), contains a convenient statement of some of these precepts. In addition to [2] set out earlier in these reasons, the Cabinet Handbook provides in section 2 under the heading Cabinet Conventions and Principles:

> ***Guiding Principles***
>
> 17. A Westminster-style Cabinet is defined by adherence to the principles of collective responsibility and Cabinet solidarity. These principles are the binding devices that ensure the unity of purpose of the Government and underpin the formulation of consistent policy advice.
>
> **Collective Responsibility**
>
> 18. Collective responsibility is a long standing and integral part of the Cabinet system. *It requires that whatever the range of private views put forward by ministers in the Cabinet, once decisions are arrived at and announced they are supported by all ministers*. It ensures that the Government is collectively accountable and responsible to the Parliament and to the people of Australia.
>
> 19. In practice, a decision of the Cabinet is binding on all members of the Government regardless of whether they were present when the decision was taken. Issues may, and should, be debated vigorously within the confidential setting of Cabinet meetings. The aim is to reach some form of consensus so that the Prime Minister, as chair of the Cabinet, can summarise what the collective decision is for recording in the Cabinet minute.
>
> **Cabinet Solidarity**
>
> 20. *Members of the Cabinet must publicly support all Government decisions made in the Cabinet, even if they do not agree with them. Cabinet ministers cannot dissociate themselves from, or repudiate the decisions of their Cabinet colleagues unless they resign from the Cabinet. It is the Prime Minister's role as Chair of the Cabinet, where necessary, to enforce Cabinet solidarity*.
>
> ***Operational Values***
>
> 21. The proper implementation of these two guiding principles is entirely dependent on a commitment to three important operational values: consultation; confidentiality; and respect for the primacy of Cabinet decisions.
>
> 22. A strong and effective Cabinet system requires ministers, their staff and departments to respect and adhere to the guiding principles and operational values.
>
> …
>
> **Primacy of the Cabinet**
>
> 31. Ministers must carry out Cabinet-determined policies with respect to their own portfolios, whether or not they agree with such policies. Ministers (and portfolio agencies) must act on Cabinet decisions as recorded in Cabinet minutes.
>
> **Ministerial responsibility**

> 32. In upholding the Cabinet guiding principles and operational values, ministers must:
>
> a. not talk publicly about matters that they propose to bring to the Cabinet nor announce a major new policy without previous Cabinet approval
>
> b. not express private views on Government policies nor speak about or otherwise become involved in a ministerial colleague's portfolio without first consulting that colleague and possibly the Prime Minister
>
> c. understand that absolute confidentiality of Cabinet discussions is essential
>
> d. adopt a strict need to know approach to any briefing they give to their staff and departmental officers on the outcome of Cabinet decisions
>
> e. enforce the strictest discipline in their offices and departments to avoid Cabinet agenda items or decisions being either knowingly or unknowingly disclosed
>
> f. ensure that proposals prepared for Cabinet consideration have involved thorough consultation across Government, are timely and of high quality, and provide concise and robust advice on implementation challenges and risk mitigation strategies.
>
> (Emphasis added)

179. Support for these fundamental principles as to the role and functioning of the Cabinet in the Cabinet system of government is to be found in *NLC Full Court* at 16-17; *NLC High Court* at 615-6; *FAI v Winneke* at 373-4; and *Sankey v Whitlam* [1978] HCA 43; (1978) 142 CLR 1 at 97-8.

180. The Cabinet Handbook does not state explicitly that the committees of the Cabinet to which it refers are subject to the same principles. However, that seems implicit in their very existence and in the provisions for their establishment. Having regard to their relationship with the Cabinet, it would be remarkable if it were otherwise.

181. Counsel for the respondent submitted that "collective responsibility and solidarity is about members of a cabinet or a cabinet committee being bound by the decisions made by the Cabinet". He submitted that this was the position which the National Cabinet had adopted until making a significant change on 4 September 2020. For the evidence of that change, counsel relied on the transcript of the Prime Minister's Press Conference on 4 September 2020 following the meeting of the National Cabinet that day:

> [T]oday we made a number of agreements. The first one, I think, was to acknowledge that how the National Cabinet worked also needed to evolve. One of the reasons COAG and its predecessors never worked was there was the unrealistic and, frankly, not very practical expectation that it could only ever operate on complete, 100 percent consensus. That sets the Federation up to fail. Australia is too diverse a place. The challenges are too disparate to think that, on every single issue, every State and Territory is going to come to exactly the

> same point. That is not a realistic expectation … So, we've decided that this notion of 100 percent, absolute consensus on any issue is not a way that the National Cabinet can indeed work. And what we'll do is we will set out areas where we can come together, and get as many States and Territories as possible to come around that agreement. Not everyone has to get on the bus for the bus to leave the station. But it is important the bus leaves the station, and we all agree on that … Even when, on occasions, some might not want to get on, they know we need to keep moving forward and that is supported, and that's we agreed to do today. And I think that is a change in the way our Federation works.

182. The Prime Minister then went on to refer to the agreement by seven of the eight States and Territories on objectives for the National Cabinet.

183. Counsel for the respondent submitted that the effect was that the National Cabinet had, on 4 September 2020, agreed to move from the requirement of 100 percent consensus for decisions to an acceptance that decisions could be made in the absence of such consensus and that individual States and Territories and, for that matter, the Commonwealth could act in accordance with their own perceived best interests. I agree that the Prime Minister's statement does suggest such a shift. However, a requirement for 100 percent consensus is not necessarily coincident with the existence of collective responsibility and Cabinet solidarity. Indeed, in the conventional operation of cabinets, those principles are applicable even when there has not been complete consensus at the Cabinet table.

184. The Tribunal invited counsel for the respondent to identify the evidence indicating that the National Cabinet had operated on the basis of a requirement for 100 percent consensus for its decisions before 4 September 2020 but counsel did not do so. Instead, counsel sought to demonstrate that the evidence of one circumstance relied upon by the applicant was not an instance of a State acting inconsistently with a decision of the National Cabinet. This concerned the evidence of whether schools should be closed. In media statements issued after the meetings of the National Cabinet on 16, 18 and 20 March 2020, the Prime Minister announced that the National Cabinet had decided that schools should remain open. However, in the media statement issued before the National Cabinet meeting on 22 March 2020, the Premier of Victoria had said that he would inform the National Cabinet that Victoria would implement a shutdown of all non-essential activity across that State to combat the spread of Coronavirus. The Premier's media statement included the following:

> I will also inform National Cabinet that school holidays will be brought forward in Victoria, starting on Tuesday 24 March.

> … The decision whether to re-open schools after the Term 1 holidays will likewise be determined following advice from the Chief Health Officer.

185. After the meeting of the National Cabinet on 22 March 2020, the Prime Minister issued a media statement which included:

> All leaders agreed that children should go to school tomorrow. Leaders agreed that we cannot see children lose an entire year of their education as a result of school closures caused by COVID-19 … State Premiers and Chief Ministers agreed that schools will remain open through to the end of the current school terms to support students whose parents choose to send their children to school. Victoria's school break will commence on Tuesday 24 March 2020.

186. Counsel for the respondent submitted that these media statements did not evidence a lack of solidarity as Victoria was acting consistently with the decision of National Cabinet to keep schools open. All it had decided was to bring forward the school holidays. As counsel recognised, this submission involved a "nuanced distinction".

187. In my view, the reality was that Victoria was, despite the National Cabinet decision, not keeping its schools open but was achieving that outcome by bringing forward the school holiday period.

188. I agree with counsel for the respondent that several of the examples on which the applicant relied had occurred after the decision of 4 September 2020 at which the National Cabinet had decided that decisions could be made without 100 percent consensus. Those examples are accordingly of limited utility in the circumstances of the present case.

189. The respondent, who has the relevant onus, did not adduce formal evidence of adoption by the members of the National Cabinet of the principles of collective responsibility and solidarity. I am willing to accept, however, that, by the adoption of the Terms of Reference attached to the minutes of the National Cabinet, it did resolve to act in accordance with such principles.

190. The evidence indicates, however, that, while National Cabinet has sought to achieve consistency in the measures to control COVID-19 and its effects and coordination of the various activities of the States and Territories directed to that end, the States and Territories did not at the relevant times in fact operate wholly in accordance with the principles of

collective responsibility and cabinet solidarity. In particular, it is evident that members of the National Cabinet did not regard themselves as bound to support decisions made at the National Cabinet irrespective of their own views, and that at times they acted in ways which were inconsistent with the National Cabinet decisions. Further, there is no evidence of attempts to enforce solidarity amongst members of the National Cabinet.

191. Numerous illustrations could be given from the evidence but it is not necessary to refer to them all. It is sufficient instead to refer to statements made by the Prime Minister in his various press releases and press conferences:

4 May 2020	Journalist:	[J]ust picking up [what] you said a minute ago … about … the easing of restrictions, I think you said that ultimately these are decisions that will be taken by the States and Territories, that on Friday we'll get a framework, but ultimately States and Territories decide. So does that mean that not all States and Territories will start to ease restrictions from Friday?
	Prime Minister:	Well, I can't pre-empt decisions of Friday. The National Cabinet, particularly on these issues where the Commonwealth has no direct authority at all, our job here is to try and ensure as much consistency across State and Territory jurisdictions as possible. … And so what you can expect on Friday is that, again, *we'll seek to have as consistent a national position as possible. But ultimately, each State and Territory are the arbiters or their own position*. But I have no doubt they will seek to do that in as consistent a way as possible. …
4 May 2020	Journalist:	Is there anything that you can do as Prime Minister, leader of the nation, to put more pressure on some States that perhaps not everyone agrees with the extent of their lockdown?
	Prime Minister:	We're a Federation and at the end of the day, States have sovereignty over decisions that fall specifically within their domain. And the National Cabinet, more than any other tool I've seen in my time in public life, has brought about a consistency of approach between States and Territories, not a uniformity, but a greater consistency. … *I respect the fact that they've each got to make their own call, just like I do, and they've got to explain it to the people who live in their State and they've got to justify it. And I think that's the appropriate transparency and accountability*.
4 May 2020	Prime Minister:	*So the Premier in Victoria will continue to make the decisions as he sees them in relation to State Schools, and that's entirely within his bailiwick. Other Premiers are making different decisions,* like in Queensland, New South

		Wales, South Australia, the Northern Territory and in Western Australia. And I think they're making good calls.
4 September 2020	Prime Minister:	And so it is not surprising that [the States and Territories] all have different outlooks about what their challenges are right now, and what they might be in the months ahead …

(Emphasis added)

192. I regard these statements of the Prime Minister as involving implicitly a recognition that, whatever may have been decided formally, the principles of collective responsibility and Cabinet solidarity were not applied in practice, at least to the full extent which those terms convey in relation to the operations of Cabinets.

193. The Statement of Agreed Facts included agreement that, in May 2020, the respondent had made public statements to the following effect:

> [4] In addition, in May 2020 the Secretary of PM&C made public statements to the following effect:
>
> - The way things generally work is the Prime Minister makes announcements first, then state premiers and territory chief ministers quite often follow on and make their own press statements and hold their own press conferences.
> - The deliberations of the cabinet and the decisions are protected from disclosure. What premiers and prime ministers say after a meeting is a matter for them. The federation comprises the Commonwealth, six sovereign states and two territories. It is not surprising that there are some differences in the application of a principle, because each is sovereign in its own right.

194. This seemed to be a recognition that the Prime Minister, Premiers and Chief Ministers were not required to, and did not, speak with one voice. The sovereign status of each polity meant that each could decide for himself or herself what was said publically including explaining a different application of the matters of principle on which the National Cabinet had decided.

195. In his affidavit, Mr Dorling referred to public statements of the Premiers of Queensland and Western Australia in September 2020 rejecting the Prime Minister's attempt to institute a shared definition of what constitutes a "Coronavirus hotspot" and the agreement in October 2020 of the Commonwealth and each of the States and Territories other than Western Australian on a "National Framework for Reopening". However, these events occurred after the period which is relevant presently.

196. Counsel for the applicant submitted that it is understandable that the National Cabinet does not observe principles of collective responsibility or Cabinet solidarity because the Premiers and Chief Ministers are not accountable (responsible) to the Australian Parliament but are instead accountable (responsible) to the Parliaments in their own States or Territories, as the case may be. They will therefore respond in a way which satisfies their obligations to their own polities. I consider that there is force in that submission and accept it.

The respondent's opinion evidence

197. Before concluding this section of the reasons, I should refer to the submission of counsel for the respondent as to the weight which the Tribunal should give to the evidence of the respondent and Ms McGregor. Counsel submitted that their evidence that the National Cabinet is a committee of the Cabinet should be given "considerable weight" for three reasons: first, the experience of both deponents; secondly, the authorities suggest that such evidence is deserving of weight; and, thirdly, because the evidence is "largely unchallenged".

198. Earlier in these reasons, I set out the senior public service experience of the respondent and Ms McGregor. I accept that they have had considerable public service experience in relation to the operation of the Cabinet.

199. Counsel referred to three authorities said to support the proposition that the Tribunal should attach considerable weight to the opinions of the respondent and Ms McGregor on this question. The first was *Sankey v Whitlam* in which Gibbs ACJ said, at 44, in relation to a claim of public interest immunity:

> Even where the claim is that the document belongs to a class which should be withheld, the Court is still required to give proper respect to the assertion by the Minister or departmental head that production would be contrary to the public interest …

In the same case, Stephen J at 59-60 referred with approval to the statement of Lord Pearson in *Rogers v Home Secretary* [1973] AC 388 at 406 that "the Court, though naturally giving great weight to the opinion of the appropriate Minister conveyed through the Attorney-General or his representative, must have the final responsibility of deciding whether or not the document or information is to be disclosed".

200. The second authority to which counsel referred was *NLC Full Court* in which Black CJ, Gummow and French JJ said, at 38, in relation to a claim of public interest immunity:

> [W]here the impact of disclosure on the public interest is peculiarly within the knowledge of the Executive, its contentions will be given particular weight.

201. The third authority to which counsel referred was *Spencer v Commonwealth of Australia* [2012] FCAFC 169; (2012) 206 FCR 309 in which the Full Court (Keane CJ, Dowsett and Jagot JJ) said in relation to a claim of public interest immunity:

> [33] [I]f there is cogent evidence of the grounds for the making of the claim for immunity of the class of documents, a matter to be assessed giving due "weight to the assertion of a responsible representative of government that there is a public interest which will be placed in jeopardy by the production of the document" …
>
> …
>
> [43] … The [respondent's] affidavits which … must be given weight as they contain assertions of responsible representatives of government that there is a public interest which would be jeopardised by the production of the documents …

202. As indicated, these authorities concerned claims for public interest immunity. The statements to which counsel referred were directed to the Court's consideration of that question with reference to the effect of disclosure of the content of particular documents. They were not directed to the resolution of a question of the kind with which the Tribunal is presently concerned, namely, whether a particular committee is within a particular statutory conception. As I have endeavoured to explain already, that issue turns on a proper construction of the term "committee of the Cabinet" and the application of the found facts to that construction. The resolution of issues of that kind is one with which the Courts are experienced. In contrast, there is no suggestion in the evidence that either the respondent or Ms McGregor have any particular expertise in the resolution of such issues. Nor does it involve matters peculiarly within their knowledge.

203. Quite apart from these considerations, counsel for the respondent acknowledged that the evidence does not support the respondent having been present at the meeting of COAG on 13 March 2020 and accepted that Ms McGregor had not been present. That by itself compromises their ability to express an opinion of utility on the present issue.

204. Counsel also referred to two authorities in the Freedom of Information Division of the Tribunal: *Secretary, Department of Prime Minister and Cabinet v Summers* [2019] AATA

5537 and *McGrath v Director-General, National Archives of Australia* [2020] AATA 1790. In each case the Tribunal member (Perry J and Forgie DP respectively) had attached weight to the evidence of a public servant. However, in the first case, the evidence concerned the effect of disclosure on the public interest and the second concerned the prospect of disclosure causing damage to the security or international relations of the Commonwealth. Neither concerned an issue of the kind being addressed presently by the Tribunal. I do not regard either decision as supportive of the respondent's present submission.

205. Counsel accepted that the rule in *Browne v Dunn* (1893) 6 R 67 has no application in proceedings of the present kind, referring to *Re Minister of Immigration and Multicultural Affairs; ex parte Applicant S154/2002* [2003] HCA 60; (2003) 77 ALJR 1909 at [55]-[57]. He submitted nevertheless that, "as a matter of practical reality", the fact that the applicant had not sought to cross-examine the respondent and Ms McGregor meant that their evidence should be more readily accepted. That submission may have had greater force if the respondent and Ms McGregor had deposed to factual matters of which they had first-hand knowledge and had indicated that that is what they were doing. However, as already explained, the affidavits of the respondent and Ms McGregor are not of this kind. I repeat my earlier remarks concerning the requirements for proper evidence. Quite apart from the identified deficiencies, the evidence of the respondent and Ms McGregor is, in material respects, inconsistent with other evidence, including the facts which the respondent had agreed with the applicant. Accordingly, I do not regard this as a persuasive consideration.

206. As a final matter, I note that when s 34 was first enacted in 1982, it contained in subs (2) and (4) "conclusive certificate" provisions, that is, provisions that a certificate signed by the Secretary of DPMC certifying that a document was of a kind to which subs (1) referred would establish conclusively that, subject to the operation of Part VI, the document was an exempt document of the specified kind. Those provisions were repealed by the *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009* (Cth) (the 2009 Amendment). In the Second Reading Speech on the Bill which became the 2009 Amendment, the Minister said:

> The repeal of the power to issue conclusive certificates is an important step in achieving greater accountability in government decision making on access requests under the FOI Act and Archives Act.

> Conclusive certificates act as a bar to someone seeking access to a document under FOI. The effect of a Minister placing a conclusive certificate on a document is to limit the capacity for Administrative Appeals Tribunal (the AAT) to review the exemption claim underlying the certificate. Under the current Act, where a conclusive certificate applies, the AAT's jurisdiction is limited to determining if reasonable grounds exist for the exemption claim. But even if the AAT were to find that no reasonable grounds exist for the exemption claim, a Minister may continue to refuse to allow access to the document.
>
> Those limitations on external review should not be preserved …

207. The Tribunal should keep this history in mind when considering the deference to be given to opinions of the present kind, when those submissions do not concern matters over which the deponents have any particular skill or experience.

208. In my view, the attempt by the respondent to have the Tribunal rely, in relation to the question of whether the National Cabinet is a committee of the Cabinet, on statements in the authorities concerning the value of statements of "responsible representatives" in the evaluation of claims for public interest immunity is misplaced. Specifically, I am not satisfied, with due respect to the respondent and Ms McGregor, that either has a relevant expertise or experience which can assist the Tribunal in the determination of this question. The weight to be given to their evidence in relation to s 47B and s 11A will be considered separately.

209. This conclusion makes it unnecessary for the Tribunal to address the submissions of counsel for the applicant concerning the non-compliance by the respondent and Ms McGregor with the Tribunal guidelines entitled "Persons Giving Expert and Opinion Evidence".

Conclusion concerning the Cabinet documents exemption

210. Having addressed several matters bearing on the question of whether the National Cabinet is a committee of the Cabinet, I have then sought to consider their collective effect. In my view, taken together they point persuasively against the National Cabinet being a committee of the Cabinet within the meaning of the statutory expression. At the very least, I am satisfied that the respondent has not discharged the onus of establishing that Mr Hupalo's decisions about these matters were justified or that the Tribunal should give a decision which is adverse to the applicant.

Conditionally exempt documents – damage to Commonwealth-State relations

211. As previously noted, s 11A(5) of the FOI Act requires an agency to give a person access to a document which is "conditionally exempt" at a particular time unless, in the circumstances, access to the document at that time would, on balance, be contrary to the public interest.

212. Division 3 of Pt IV of the FOI Act provides that specified documents will be "conditionally exempt" on public interest grounds. Section 47B, which the respondent invoked by way of additional defence to the application, provides:

> **47B Public interest conditional exemptions—Commonwealth-State relations etc.**
>
> A document is conditionally exempt if disclosure of the document under this Act:
>
> (a) would, or could reasonably be expected to, cause damage to relations between the Commonwealth and a State; or
>
> (b) would divulge information or matter communicated in confidence by or on behalf of the Government of a State or an authority of a State, to the Government of the Commonwealth, to an authority of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth or of an authority of the Commonwealth; or
>
> (d) would divulge information or matter communicated in confidence by or on behalf of an authority of Norfolk Island, to the Government of the Commonwealth, to an authority of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth or an authority of the Commonwealth; or
>
> (f) would divulge information or matter communicated in confidence by or on behalf of the Government of a State or an authority of a State, to an authority of Norfolk Island or to a person receiving the communication on behalf of an authority of Norfolk Island.
>
> Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).

213. The respondent invoked subs (a) only and did not invoke any other provision within Division 3 of Part IV.

214. Section 11B informs the determination of whether the grant of access to a conditionally exempt document would, on balance, be contrary to the public interest:

> **11B Public interest exemptions—factors**
>
> *Scope*

(1) This section applies for the purposes of working out whether access to a conditionally exempt document would, on balance, be contrary to the public interest under subsection 11A(5).

(2) This section does not limit subsection 11A(5).

Factors favouring access

(3) Factors favouring access to the document in the public interest include whether access to the document would do any of the following:

(a) promote the objects of this Act (including all the matters set out in sections 3 and 3A);

(b) inform debate on a matter of public importance;

(c) promote effective oversight of public expenditure;

(d) allow a person to access his or her own personal information.

Irrelevant factors

(4) The following factors must not be taken into account in deciding whether access to the document would, on balance, be contrary to the public interest:

(a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;

(b) access to the document could result in any person misinterpreting or misunderstanding the document;

(c) the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made;

(d) access to the document could result in confusion or unnecessary debate.

Guidelines

(5) In working out whether access to the document would, on balance, be contrary to the public interest, an agency or Minister must have regard to any guidelines issued by the Information Commissioner for the purposes of this subsection under section 93A.

215. In invoking s 11A and s 47B(a), the respondent did not distinguish between the individual documents comprising the subject documents. Instead counsel made his submissions by reference to the subject documents as a class, contending that the Tribunal should conclude that disclosure of any documents in the class of minutes of meetings of the National Cabinet would be damaging to relations between the Commonwealth and a State.

The statutory concepts

216. The word "damage" in s 47B is not qualified by any adjective as to extent or character. In context, it seems apt to refer to forms of intangible damage: *Diamond v Chief Executive Officer of the Australian Curriculum, Assessment and Reporting Authority* [2014] AATA 707 at [103]; *Re Maher and Attorney-General's Department* (1985) 7 ALD 731 at 742. It can also be taken to connote a less severe deleterious effect than "a substantial adverse effect", which is the expression used in the cognate provisions in ss 47D, 47E and 47J of the FOI Act.

217. On the other hand, s 47B(a) operates with respect to "damage", which would preclude adverse effects which cannot be characterised as such, for example, effects which do no more than cause relationships to develop in particular ways, without being damaging. The damage need not be generalised damage to the relationship between the Commonwealth and the State: damage to the relations in some particular respect would be sufficient: *Re Guy v Department of Transport* (1987) 12 ALD 358 at 363.

218. The term "relations between the Commonwealth and a State" in s 47B should not be understood as having a narrow conception. It is capable of encompassing the whole of the relationship between the Commonwealth, on the one hand, and a State or States (accepting that, in accordance with s 23(b) of the *Acts Interpretation Act 1901* (Cth), the singular "a State" may encompass two or more States). In *Arnold (on behalf of Australians for Animals) v Queensland* (1987) 73 ALR 607, Wilcox J said of the then s 33A of the FOI Act (the predecessor of s 47B):

> [T]he words 'relations between the Commonwealth and a State' refer to the total relationship between the Commonwealth and the relevant State. As is essential in a federation, there exists a close working relationship, over a wide spectrum of matters and at a multitude of levels, between representatives of the Commonwealth and representatives of each State. The word 'relations' includes all of those contacts.

219. The expression "could reasonably be expected to prejudice the future supply of information" in the former s 43(1)(c)(ii) of the FOI Act was considered by Bowen CJ and Beaumont J in *Attorney-General's Department v Cockcroft* [1986] FCA 35; (1986) 10 FCR 180. Their Honours said, at 190, that the expression required "a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or

ridiculous, to expect that those who would otherwise supply information of the prescribed kind to the Commonwealth or any agency would decline to do so if the document in question were disclosed under the Act". This meaning was applied to the former s 33A of the FOI Act in *Arnold v Qld*, by Wilcox J at 616 and by Burchett J at 628.

220. Cognates of the expression "could reasonably be expected to" have been considered in later authorities, resulting in some refinement of the reasons in *Cockcroft*. Perry J referred to these authorities in *Secretary, Department of Prime Minister and Cabinet v Summers* at [42]-[47]. In the view I take of the matter, it is not necessary to review those authorities presently. It is sufficient to indicate that I accept that the Tribunal is to proceed on the basis that s 47B(a) requires, in accordance with its terms, consideration of whether disclosure of the subject documents "would, or could reasonably be expected to" cause damage to relations between the Commonwealth and a State and that, if satisfied of either limb, the subject documents will be conditionally exempt.

221. It was not suggested that there is any relevant distinction between the terms "disclosure" in s 47B and "access" in s 11A(5).

Matters of approach

222. Mr Hupalo did not rely upon s 47B for either of his decisions. Reliance on the provision was raised for the first time in the affidavits filed by the respondent in relation to the current applications. The Tribunal is therefore in the position of primary decision-maker in relation to the application of s 47B(a) and s 11A. This was another consideration making appropriate the Tribunal's inspection of the documents.

223. Counsel for the respondent reminded the Tribunal that s 11B(5) required it, when working out whether access to a document would on balance be contrary to the public interest, to have regard to the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act. However, counsel did not identify any particular guideline to which the Tribunal should have regard, let alone make oral submissions concerning its application.

224. The prospect that disclosure of a document may cause damage to relations between the Commonwealth and a State does not of itself mean that the document need not be

disclosed. The document may still be disclosable even if the disclosure would, or could reasonably be expected to, cause such damage. The document need not be disclosed only if a further condition is established, that is, that access to the document at the time would, on balance, be contrary to the public interest. That is to say, the FOI Act does not contemplate that all documents which would or may cause damage to relations between the Commonwealth and a State will be immune from disclosure.

225. Accordingly, the Tribunal must consider two questions in the application of s 11A(5) and s 47B(1)(a):

(a) would disclosure of the subject documents cause, or reasonably be expected to cause, damage to relations between the Commonwealth and a State;

(b) if so, would access to the documents at this time, on balance, be contrary to the public interest.

226. If the first question is answered in the negative, then the documents are not conditionally exempt and the applicant will be entitled to access to them.

227. Both questions require the Tribunal to engage in a process of evaluation having regard, in particular, to the content and nature of the documents, such evidence as is available as to the effect of disclosure, to matters which may be inherent in the documents or in the disclosure, and to the general context.

228. Again, it is the respondent who has the onus of establishing that the Tribunal should give a decision adverse to the applicant (s 61(1)(b) of the FOI Act). However, unlike the question of whether the National Cabinet is a committee of the Cabinet, the status of the documents sought by the applicant as conditionally exempt, or otherwise, is to be assessed at the present time and by reference to the material now before the Tribunal. That is so for two inter-related reasons: s 47B does not contain either an explicit or implicit temporal limitation; and it indicates that the prospect of damage caused by disclosure is to be assessed at the time the disclosure will occur – see *Secretary, Department of Foreign Affairs and Trade v Whittaker* [2005] FCAFC 15; (2005) 143 FCR 15 at [26].

229. Likewise, the question of whether the grant of access to the documents would be contrary to the public interest is to be assessed at the present time, that is, at the time the access would occur.

Is a class claim available?

230. As previously noted, the respondent made his claims under s 47B and s 11B as a class claim. The consequence was that counsel did not make submissions by reference to the content of the individual subject documents. Nor did he submit that the disclosure of specific portions of the subject documents would cause damage to Commonwealth-State relations. Counsel submitted instead:

> [W]e say that if any of the information in any of the documents was released - no matter what it was - that would cause Members of the National Cabinet going forward to apprehend that their discussions would not be confidential, and there would be no assurance of that. And Your Honour can readily imagine why people coming to the National Cabinet to discuss important matters might raise things in a different way if they apprehended that what they said, or the position they took, could be released to the public pursuant to the Freedom of Information Act, than if they could be confident that would not occur.
>
> And so Your Honour doesn't need to get into the contents of the document. And, in truth, we submit, would be assisted little by doing so for this purpose. Because the damage to the Commonwealth State relations occurs by the undermining of the confidentiality that I've referred to.

231. Although counsel did not say so expressly, I took him to be invoking, by analogy, the approach stated by the majority (Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ) in *NLC High Court* at 616:

> The classification of claims for public interest immunity in relation to documents into "class" claims and "contents" claims has been described as "rough but accepted". It serves to differentiate those documents the disclosure of which will be injurious to the public interest, whatever the contents, from those documents which ought not to be disclosed because of the particular contents. Both upon principle and authority, it is hardly contestable that documents recording the deliberations of Cabinet fall within a class of documents in respect of which there are strong considerations of public policy militating against disclosure regardless of their contents.
>
> (Citations omitted)

232. There is, *prima facie*, a distinction in s 47B between subs (a) on the one hand, and subss (b), (d) and (f), on the other. The criterion on which the latter operates is the prospect that information communicated in confidence in particular contexts would be divulged, whereas subs (a) is concerned with an effect of the disclosure of the document itself. This

raises the possibility that the former requires consideration of the contents of the document in question, but that may not necessarily be so in the case of the latter.

233. However, an initial difficulty with counsel's submission is that it seemed to assume the validity of the minor premise, namely, that disclosure of minutes of the National Cabinet would, self-evidently, be damaging to Commonwealth-State relations. There is no reason for the Tribunal to start with that premise and there may be good reason to think that it should not. Were it otherwise, the Tribunal would be applying a rule or policy without regard to the circumstances of the particular case. Whether or not damage to Commonwealth or State relations may result from disclosure may depend on a number of fact-specific matters, for example, the time which has elapsed between the meeting in question and the time of the prospective disclosure, the subject matter of the minutes, and the attitude of other participants in the meeting in question when that is known. In saying this, I am not overlooking considerations which may point in favour of the minutes of the National Cabinet, as a class, being of a kind to which public interest immunity may apply. They are considerations of the kind referred to in the reasons of the majority in *NLC High Court* at 615-6 set out earlier in these reasons with respect to the public interest in the confidentiality of Cabinet documents.

234. However, s 47B(a) operates on a more confined criterion than the public interest which forms the basis of public interest immunity. It requires consideration of whether disclosure of the subject documents would, or could reasonably be expected, have the effect to which the provision refers. The public interest as a discrete matter is to be assessed in the second limb of the enquiry, that is, under s 11A(5).

235. It is also to be noted that the FOI Act makes a broad distinction between documents according to their class and their content. Some exemptions are class-based in that the exemption is expressed by reference to the class to which they belong. Section 34(1)(b) is an example. There are other examples in Division 3 of Part IV.

236. Other documents are made conditionally exempt because of the effect which disclosure of their content would have. Sections 47D-47J in Division 3 of Part IV are examples. These provisions do not refer explicitly to disclosure of the *contents* of the documents, only to their

disclosure. But it seems inherent that it is disclosure of the content of the documents which may give rise to the specified adverse effects. And it would be difficult to assess the prospect of those effects being caused without regard to the documents' contents.

237. Section 47C and, as noted s 47B(b), (d) and (f) do not refer expressly to an adverse effect of disclosure but they do seem necessarily to turn on an assessment of the evidence concerning the effect of disclosure of the content of the documents.

238. The respondent's submission that the conditionally exempt status of the subject documents be determined by reference to their class, rather than by reference to their individual content, does not seem consistent with this broad scheme in the FOI Act. As was noted by the Minister in the Second Reading Speech for the Freedom of Information Bill 1981 "only in some cases are the exempt documents defined by reference to the nature of the document itself, such as Cabinet and Executive Council documents".

239. The very nature of the criterion upon which s 47B(a) operates seems inconsistent with it having an application to a class of documents. It seems to contemplate a factual enquiry as to the effect of disclosure in the circumstances, rather than the application of some form of *a priori* reasoning by reference to a category of documents. Put slightly differently, a document is to be conditionally exempt because of the perceived effect of *its* disclosure: not the perceived effect of disclosure of the class of documents to which it belongs. A focus on whether disclosure of a class of documents would be damaging to Commonwealth-State relations would divert attention from the application of the statutory criterion in s 47B(a) to the document, that is to whether *its* disclosure would have, or be reasonably expected to have, the relevant adverse effect.

240. This view of the position is consistent with the common law relating to public interest immunity. The majority in *NLC High Court*, after referring to the classification of claims for public interest immunity as "class" claims, and "contents" claims, continued at 616:

> [W]hatever the position may have been in the past, the immunity from disclosure of documents falling within such a class *is not absolute*. The claim of public interest immunity must nonetheless be weighed against the competing public interest of the proper administration of justice, which may be impaired by the denial to a court of access to relevant and otherwise admissible evidence. As Gibbs ACJ said in *Sankey v Whitlam*:

> "I consider that although there is a class of documents whose members are entitled to protection from disclosure irrespective of their contents, the protection is not absolute, and it does not endure for ever. The fundamental and governing principle is that documents in the class may be withheld from production only when this is necessary in the public interest. In a particular case the court must balance the general desirability that documents of that kind should not be disclosed against the need to produce them in the interests of justice. The court will of course examine the question with especial care, giving full weight to the reasons for preserving the secrecy of documents of this class, *but it will not treat all such documents as entitled to the same measure of protection - the extent of protection required will depend to some extent on the general subject matter with which the documents are concerned*. If a strong case has been made out for the production of the documents, and the court concludes that their disclosure would not really be detrimental to the public interest, an order for production will be made."
>
> (Emphasis added and citation omitted)

241. In my opinion, the structure and terms of the FOI Act make it appropriate to apply this approach by analogy. Accordingly, even if the Tribunal did adopt the class-based approach for which counsel for the respondent contended, it would not relieve it of the obligation to assess the effect of disclosure of each individual document.

242. I also observe that counsel's submission is inconsistent with the approach stated by the Tribunal in *Re MacTiernan and Secretary, Department of Infrastructure and Regional Development* [2016] AATA 506 at [63]:

> … What s 47B(a) of the FOI Act requires, and indeed what each of the other sections of the FOI Act which are at issue in this application (namely s 47B(b), s 47C(1) and s 47E(d) of the FOI Act) require, is a closer analysis of the nature of the information contained in each of the Contested Documents to determine whether a particular Contested Document is conditionally exempt under the section …

243. For these reasons, I do not accept the submission that the present application may be determined by reference to the documents as a class, and without the Tribunal's consideration of the content of the documents. In this case, that will include the Tribunal's inspection of the documents.

244. This conclusion does not mean that the considerations which underpinned counsel's submission are not relevant at all. The prospect of damage being caused by disclosure of each document is to be assessed having regard, not only to the content of each document, but also by reference to the significance of the disclosure more generally.

The respondent's evidence as to the effect of disclosure of the minutes of 29 May 2020

245. I refer again to the extensive senior public service experience of the respondent. He deposed to having over 40 years' experience in Commonwealth and State public sectors and said that he had "developed a depth of knowledge across Commonwealth and State government Departments, including in the economic policy, cabinet and governance areas of public policy and administration". I accept that the respondent has held the positions and has had the experience to which he deposed.

246. In addition to deposing to aspects of his role as Secretary of DPMC, the respondent deposed:

> [5] As a central agency in the Australian public service, PM&C has a critical role in promoting the whole-of-government perspective that comes from our need to advise the Prime Minister as Chair of Cabinet and National Cabinet and to ensure policy coordination in our advice and on policy development and implementation. We provide a nationwide perspective that comes from our central advising role. Among other responsibilities, I chair the APS Secretaries Board, I attend all Cabinet meetings, and along with my State and Territory counterparts, and Commonwealth and state note takers, all National Cabinet meetings.

247. Further, at [11], the respondent deposed that DPMC is the Commonwealth department with administrative responsibility for inter-governmental relations and communications with State and Territory governments. With respect to the harm which he apprehended would result from disclosure of any minutes of National Cabinet meetings, the respondent deposed:

> [12] I consider that disclosure of any of the National Cabinet minutes would undermine the operation of National Cabinet, damage relations between the Commonwealth and the States, and be contrary to the public interest.
>
> [13] In my view, effective working relationships between the States and Territories and the Commonwealth are central to Australia's public interest. The Commonwealth and State and Territory Governments share responsibility and must cooperate to achieve optimal outcomes for the Australian people.
>
> …
>
> [24] Since its establishment on 13 March 2020, all members of National Cabinet have attended and participated in National Cabinet meetings on the clear understanding that these meetings were conducted in accordance with Cabinet conventions - namely that the convention of confidentiality applied to discussions, submissions and the records of the meeting. This understanding is set out in Section 8 of the Cabinet Handbook, 14th Edition. Additionally, the Prime Minister, as Chair of National Cabinet, has publicly stated that National Cabinet meetings would be held

in accordance with Cabinet rules. An undermining of confidentiality which is central to those rules and conventions would be a serious shift to the basis on which the National Cabinet has been operating, and would have a significantly deleterious effect, for the reasons I outline below.

[25] In my view, the disclosure of National Cabinet minutes as a result of a request under the FOI Act would severely undermine the basis of the National Cabinet and its effectiveness. National Cabinet was founded on the clear understanding and expectation of confidentiality. If the members of National Cabinet are not assured of the ongoing confidentiality of records of the deliberations of the National Cabinet, this would undermine its effectiveness by:

- creating difficulty through exposing negotiations or discussions that are underway, including in the development of parallel policies,
- adversely affecting the continued level of trust or co-operation between the Commonwealth and the States and Territories, and
- impairing or prejudicing the open flow of information to and from the members of the National Cabinet, which would significantly hinder the participants willingness to participate in National Cabinet meetings with the same deliberative candour.

[26] In my view, there is a real prospect of damage to relations between the members of National Cabinet if official records of National Cabinet, such as the National Cabinet minutes, are disclosed. Such an outcome would be directly contrary to that shared understanding of confidentiality. In my view, such an intrusion into the confidentiality of the National Cabinet process would affect the full and frank nature of discussions held by members of the National Cabinet and thus neuter its effectiveness. In turn, and based on my earlier evidence that National Cabinet arrangements are superior to the former COAG arrangements, this will impact on the ability of the members of National Cabinet to work cohesively together and gain further benefits in the national interest compared to previous governance arrangements.

[27] The confidentiality of shared information as a decision-making platform between members of National Cabinet has been invaluable. Cooperation and sharing sensitive health data, projections and judgements, allowed for the best decisions to be made for the Australian people. Disclosure of National Cabinet documents and deliberations would likely impede and undermine that exchange of accurate and candid information and ideas between members by inviting caution about the possible implications if this information were publicly disclosed.

[28] The confidentiality of National Cabinet deliberations has not prevented disclosure of the outcomes of these deliberations. National Cabinet meetings are followed, by agreement of National Cabinet members, with public announcements and media releases by the Prime Minister and other State/Territory leaders. Those public announcements, by the Prime Minister and members of the National Cabinet, of its decisions have been critical to building public confidence in this body. Those announcements allow decisions which have been agreed by participants to be clearly articulated and responsibility for that implementation to be transparently acknowledged. This ongoing transparency has been critical to maintaining public confidence in the National Cabinet.

[29] I consider the release of National Cabinet deliberations and documents, other than by those formal decisions and announcements by the Prime Minister and members of the National Cabinet, would lead to an apprehension on the part of National

> Cabinet members and caution in their contribution to discussions. Such an outcome would in my view prejudice and weaken the ability of the National Cabinet to make decisions to achieve the best outcomes in the national interest.
>
> …
>
> [37] In conclusion, it is my view that the undermining and breakdown of the confidentiality of National Cabinet material would be very damaging to Commonwealth-State relationships and would be contrary to the public interest.

248. In [30] and following, the respondent deposed to the agreement of the National Cabinet on 5 February 2021 to establish a Task Force to provide recommendations to the National Cabinet concerning the response to COVID-19. Counsel for the respondent acknowledged that the respondent's evidence about the establishment of the Task Force was not a significant part of the case in answer to the applicant's application, and, accordingly, it need not be detailed presently.

249. Ms McGregor expressed a strong view that confidentiality is important to the successful operation of the National Cabinet. She deposed:

> [44] It is my strong view that confidentiality underpins the successful operation of the National Cabinet. This is even more paramount in a Cabinet committee whose members are drawn from differing political parties across Australia. The agreement by all members that the National Cabinet operates in this way means that members are free to have wide ranging and without prejudice discussions where multiple perspectives on important matters can be brought to bear on an issue without the inevitable constraint that full public scrutiny and transparency would bring. While implementation of National Cabinet decisions remains a matter for States and Territories, the robust and confidential discussions which underpin those decisions have consistently remained confidential. As I set out earlier [at 39] there is an appreciation that absolute consensus is not required in the National Cabinet, but it remains the case that collective responsibility and solidarity are features of the National Cabinet that are adhered to by all its members, regardless of their political ideology.

250. As can be seen, this evidence of the respondent and Ms McGregor was directed to the contents of the minutes of meetings of the National Cabinet considered generally. It was not directed specifically to the content of the minutes which are the subject of the present application before the Tribunal, ie, the minutes of the meetings held on 15 March 2020 and 29 May 2020.

251. In their affidavits, the respondent and Ms McGregor did not differentiate between matters bearing upon the prospect of damage to Commonwealth-State relations for the purposes of

s 47B(a) and matters bearing upon the public interest for the purposes of ss 11A(5) and 11B. This is understandable as there is some overlap between the two considerations.

252. It may be observed, however, that not all of the evidence extracted above is directed to the prospect of "damage to relations between the Commonwealth and a State", being the criterion upon which s 47B(a) operates. Counsel for the applicant drew attention in this respect to the respondent's statement in his affidavit that the disclosure of the National Cabinet minutes pursuant to the FOI Act would "severely undermine the basis of the National Cabinet and its effectiveness", at [25]; that there is "a real prospect of damage to relations between *the members* of the National Cabinet", at [26]; that disclosure will "impact on *the ability of the members of National Cabinet to work cohesively together* and *gain further benefits in the national interest* compared to previous governments arrangements", at [26]; that disclosure will lead to "a apprehension on the part of National Cabinet members and caution in their contribution to discussions [which] would … prejudice and weaken the ability of the National Cabinet to make decisions to achieve the best outcomes in the national interest", at [29]; and that disclosure would "*diminish the Australian community's certainty and confidence in Australia's response to COVID-19*", at [33] (emphasis added).

253. I accept the submission of counsel for the applicant on this topic. An undermining of the basis of the National Cabinet is not coterminous with damage to relations between the Commonwealth and a State or States. Likewise, the prospect of impairment in the achievement of "the best outcomes in the national interest" is not synonymous with damage to Commonwealth-State relations. Nevertheless, I consider that in the extracted passages set out above the respondent has deposed to some forms of damage to Commonwealth-State relationships which he apprehends would result from the disclosure of the minutes of the National Cabinet generally.

Consideration of the effect of disclosure of the minutes of 29 May 2020

254. In considering whether disclosure of the minutes of 29 May 2020 may cause damage to the relations between the Commonwealth and a State in the sense discussed above, it is appropriate to note at the outset some of their features, including matters which the minutes do not contain.

255. The minutes provided for the Tribunal's inspection differ from the form of minutes of meetings of many organisations. In common experience minutes of meetings usually have a heading identifying the document as a meeting of the entity, association or group held on a particular date and time and usually commence with an identification (by name or description) of those who were present at, or who participated in, the meeting. There may be a record of the apologies provided by those unable to attend. There will usually be a record that the minutes of the previous meeting were adopted (with or without modification), and that may be followed by a record of the discussion, or at least the decisions made, concerning matters arising from the minutes. In relation to the business of the meeting, there will usually be a record in relation to each item of the motions put, their movers and seconders, and of the fate of the motion.

256. The documents provided for the Tribunal's inspection by the respondent of the minutes of the meeting of 29 May 2020, do not follow this style or form. In particular, they:

(a) do not have a heading identifying the documents as minutes of a meeting of the National Cabinet held on 29 May 2020. Instead the heading is "Cabinet Minute" with a subheading "National Cabinet". The date 29 May 2020 is stated separately;

(b) do not record any of the participants in the meeting of the National Cabinet on 29 May 2020 and do not contain any reference to apologies;

(c) do not record an adoption of the minutes of the previous meeting of the National Cabinet;

(d) do not record motions made at the meeting, let alone the mover and seconder of motions, or the fate of motions;

(e) are for the most part in the nature of a record, in short point form, of outcomes, that is to say, a record of the matters upon which the National Cabinet agreed or which it endorsed. They do not record any of the discussion which preceded the agreement or the endorsement on each item, let alone views conveyed at the

National Cabinet meeting by the Prime Minister, a State Premier or a Territory Chief Minister;

(f) do not record any of the considerations, pro and con, bearing on each outcome or of the matters weighing on alternatives; and

(g) do not contain any reference to a proposal having been raised and discussed but not pursued with or without a resolution that no action be taken with respect to the proposal.

257. I note in passing that it may be that the minutes of the National Cabinet were prepared in accordance with the practice to which Professor Weller referred at 80-81 of the text to which reference was made earlier, namely, that they "be as short as possible and apart from the decision itself … be limited to such explanations as is indispensable to render the decision intelligible".

258. In these circumstances, the submission of counsel for the respondent that participants in the National Cabinet "might raise things in a different way if they apprehended that what they said, or the position they took, would be released", pursuant to the FOI Act does not have a sound basis, at least with respect to those minutes. That evidence seems to be directed to minutes of the commonplace kind referred to above. The fact is that nothing of what was said by an individual member of the National Cabinet, or of the positions advocated by individual members, would be disclosed. Instead, all that would be disclosed would be the outcome of a collective decision-making process. If it was perceived publicly that the National Cabinet resolved on positions reached with a 100% consensus, then it could be inferred that each member supported the position resolved upon. But I have already referred to evidence is seemingly inconsistent with the National Cabinet having required 100% consensus for its decisions.

259. The content of the minutes of the 29 May 2020 meeting as described above also means that much of the evidence of the respondent and Ms McGregor as to the harm they apprehend would result from a disclosure of the minutes cannot be accepted. Their evidence as extracted above seems to have been based on an assumption that the minutes

have a different content. By way of example, the respondent's affidavit assumes that the disclosure of the minutes of 29 May 2020 would create difficulty "through exposing negotiations or discussions … in the development of parallel policies" and would impair or prejudice "the open flow of information to and from members of the National Cabinet". That is a view which cannot reasonably be sustained having regard to the content of the minutes of 29 May 2020. Their disclosure would not reveal "negotiations or discussions", the "development of parallel policies" and would not impede "the open flow of information". I repeat that the minutes reveal only the matters finally resolved upon.

260. Similarly, the respondent's opinion that disclosure of the minutes would "affect the full and frank nature of discussions held by members of the National Cabinet and thus neuter its effectiveness" cannot be sustained when one has regard to the actual content of the minutes of 29 May 2020. Contrary to the respondent's evidence, disclosure of the minutes of 29 May 2020 will not result in the disclosure of the "exchange of accurate and candid information and ideas between members": it will result only in the disclosure of the formal outcomes of the discussion and deliberations without any revelation of the proposals or discussion which preceded it.

261. Instead of addressing the implications arising from the relatively limited content of the minutes of 29 May 2020, the evidence of the respondent and Ms McGregor is pitched at a reasonably high level of generality. As already noted, it can be said, reasonably, that their evidence is evidently directed to minutes with a different form and content. Accordingly, while giving due respect to their views, I do not regard them as persuasive.

262. Quite apart from the considerations just mentioned, an important matter bearing upon the assessment of whether disclosure of the minutes would, or could reasonably be expected to, cause damage to Commonwealth-State relations is the extent to which the matters contained in the minutes have already been disclosed publicly. In this respect, it is pertinent to note that, in several instances, the subject of the agreements and endorsements recorded in the minutes was announced publicly by the Prime Minister in the press conference which followed the meeting of the National Cabinet on 29 May 2020. The Prime Minister's announcements are too long to set out in these reasons. The following extract, which repeats some aspects set out earlier in these reasons, is sufficient, however, to give

an indication of the public disclosures made by the Prime Minister of the decisions of the National Cabinet made at the meeting on 29 May 2020:

> The other thing we agreed today is a major change in terms of how COAG will work in the future. And, if I can move to that chart, COAG is no more. It will be replaced by a completely new system and that new system is focused on the success that has been yielded by the operation of the National Cabinet. What we'll be doing is keeping the National Cabinet operating and particularly during the COVID period, we'll continue to meet on a fortnightly basis. In a normal year it will meet on a monthly basis. Wouldn't meet in person. One of the things we've learned over meeting so regularly is we can work effectively together as we get together using the telepresence facilities which means Premiers, particularly for those in the more remote states have been able to access that engagement on a far more regular basis and it has worked incredibly well. And so we will continue to meet on a monthly basis in an ordinary year and we'll continue to meet on a fortnightly basis as we work through the COVID period. Now, how it will be different to the way COAG worked, is the National Cabinet will be driven by a singular agenda, and that is to create jobs. It will have a job-making agenda. And the National Cabinet will drive the reform process between state and federal cooperation to drive jobs. It will drive a series of Ministerial Cabinet subcommittees, if you like, that will be working in each of the key areas, and this is an initial list of areas and that will be further consulted on with the states. So in rural and regional Australia, on skills as I was talking to the National Press Club just this week; on energy; on housing; transport and infrastructure; population and migration; and recognising the important role of health, in terms of having a healthy workforce and a healthy community to support a strong economy.
>
> The National Cabinet will continue to work with a laser-like mission focus on creating jobs as we come out of the COVID crisis and we work into the years into the future. The National Cabinet will work together with what is known as the Council on Federal Financial Relations, that is basically the meeting of Treasurers. They actually met today. Those treasurers will take responsibility for all of the funding agreements between the states and the Commonwealth. They will no longer be the province and domain of individual Ministerial portfolios, the Treasurers will bring ultimately those agreements together, consulting with the portfolio Ministers but being responsible for all of those agreements.
>
> And National Cabinet agreed today that one of the first jobs that the Council of Federal Financial Relations will need to do, is look at all of those agreements and how they can be consolidated and rationalised. Obviously, there are the large foundational agreements like the ones I've announced today, they will obviously continue in the form that they've been set out. Education is another which is already in place. But there are multiple other agreements that will be available to the council to be able to be looked at and consolidated and reviewed by the Treasurers to ensure we can get a more effective federation.
>
> …
>
> Once a year, the National Cabinet will meet together with the Treasurers as well as the Australian Local Government Association in a new council which is focused on national federation reform. This agreement, this set of processes, the funding agreements, ensuring that we continue to get expert advisory support, both directly to the National Cabinet and each of those Ministerial areas, which won't be pursuing a shopping list of agenda items, they'll be pursuing the tasks that National Cabinet has set them to create jobs in our economy.
>
> …
>
> So, that is an exciting new agenda for our federation. Federation reform issues and responsibilities between states and territories and the Commonwealth will be considered at the National Cabinet because we think that gives Australians confidence. And this really is

> a job of rebuilding confidence, right across the country. And that includes confidence in our governance and making sure that all governments are working closely together and in particular that we're doing so to get Australians back into work.
>
> The final details of which ministerial groups are set in this area, and as I said, the consolidation that takes place in the other areas, that will come in time. But we've agreed on the new structure and we think that will ensure for Australians that they'll get better government, more focused government, at both a state and at a federal level.

263. Plainly, the Prime Minister, at least, did not consider that the disclosure of these decisions would be causative of damage to relations between the Commonwealth and the States.

264. The extent of the disclosure to date makes it difficult for the Tribunal to conclude that disclosure of the formal agreements and resolutions by the National Cabinet, the effect of which was summarised by the Prime Minister in his public statements, would be causative of such damage.

265. The evidence before the Tribunal indicates that the practice of the Prime Minister holding a press conference after National Cabinet meetings in which he announced decisions of the National Cabinet was well established by 29 May 2020. I noted earlier the agreed fact concerning the respondent's statement in May 2020 concerning this practice. It is accordingly reasonable to infer that the Prime Minister and each Premier and Chief Minister participated in the National Cabinet meeting on 29 May 2020 with an awareness that the decisions they made in their meeting would, or at least may, be announced publicly. It can be inferred in turn that each conducted himself or herself in the meeting with that awareness.

266. I indicated earlier that it would be appropriate to take into account that the minutes are of a body engaged in high level public policy decision-making and that there are well recognised justifications for such minutes being kept confidential. However, this does not mean that the particular content of minutes in question can be put to one side.

267. In my view, when regard is had to the nature of the minutes of the National Cabinet meeting (including the matters which they do not contain), the Prime Minister's public statements concerning the decisions made at the meeting on 29 May 2020, and the apparent expectation of the National Cabinet participants that the Prime Minister would announce publicly the decisions made at the meeting, a finding that disclosure of the formal record of the decisions would cause damage to relations between the Commonwealth and a State

would be inappropriate. I emphasise that, in forming that view, I have taken into account that the minutes do not reveal the contribution of any individual participant, any debate which may have occurred regarding each item or the considerations taken into account in relation to each item. In that circumstance, there is no reason to suppose that any participant in the National Cabinet, acting rationally, would feel some inhibition in his or her contributions to the debate at the National Cabinet by reason of the formal disclosure of the minutes of 29 May 2020.

268. I conclude therefore that s 47B(a) of the FOI Act does not have the effect that the minutes of the National Cabinet made on 29 May 2020 are conditionally exempt.

The effect of disclosure of the minutes of 15 March 2020

269. The same conclusion may be reached even more confidently with respect to the minutes of the National Cabinet meeting of 15 March 2020 which are the subject of the application in AATA 5876/2020. Those minutes comprise two principal subject matters. Item 1 records the National Cabinet's agreement on its own Terms of Reference and for the establishment of the AHPPC and the National Coordination Mechanism (NCM) as sub-committees of the National Cabinet. Attachment A contains the Terms of Reference with content under the headings "Purpose", "Membership", "Operating principles", "Secretariat support" and "Meeting arrangements".

270. These minutes do not disclose the participants in the meeting, any motion, proposal, objection or contribution by an individual participant, nor any of the discussion concerning the Terms of Reference. They do not even disclose the genesis of the Terms of Reference.

271. Again, the evidence of the respondent and Ms McGregor is seemingly directed to minutes with a very different content than those concerning Item 1 in the minutes of 15 March 2020.

272. 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).

273. Items 8 and 10 in the minutes of 15 March 2020 concern only the agreement on the time of future meetings of the National Cabinet. It could not reasonably be held that disclosure now of those details would cause damage to the relations between the Commonwealth and a State.

274. Items 2-7 in the Minutes of the meeting on 15 March 2020 concern matters which are beyond the bounds of the applicant's second request for documents on 10 July 2020. The respondent drew attention in this circumstance to s 22 of the FOI Act which provides, in effect, for access to be given to an edited copy of the document, that is, edited so as to exclude the portions which are irrelevant to the applicant's request. I am satisfied that s 22 is applicable in this case so that the applicant may be provided with a copy of the minutes of 15 March 2020 comprising only Items 1, 8, 10 and Attachment A. Counsel for the applicant did not submit to the contrary.

275. In summary, I am satisfied that s 47B(a) does not apply to any of the subject documents. Accordingly, they are not "conditionally exempt" with the consequence that it is not necessary for the Tribunal to consider the application of s 11A.

Conclusion

276. For the reasons given above, I am satisfied that none of the subject documents is an official record of a committee of the Cabinet and accordingly exempt from production by reason of s 34(1)(b) of the FOI Act. I am also satisfied that none of the subject documents is, by reason of s 47B(a) of the FOI Act, a conditionally exempt document. At the very least, I am satisfied that the respondent has not discharged the onus of establishing that the decisions of Mr Hupalo refusing the applicant access to the documents were justified or that the Tribunal should give a decision adverse to the applicant.

Decision

277. The decisions under review, namely, the decisions of Mr Hupalo of 6 and 10 August 2020 respectively, are set aside. The Tribunal orders that the applicant be granted access to:

(a) the documents sought in his letter of request of 10 July 2020 which is the subject of AAT 2020/5875; and

(b) the documents sought in his letter of request of 10 July 2020 which is the subject of AAT 2020/5876, other than those sought in paragraph 1 of the letter and the Cabinet Handbook (it having already been provided to the applicant) and other than Items 2-7 in the Minutes of the meeting on 15 March 2020.

278. The respondent sought a stay of an order granting access so as to "avoid the operation" of s 44A(1) of the AAT Act pending an appeal to the Federal Court. As the parties did not make submissions with respect to that application, I will give them the opportunity to do so.

I certify that the preceding two hundred and seventy-eight (278) paragraphs are a true copy of the reasons for the decision herein of The Honourable Justice White.

.....**[SGND]**.....
Associate

Dated: **5 August 2021**

Date of hearing:	**19 May 2021**
Counsel for the Applicant:	**Mr G Watson SC** **Ms D Tang**
Counsel for the Respondent	**Mr A Berger QC** **Australian Government Solicitor**