
Confidentiality and executive accountability: the case of National Cabinet *

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Abstract This article questions the compatibility of cabinet confidentiality and the accountability of the executive through an exploration of the use of cabinet-in-confidence as a claim to public interest immunity in response to a Senate order for production of documents. Specifically, this article analyses the Australian Government's attempts to expand this claim to include deliberations and documents relating to National Cabinet. There has been significant contestation as to whether National Cabinet is a committee of Federal Cabinet which would extend the protections of cabinet-in-confidence to that entity, or whether National Cabinet is related to Cabinet only by name and that, rather, it is simply an intergovernmental forum. The implications of this determination are significant and have the potential to influence whether a public interest immunity claim on such a basis is acceptable to the Senate.

¹ The author is a Senior Research Officer with the Department of the Senate. The views expressed in this article represents her personal views and not the views of the department. This article is an abridged and updated version of a paper submitted towards the completion of the Graduate Certificate in Parliamentary Law, Practice and Procedure at the University of Tasmania, awarded in 2022.

INTRODUCTION

Australia's parliamentary democracy was designed as a system of two houses with the Senate importantly acting as a house of scrutiny and review,² holding the executive government to account. One of the key ways in which the Senate can do this is through its power to require the production of documents and its authority to determine the validity of public interest immunity (PII) claims. However, as this article will demonstrate, the executive continues to resist these powers.

The article will provide a brief introduction to the Senate's powers relating to orders for production of documents (OPD) and PII before providing some background to the establishment of National Cabinet. The distinctions between National Cabinet and Federal Cabinet (Cabinet) will be unpacked to provide a basis for determining whether cabinet confidentiality should apply to its deliberations and/or documents. The article explores independent Senator Rex Patrick's attempts to hold the executive accountable by pursuing the issue of National Cabinet and cabinet confidentiality. Through this analysis it will be argued that attempts to subvert the Senate's accountability mechanisms under the guise of cabinet-in-confidence only works to undermine the strength of Australia's parliamentary democracy and principles of responsible government—calling into question the compatibility of cabinet confidentiality and the accountability of the executive. It will be demonstrated that the Senate retains the power to order the production of documents as an important component of its role in the scrutiny of the executive despite significant resistance and political manoeuvring.

ORDER OF PRODUCTION OF DOCUMENTS AND PUBLIC INTEREST IMMUNITY CLAIMS

The Senate has the power to compel evidence which includes requiring the attendance of witnesses, answering of questions, the production of documents, as well as the ability to apply penalties to those who obstruct the Senate.³ This power is derived from Section 49 of the Australian Constitution which aligns the powers of each House of the

² See, for example: R. Mulgan, 'The Australian Senate as a 'House of Review'', *Australian Journal of Political Science*, 31(2), 1996, pp. 191–204.

³ H. Evans, 'The Senate's power to obtain evidence', *Papers on Parliament*, no. 50, 2010, p. 1.

Australian Parliament to those of the United Kingdom's House of Commons. However, the Parliament also has the ability to change its powers by legislation.⁴ Harry Evans, former Clerk of the Australian Senate, explained that there are no limitations in law to this power as there have been no legislative changes by parliament—with one exception—nor have there been any authoritative court judgements establishing any such limitations.⁵

With regard to OPD, there is no category of documents that the Senate cannot insist on being produced. However, the matter of executive privilege is particularly important here. Whilst executive governments often attempt to claim the right to withhold information from the Senate on the basis that the disclosure of the information would be contrary to the public interest—known as a PII claim—the Senate has never conceded that any such right or privilege exists.⁶ Furthermore, by resolution in 1975, the Senate affirmed that it possesses the power to summon persons to answer questions and produce documents, files and papers, as well as the ability to determine whether or not PII claims are acceptable or not on a case-by-case basis.⁷

Also noteworthy are two landmark court decisions made in 1998 and 1999 which upheld the powers of upper houses to hold the executive to account and to access the documents it requires, underlining the parliament's scrutiny function within the context of the doctrine of responsible government. These were the decisions of the High Court in *Egan v. Willis*⁸ and the New South Wales Court of Appeal in *Egan v. Chadwick*.⁹ A key part of the parliament's power to require documents involves weighing up the need for the parliament to be informed against confidentiality in the public interest. In *Egan v Chadwick*, Priestley JA stated:

... no legal right to absolute secrecy is given to any group of men and women in government, the possibility of accountability can never be kept out of mind, and

⁴ *Commonwealth of Australia Constitution Act 1900*, s. 49.

⁵ Evans, 'The Senate's power to obtain evidence', p. 1. Note: The one exception to legislative changes was the limitation of penalties which may be imposed, see: *Parliamentary Privileges Act 1987*, s. 7.

⁶ Evans, 'The Senate's power to obtain evidence', p. 5; J. R. Odgers, *Odgers' Australian Senate Practice*, 14th ed., edited by Rosemary Laing and revised by H. Evans. Canberra: Department of the Senate. 2016, pp. 601–676.

⁷ *Journals of the Senate*, No. 87, 16 July 1975, p. 831.

⁸ *Egan v. Willis* [1998] HCA 71; 158 ALR 527.

⁹ *Egan v. Chadwick* [1999] NSWCA 176.

this can only be to the benefit of the people of a truly representative democracy.¹⁰

In the years following the Egan cases, which confirmed the power of upper houses to order the production of documents, the NSW Legislative Council appointed an independent arbiter to assess claims of PII which proved quite effective with most orders complied with.¹¹ However, Beverly Duffy explained that by mid-2005 it appeared that ‘the post *Egan v Chadwick* ‘honeymoon’ was over’ and the Clerk at the time noted the increasing frequency of claims of privilege.¹² Nonetheless, these cases canvassed important issues relating to the powers and privileges of both State and Commonwealth houses of parliament and conveyed the necessity of reasonable clarity for the resolution of claims by the executive for PII.

Returning to a Commonwealth context, following a period of frustration with the executive declining to answer questions or produce documents without adequate explanation, on 13 May 2009, the Senate reemphasised its power through an order of continuing effect and clarified the process for making PII claims. This process outlined that a minister should provide an explanation for the PII claim which includes a recognised ground¹³ upon which the claim is being made, as well as a statement explaining the harm to the public interest that could result from the production of the information.¹⁴ Former Clerk of the Australian Senate, Dr Rosemary Laing explained the process as:

... a means to balance competing public interest claims by governments on the one hand, that certain information should not be disclosed because disclosure would harm the public interest in some way, and by parliament's claim, as a representative body in a democratic polity, to know particular things about government administration, so that the parliament can perform its proper

¹⁰ *Egan v. Chadwick* [1999] NSWCA 176, [129] citing *Commonwealth of Australia v. John Fairfax & Sons Ltd* (1980) 147 CLR 39, 52 (Mason J).

¹¹ Odgers, *Odgers' Australian Senate Practice*, p. 675.

¹² B. Duffy, ‘Orders for papers and cabinet confidentiality post *Egan v Chadwick*’, *Australasian Parliamentary Review*, vol. 21(2), 2006, pp. 93–94.

¹³ Note: Odgers lists a number of potentially acceptable and unacceptable grounds for claims of public interest immunity based on cases in the Senate, see pp. 662–670

¹⁴ Odgers, *Odgers' Australian Senate Practice*, p. 653.

function of scrutinising and ensuring accountability for expenditure and administration of government programs.¹⁵

Nonetheless, the executive has continued to resist and, at times, refused to provide information to the Senate. Evans noted that it is the executive that is most likely to refuse to provide information to the Senate and to seek to conceal information from the legislature and the public.¹⁶ At the same time, given the extensive resources at its disposal, the executive is also well equipped to resist the powers of the legislature.¹⁷ On the other hand, the Senate does have various remedies at its disposal for such situations including, for example:

- procedural penalties, such as censuring a minister or declining to pass legislation until the information is produced;
- referral of the matter to a committee for inquiry;
- questioning through the Senate Estimates process; and
- imprisonment or fines for contempt (although use of this remedy is unlikely due to the practical difficulties of utilising this power, particularly if used against a Minister in the House of Representatives).¹⁸

CABINET AND PUBLIC INTEREST IMMUNITY CLAIMS

It is commonly accepted that government holds certain information that, in the public interest, would be best kept undisclosed.¹⁹ Whilst there are no specific grounds that the Senate has conceded to the executive to withhold information, there are a number of potentially accepted grounds that have been recognised by the Senate on numerous occasions. Odgers outlines these potentially acceptable grounds in detail and with

¹⁵ R. Laing, 'Senate Legal and Constitutional Affairs References Committee: Public interest immunity claim', *Official Committee Hansard*, Commonwealth of Australia: Canberra, 31 January 2014, p. 4.

¹⁶ Evans, 'The Senate's power to obtain evidence', p. 8.

¹⁷ Note: this issue, particularly in relation to the ability of parliamentary committees to hold the executive to account, is also raised in L. Grenfell and S. Moulds, 'The role of committees in rights protection in federal and state parliaments in Australia', *UNSW Law Journal*, 41(1), 2018, p. 41.

¹⁸ Evans, 'The Senate's power to obtain evidence', pp. 5–6; Odgers, *Odgers' Australian Senate Practice*, pp. 672–673.

¹⁹ R. Macreadie and G. Gardiner, 'An introduction to parliamentary privilege', *Victorian Parliamentary Research Service*, research paper no. 2, 2010, p. 23; Odgers, *Odgers' Australian Senate Practice*, p. 664.

examples.²⁰ However, for the purposes of this article the potentially acceptable ground in the context of the dispute surrounding the National Cabinet relates to the disclosure of cabinet deliberations.²¹

The Cabinet is ‘a key institution of the Westminster tradition of parliamentary practice’²² whose membership consists of the Prime Minister and the Government’s senior ministers, as determined by the Prime Minister. The Cabinet is established by convention rather than by constitution, therefore its establishment and procedures are not the subject of any legislation. Instead, the Cabinet’s structure and operation is determined by the Prime Minister and is guided by the principles of collective responsibility and solidarity—underpinned by strict confidentiality conventions—which are outlined in the *Cabinet Handbook* published by the Department of the Prime Minister and Cabinet (PM&C).²³ The process of the Cabinet is designed to achieve ‘policy coherence and political support at the apex of executive government’.²⁴ The *Cabinet Handbook* states that the convention of confidentiality provides for the ‘opportunity to contest policy ideas in a highly confidential manner in order to ensure that the collective decision that ultimately arises from the Cabinet’s deliberations is the best possible policy decision for the administration of the Government’.²⁵ Nonetheless, a key issue rests on finding the balance in weighing up the value of cabinet as a forum for confidential and candid government deliberations and decision making on the one hand and, on the other, the value of public and parliamentary scrutiny.²⁶ Cabinet confidentiality remains a contested concept²⁷ and continues to have an impact on the

²⁰ Odgers, *Odgers' Australian Senate Practice*, pp. 662–667.

²¹ A second potentially acceptable ground that is also relevant in the context of this article is the potential to prejudice relations between the Commonwealth and the states, however a detailed analysis of this ground is not within the scope of this article. For further information, see: Odgers, *Odgers' Australian Senate Practice*, p. 666.

²² M. Rodrigues, ‘Cabinet confidentiality’, *Parliamentary Library Publication – Politics and Public Administration Section*, Parliamentary Library: Parliament of Australia, Department of Parliamentary Services, 2020, p. 1.

²³ Department of the Prime Minister and Cabinet (PM&C), *Cabinet Handbook – 14th edition*, 19 October 2020. Accessed at: www.pmc.gov.au/resource-centre/government/cabinet-handbook.

²⁴ Rodrigues, ‘Cabinet confidentiality’, p. 1.

²⁵ PM&C, *Cabinet Handbook – 14th edition*, p. 10.

²⁶ Rodrigues, ‘Cabinet confidentiality’, p. 11.

²⁷ J. Evans, ‘Orders for papers and executive privilege: committee inquiries and statutory secrecy provisions’, *Australasian Parliamentary Review*, 17(2), 2002, p. 198.

ability of parliament to access certain information which raises questions about the compatibility of cabinet confidentiality and the accountability of the executive.

The Senate tends to accept the confidentiality of cabinet deliberations as a reasonable ground for the executive to withhold information. However, Odgers makes it clear that this ground is not to be mistaken with confidentiality of *any* information or documents relating to the Cabinet, rather it is quite specifically applicable to cabinet *deliberations*.²⁸ This is because the acceptance of the confidentiality of cabinet deliberations rests on the rationale that senior ministers should be able to engage in free and frank discussion and, therefore, information or documents that do not reveal the specifics of deliberations should not necessarily receive the same protection. Odgers states a claim that a document is a cabinet document should not just be accepted on face value, rather:

it has to be established that disclosure of the document would reveal cabinet deliberations. The claim cannot be made simply because a document has the word 'cabinet' in or on it.²⁹

Nonetheless, this has not prevented the executive from attempting to claim that anything with a connection to the Cabinet is confidential. This issue will be explored in relation to information and documents relating to National Cabinet, but first a brief history of National Cabinet will be provided to establish the basis for the analysis.

A BRIEF HISTORY OF NATIONAL CABINET

National Cabinet was established on 13 March 2020 in response to the COVID-19 pandemic and addressed the need for cooperation between state and federal governments in providing leadership and critical decision-making during the public health crisis.³⁰ Saunders has described the establishment of National Cabinet as 'a

²⁸ Odgers, *Odgers' Australian Senate Practice*, p. 665.

²⁹ Odgers, *Odgers' Australian Senate Practice*, p. 665.

³⁰ Prime Minister the Hon Scott Morrison MP, 'Advice on coronavirus – media release', 13 March 2020. Accessed at: www.pm.gov.au/media/advice-coronavirus. Note: the remit of the National Cabinet has since expanded, see: Prime Minister the Hon Scott Morrison MP, 'Press conference – Australian Parliament House, ACT – transcript', 29 May 2020. Accessed at: www.pm.gov.au/media/press-conference-australian-parliament-house-act-29may20.

response to an urgent public health crisis that could not be effectively met without drawing on the powers, knowledge and capacities of both the Commonwealth and the States and territories'.³¹ Menzies adds that crises present challenges for democratic leaders given the need for critical and rapid decision-making in contexts often characterised by uncertainty, whereby finding the right balance between accountability and rapid decision-making may be difficult, particularly 'during an era of reduced trust in political leaders'.³² Importantly, transparency of decision-making in such a situation goes a long way to promote public understanding and trust.

National Cabinet is an intergovernmental forum with a structure which reflects a model of executive federalism whereby its membership—consisting of the Prime Minister and all state and territory premiers and chief ministers—share information, discuss and negotiate on behalf of their respective jurisdictions with the intention of coordinating decision-making and policy implementation, where agreeable.³³ Importantly, each head of government remains responsible to their own cabinet and parliament' and 'each government is responsible for implementing the decisions taken within their sphere of competence, for their own jurisdiction, often adapting them to local realities'.³⁴ This scenario played out many times in response to the COVID-19 pandemic, with certain states and territories making decisions that differed to other jurisdictions based on their own jurisdictional circumstances and needs. This will be discussed in further detail later in the analysis.

In a media release on 29 May 2020, Prime Minister the Hon Scott Morrison announced that the National Federation Reform Council (NFRC), with National Cabinet at its centre, would permanently replace the existing intergovernmental architecture of COAG, stating: 'National Cabinet has proven to be a much more effective body for taking decisions in the national interest than the COAG structure'.³⁵ However, the

³¹ C. Saunders, 'A new federalism? The role and future of the National Cabinet', *Governing during crises – Policy Brief No. 2*, University of Melbourne in collaboration with COVID-DEM, 2020, p. 3; P. de Biase and S. Dougherty, 'Federalism and public health decentralisation in the time of COVID-19', *OECD Working Papers on Fiscal Federalism*, No. 33, 2021, pp. 25–26.

³² J. Menzies, 'Explainer: what is the national cabinet and is it democratic?', *The Conversation*, 31 March 2020. Accessed at: <https://theconversation.com/explainer-what-is-the-national-cabinet-and-is-it-democratic-135036>.

³³ Menzies, 'Explainer: what is the national cabinet and is it democratic?'.

³⁴ Saunders, 'A new federalism? The role and future of the National Cabinet', p. 3.

³⁵ Prime Minister the Hon Scott Morrison MP, 'Update following national cabinet meeting – media release', 29 May 2020. Accessed at: www.pm.gov.au/media/update-following-national-cabinet-meeting.

structure, membership and processes of National Cabinet are particularly important because they are distinct in meaningful ways to the structure, membership and processes of the Cabinet, which has implications for the way they each relate to parliament. These key distinctions are outlined below.

DISTINCTIONS BETWEEN FEDERAL CABINET AND NATIONAL CABINET

There has been significant debate about whether or not the National Cabinet is a committee of the Cabinet. The Government's position is that National Cabinet is a committee of Cabinet³⁶ whereas others—including a Federal Court judge and a number of senators and academics—have argued that it is not a committee of Cabinet.³⁷ If National Cabinet is a committee of Cabinet, then the same rules apply to National Cabinet as they do the Cabinet which includes the confidentiality of cabinet deliberations. As the Senate generally accepts the rationale of cabinet confidentiality when it comes to deliberations of cabinet, this has significant implications for OPD and the acceptability of PII claims in this context.

The doctrines of collective responsibility and cabinet solidarity are fundamental to any analysis of the relationship between the executive and legislature.³⁸ The *Cabinet Handbook* states 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'.³⁹ Collective responsibility ensures that the Government is collectively accountable and responsible to the parliament and the public for its decisions. Cabinet solidarity works in tandem to ensure that ministers cannot absolve themselves of responsibility by stating that they did not support a

³⁶ J. Reid, Senate Finance and Public Administration Legislation Committee, Supplementary Estimates, Official Committee Hansard, Commonwealth of Australia, Canberra, 25 October 2021, p. 70.

³⁷ Menzies, 'Explainer: what is the national cabinet and is it democratic?'; *Patrick and Secretary, Department of Prime Minister and Cabinet [2021] AAT 2719*; Senator Rex Patrick, *Journals of the Senate*, No. 127, 23 November 2021, p. 4279; Senator Malcolm Roberts, Parliamentary debates, *Senate Official Hansard*, Commonwealth of Australia, Canberra, 23 November 2021, p. 18; A. Twomey, Senate Finance and Public Administration Legislation Committee, COAG Legislation Amendment Bill 2021, *Official Committee Hansard*, Commonwealth of Australia, Canberra, 27 September 2021, pp. 31–33.

³⁸ P. Weller, 'Cabinet government: an elusive ideal?', *Public Administration*, vol. 18 (4), 2003, p. 704.

³⁹ PM&C, *Cabinet Handbook – 14th edition*, p. 9.

decision of government. This is because, as members of Cabinet, ministers must publicly support all government decisions made in Cabinet, even if they do not agree with them. If this does happen, Cabinet ministers are obliged to resign or the Prime Minister, as Chair of Cabinet, may enforce cabinet solidarity.⁴⁰

It is clear that neither of these core cabinet principles apply to National Cabinet. For instance, it has been noted that there have been numerous occasions where premiers and chief ministers acted independently of the decisions of National Cabinet including on mask mandates, lockdowns, definitions of close and casual contacts, quarantine arrangements, face-to-face schooling, and the timing of reopening of state and international borders.⁴¹ Menzies explained ‘the search for unity can be overborne by local circumstances [whereby, at times,] [s]ome states moved earlier to introduce restrictions and shutdowns outside of the national cabinet ... [In these situations,] the premiers were reacting to the different circumstances and anxiety within their jurisdiction’.⁴² Prominent constitutional academic and lawyer, Professor Anne Twomey noted that, largely, the principles of federalism have been respected with regard to how National Cabinet has operated.⁴³ These examples indicate that National Cabinet does indeed operate differently than Cabinet with respect to the principles of collective responsibility and cabinet solidarity. Within Cabinet, ministers are expected to publicly support and act in alignment with decisions of Cabinet. As demonstrated, that same expectation is not the case for National Cabinet despite efforts to find agreement and consensus where possible. Indeed, the 2020 *Review of COAG Councils and Ministerial Forums: report to National Cabinet* stated: ‘It is important to recognise the diversity between and within jurisdictions and the disparate nature of the challenges faced across the federation – where appropriate, decisions should be principles-based and

⁴⁰ PM&C, *Cabinet Handbook – 14th edition*, p. 9; *Egan v Chadwick 1999 46 NSWLR 563*; A. Twomey, ‘Nowhere to hide: the significance of national cabinet not being a cabinet’, *The Conversation*, 2021. Accessed at: <https://theconversation.com/nowhere-to-hide-the-significance-of-national-cabinet-not-being-a-cabinet-165671>.

⁴¹ Menzies, ‘Explainer: what is the national cabinet and is it democratic?’; Saunders, ‘A new federalism? The role and future of the National Cabinet’, p. 4; A. Twomey, ‘Multi-Level government and COVID-19: Australia as a case study’, Melbourne Forum on Constitution-Building, *Constitutional Transformation Network*, 2021, p. 3. Accessed at: https://law.unimelb.edu.au/_data/assets/pdf_file/0003/3473832/MF20-Web3-Aust-ATwomey-FINAL.pdf.

⁴² Menzies, ‘Explainer: what is the national cabinet and is it democratic?’.

⁴³ Twomey, ‘Multi-Level government and COVID-19: Australia as a case study’, p. 3.

allow individual jurisdictions to determine the best way to achieve agreed outcomes'.⁴⁴ Furthermore, the Secretary of PM&C made public statements in May 2020 to the effect of that whilst, in his view, deliberations of National Cabinet are protected from disclosure, what premiers and prime ministers say after a meeting is a matter for them because each is sovereign in their own right.⁴⁵ Indeed, the Prime Minister stated in a press conference on 5 May 2020: 'as we've seen already and as has been the case, states and territories have operated on different timetables, there have been different nuances ... ultimately, each state and territory are the arbiters of their own position'.⁴⁶ Even if premiers and chief ministers agreed a position at National Cabinet, they would still, in most cases, need to pass it through their respective parliaments in order to implement it in their jurisdiction.⁴⁷ Therefore, it is clear that the principles of collective responsibility and solidarity do not apply in the context of National Cabinet given that premiers and chief ministers are accountable to their own parliaments, cabinets and voters rather than to the Commonwealth parliament or Cabinet. Despite this, the Government has continued to argue that National Cabinet deliberations and documents are cabinet-in-confidence.

Interestingly, in October 2020, PM&C published an updated *Cabinet Handbook* (14th edition) which added in a new section specifically on National Cabinet. It states that 'maintaining the confidentiality of all National Cabinet documents ... is essential to enable full and frank discussions' and that the Council on Federal Financial Relations

⁴⁴ P. Conran AM, *Review of COAG councils and ministerial forums: report to National Cabinet, Department of the Prime Minister and Cabinet, 2020*, p. 3. Accessed at: www.pmc.gov.au/sites/default/files/final-report-review-coag-councils-ministerial-forums.pdf.

⁴⁵ See, for example: P. Gaetjens, Senate Select Committee on COVID-19, Australian Government's response to the COVID-19 pandemic, *Official Committee Hansard*, Commonwealth of Australia, Canberra, 9 March 2021, p. 3.

⁴⁶ Prime Minister the Hon Scott Morrison, *Press conference – Australian Parliament House, ACT – transcript*, 5 May 2020. Accessed at: www.pm.gov.au/media/press-conference-australian-parliament-house-act-05may20.

⁴⁷ Each jurisdiction has its own emergency powers which suspend certain normal functions of government. For more information, see: <https://justiceconnect.org.au/resources/how-do-emergency-powers-work-across-australia/>.

(CFFR)⁴⁸ and the National Cabinet Reform Committees (NCRCs)⁴⁹ are bodies or committees of cabinet.⁵⁰ However, it does not explicitly state that *National Cabinet* itself is a committee of cabinet. Nonetheless, the handbook does outline that National Cabinet ‘operates according to the longstanding Westminster principles of collective responsibility and solidarity’, although the ‘precise structure, shape and operation of the National Cabinet are matters for its members’ including the determination of meeting schedules.⁵¹ Additionally, National Cabinet ‘does not derogate from the sovereign authority and powers of the Commonwealth or any State or Territory’.⁵² The handbook also states that confidentiality of all National Cabinet documents is central to securing an environment where full and frank discussion can take place.⁵³ These additions to the *Cabinet Handbook* appear to be an attempt to further support the Government’s position that National Cabinet is a committee of cabinet.

Furthermore, on 17 September 2021, the Prime Minister, Premiers and Chief Ministers released a statement titled ‘the Importance of Confidentiality to Relationships between the Commonwealth and the States and Territories’ which explained that:

Since its establishment on 13 March 2020, all members of National Cabinet have participated on the clear understanding that these meetings were conducted according to longstanding Cabinet conventions – most importantly, the confidentiality applied to discussions, papers and records of meetings. Consistent with this, meetings and operations of National Cabinet have been conducted in line with the process outlined in the Commonwealth Government’s Cabinet Handbook.

⁴⁸ The CFFR consists of the Commonwealth and state and territory Treasurers and reports to the National Cabinet under the Australian Federal Relations Architecture. CFFR is responsible for overseeing the financial relationship between the Commonwealth and the states and territories. It is also responsible for broad economic and fiscal issues, such as deregulation, and legislative oversight of GST operations. See: Conran AM, *Review of COAG councils and ministerial forums: report to National Cabinet, Department of the Prime Minister and Cabinet*, p. 19.

⁴⁹ The NFRC was established by agreement of the National Cabinet on 29 May 2020 following the cessation of the COAG. The NFRC comprises National Cabinet (First Ministers), CFFR (all Treasurers), and the Australian Local Government Association (ALGA). See: Conran, *Review of COAG councils and ministerial forums: report to National Cabinet, Department of the Prime Minister and Cabinet*, p. 20.

⁵⁰ PM&C, *Cabinet Handbook – 14th edition*, pp. 30–32.

⁵¹ PM&C, *Cabinet Handbook – 14th edition*, p. 30.

⁵² PM&C, *Cabinet Handbook – 14th edition*, p. 30.

⁵³ PM&C, *Cabinet Handbook – 14th edition*, p. 31.

...

The principles of Cabinet confidentiality which underpin National Cabinet deliberations have not prevented appropriate disclosure of outcomes. By agreement of National Cabinet members, meetings are, and will continue to be, followed by public statements that articulate decisions made by the National Cabinet. This approach is consistent with the conventions and operations of Cabinet and has been critical to building and maintaining public confidence in the National Cabinet without undermining the important principles of Cabinet confidentiality or the sensitivity of the content of the deliberations.⁵⁴

Attempts to apply the principles of Cabinet to National Cabinet raise concerns about the appropriateness of its institutional architecture. Saunders suggests that whilst it is arguable there is a need for some level of solidarity and respect for confidentiality within an intergovernmental body such as National Cabinet, it should be implemented through a framework designed specifically for its own needs rather than ‘imported from a conceptually different source that leads to confusion regarding the true nature and powers of the National Cabinet’.⁵⁵ Similarly, Twomey has argued that as an intergovernmental body comprised of equals, it is not an appropriate basis to build National Cabinet upon.⁵⁶ Nonetheless, it is important to note that the *Cabinet Handbook* does not have the force of legislation and is rather a guide to principles and practice. Therefore, merely claiming that National Cabinet documents and deliberations are confidential and that the CFFR and NCRC are bodies or committees of cabinet does not necessarily make it so.

A number of questions have been raised about the appropriateness of the use of the label of ‘cabinet’ for National Cabinet. From Menzies’ perspective, although called a ‘cabinet’, ‘the national cabinet is technically an intergovernmental forum’ and therefore, the ‘conventions and rules of cabinet, such as cabinet solidarity and the secrecy provisions, do not apply’.⁵⁷ Timmins, an FOI lawyer, agrees stating that ‘the

⁵⁴ Statement from the Prime Minister, Premiers, and Chief Ministers, ‘The Importance of Confidentiality to Relationships between the Commonwealth and the States and Territories’, 17 September 2021, pp. 1–2. Accessed at: www.pm.gov.au/sites/default/files/media/national-cabinet-statement-the-importance-of-confidentiality-to-relationships.pdf.

⁵⁵ Saunders, *A new federalism? The role and future of the National Cabinet*, p. 6.

⁵⁶ Twomey, *Multi-Level government and COVID-19: Australia as a case study*, pp. 3–4.

⁵⁷ Menzies, *Explainer: what is the national cabinet and is it democratic?*.

national cabinet does not have the essential attributes of a cabinet or a cabinet committee'.⁵⁸ Furthermore, Saunders discusses the issue of using the terminology of 'cabinet' in relation to the naming of the National Cabinet, highlighting the motive for confidentiality:

On no view ... is this body a 'cabinet' as the term is used elsewhere in parliamentary government. A Cabinet typically is a group of Ministers drawn from and collectively accountable to the same Parliament.

What presently is called the 'National Cabinet' is a group of government leaders, heading different cabinets, through which they are individually and collectively accountable to different Parliaments and different configurations of the people for the exercise of different powers. That, indeed, is the whole point.

Use of the terminology of cabinet is misleading. If it were to cause the superimposition of ideas about decision-making drawn from the more familiar kind of cabinet, the chance to make this important initiative work would be lost.

The problem is compounded by the suggestion that, somehow the National Cabinet fits within the Commonwealth cabinet structure. This is a logical impossibility, apparently driven by a desire to keep proceedings confidential.⁵⁹

In line with this view, Twomey has stated that 'cabinet confidentiality exists only to collective ministerial responsibility to parliament' and that the National Cabinet 'is not collectively responsible to the Commonwealth parliament'.⁶⁰ As discussed above, premiers and chief ministers are responsible to their own jurisdictional parliaments. Therefore, 'the principle of cabinet confidentiality cannot apply in this circumstance as a qualification on the broader principle of responsible government'.⁶¹ From this perspective, the rationale of cabinet confidentiality cannot be applied to conceal documents or deliberations of National Cabinet when claiming PII on an OPD from the Senate. It is clear that there is a distinction between Cabinet and National Cabinet when

⁵⁸ P. Timmins, Senate Finance and Public Administration Legislation Committee, COAG Legislation Amendment Bill 2021, *Official Committee Hansard*, Commonwealth of Australia, Canberra, 27 September 2021, p. 24.

⁵⁹ Saunders, *A new federalism? The role and future of the National Cabinet*, p. 6.

⁶⁰ Twomey, *Senate Finance and Public Administration Legislation Committee: COAG Legislation Amendment Bill 2021*, p. 30.

⁶¹ Twomey, *Senate Finance and Public Administration Legislation Committee: COAG Legislation Amendment Bill 2021*, p. 30.

the structure, membership and processes of each body are compared. At the same time, it is also apparent that there is significant contestation over the conventions that apply to the new body which has important implications for its relationship with parliament. The case of Senator Patrick's pursuit of this issue exemplifies this point.

NATIONAL CABINET AND THE TREATMENT OF PUBLIC INTEREST IMMUNITY CLAIMS: SENATOR REX PATRICK'S CASE

Senator Patrick has initiated actions to maintain the accountability of the executive in relation to National Cabinet since the rationale of cabinet-in-confidence was used as the justification for the refusal to provide documents of National Cabinet, exempting it from freedom of information laws. In pursuing this issue, Senator Patrick referred a refused FOI application to the Administrative Appeals Tribunal (AAT). Senator Patrick's FOI request sought access to all the meeting notes and minutes taken at the National Cabinet meeting held on 29 May 2020, as well as a range of documents relating to the formation and functioning of the National Cabinet.⁶²

The decision of the AAT was handed down on 5 August 2021 by Justice Richard White in the case *Patrick and Secretary, Department of Prime Minister and Cabinet [2021] AAT 2719*. It was determined that National Cabinet was not a committee of Cabinet for the purposes of the *Freedom of Information Act 1982* (Cth) (Austl.) (FOI Act).⁶³ Justice White found that the evidence 'point[ed] persuasively against the National Cabinet being a committee of the Cabinet within the meaning of the statutory expression'.⁶⁴ Whilst an AAT decision or use of determinations relating to the FOI Act is 'not a

⁶² *Patrick and Secretary, Department of Prime Minister and Cabinet [2021] AAT 2719*, pp. 8–9.

⁶³ The FOI Act exempts Cabinet documents as a general category from a statutory duty to release upon request. Section 34 of the FOI Act stipulates: (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.

⁶⁴ *Patrick and Secretary, Department of Prime Minister and Cabinet [2021] AAT 2719*, p. 64.

legitimate basis for a claim of public interest immunity in a parliamentary forum',⁶⁵ and it is rather a matter for the Senate to determine the validity of PII claims, its findings nonetheless have broader implications for understanding how National Cabinet relates to parliament. The case provides important analysis in unpacking whether or not National Cabinet is a committee of Cabinet and determines that this notion is inconsistent with the nature and membership of the intergovernmental body.

Justice White determined that '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'.⁶⁶ Justice White considered a range of factors in determining whether or not National Cabinet was a committee of Cabinet, including: the manner by which it was established, its composition, its relationship with Cabinet and the manner of its operation, as well as its place in the system of responsible and representative government established under the Constitution. It was determined that a committee of cabinet would need to be a subgroup of Cabinet, be comprised of ministers who are members of parliament and the ruling party or parties, as well as established by either the Prime Minister or Cabinet. Justice White considered that the evidence did not support a conclusion that National Cabinet's role was to assist Cabinet, nor is it subordinate to it, and importantly National Cabinet does not need to take its decisions to Cabinet for endorsement. Furthermore, it was also noted that the Prime Minister does not determine the shape, structure, membership and operation of National Cabinet.⁶⁷

With regard to membership, White J stated that, unlike other Cabinet committees, National Cabinet's membership was not comprised of ministers of the Federal Government (other than the Prime Minister), nor comprised of persons belonging to the same government or even political party.⁶⁸ Therefore, His Honour concluded that 'the composition and membership of the National Cabinet points against it being a committee of the Cabinet'.⁶⁹ Justice White also concluded that National Cabinet was

⁶⁵ Odgers, *Odgers' Australian Senate Practice*, p. 669.

⁶⁶ *Patrick and Secretary, Department of Prime Minister and Cabinet [2021] AAT 2719*, p. 17.

⁶⁷ *Patrick and Secretary, Department of Prime Minister and Cabinet [2021] AAT 2719*, pp. 38–46.

⁶⁸ *Patrick and Secretary, Department of Prime Minister and Cabinet [2021] AAT 2719*, p. 30.

⁶⁹ *Patrick and Secretary, Department of Prime Minister and Cabinet [2021] AAT 2719*, p. 38.

established by a resolution of COAG on 13 March 2020 rather than by the Prime Minister or Cabinet.⁷⁰

Whilst the Government provided the requested documents and did not appeal the decision, it continued to make further claims of cabinet confidentiality in relation to National Cabinet proceedings. During a late 2021 estimates hearing, Senator Patrick asked why requests for information and documents in relation to National Cabinet were still being met with the justification of cabinet-in-confidence even after the determination by White J in the AAT case which made it ‘absolutely clear that the national cabinet is not a committee of the federal cabinet; it is an intergovernmental body’.⁷¹ He referred to a letter received by the Chair of the Senate Select Committee on COVID-19, Senator Katy Gallagher, from the Prime Minister’s Office (after White J’s decision) making a PII claim on the basis of the cabinet exemption in relation to National Cabinet. A PM&C department official responded that ‘the government’s position remains that national cabinet was established and intended to be established as a committee of the federal cabinet’.⁷² Furthermore, PM&C stated in a submission to a Senate inquiry ‘[t]he decision of the AAT is not considered to have precedential force beyond the fact and documents before it’.⁷³ Therefore, despite the outcome of the of the AAT case, the Government has continued to operate on the premise that it is able to claim cabinet-in-confidence in relation to documents pertaining to National Cabinet.

This position was further demonstrated by the Government’s introduction of a bill to the House of Representatives on 2 September 2021 which would legislate that National Cabinet is a committee of cabinet and, as such, afford it the same confidentiality provisions in legislation such as the FOI Act.⁷⁴ The Senate referred the bill to the Senate Finance and Public Administration Legislation Committee. Most of the submissions

⁷⁰ Patrick and Secretary, *Department of Prime Minister and Cabinet* [2021] AAT 2719, pp. 24–29.

⁷¹ Senator Rex Patrick, Senate Finance and Public Administration Legislation Committee, Supplementary Estimates, *Official Committee Hansard*, Commonwealth of Australia, Canberra, 25 October 2021, p. 69.

⁷² J. Reid, Senate Finance and Public Administration Legislation Committee, Supplementary Estimates, *Official Committee Hansard*, Commonwealth of Australia, Canberra, 25 October 2021, p. 70.

⁷³ Department of the Prime Minister and Cabinet, Senate Finance and Public Administration Legislation Committee Inquiry into the COAG Legislation Amendment Bill 2021 – Submission, Senate Finance and Public Administration Legislation Committee, 2021, p. 5. Accessed at: www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/COAG/Submissions.

⁷⁴ See *COAG Legislation Amendment Bill 2021* (Cth) Schedule 3.

received by the committee raised concerns about the bill.⁷⁵ According to the Law Council of Australia, the proposed legislation would overrule the decision of the AAT and ‘erect a legal fiction’.⁷⁶ Twomey explained that whilst the ‘parliament can enact a law that asserts things that are not true, it is unwise to do so as it brings the law into disrepute and damages public confidence in the law’.⁷⁷ Geoffrey Watson, a barrister and former counsel assisting the Independent Commission Against Corruption (ICAC), argued that the proposed amendment disrupts the pre-existing legal and historical notions of what comprises a cabinet, undermines responsible government and transparency, as well as undermining federalism.⁷⁸ He asserted that ‘[w]e have ample protections in place, in appropriate places, to protect against the release of documents which should not be released’.⁷⁹ The Law Council of Australia argued that there was inadequate justification for applying an absolute exception based on a document’s status rather than considering the substance of the information and the implications of public release.⁸⁰ Doing so would effectively undermine accountability and weaken transparency by enabling the executive to decide on an *ad hoc* basis whether or not to disclose information about the deliberations and decisions of National Cabinet.⁸¹ The

⁷⁵ Including submissions from: Accountability Round Table; Australian Human Rights Commission; Australia’s Right to Know; Governance Institute of Australia; Grata Fund; Law Council of Australia; Office of the Australian Information Commissioner; Office of the Victorian Information Commissioner; Podger; Senator Patrick; The Australia Institute; Twomey. Accessed at: www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/COAG/Submissions.

⁷⁶ Law Council of Australia, Senate Finance and Public Administration Legislation Committee Inquiry into the COAG Legislation Amendment Bill 2021 – Submission, Senate Finance and Public Administration Legislation Committee, 2021, pp. 5 and 9. Accessed at: www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/COAG/Submissions.

⁷⁷ Twomey, *Senate Finance and Public Administration Legislation Committee Inquiry into the COAG Legislation Amendment Bill 2021*, 2021, p. 2. Accessed at: www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/COAG/Submissions.

⁷⁸ G. Watson, Senate Finance and Public Administration Legislation Committee: COAG Legislation Amendment Bill 2021, *Official Committee Hansard*, Commonwealth of Australia, Canberra, 27 September 2021, p. 23.

⁷⁹ Watson, *Senate Finance and Public Administration Legislation Committee*, pp. 23–24.

⁸⁰ Law Council of Australia, *Senate Finance and Public Administration Legislation Committee*, p. 7.

⁸¹ Law Council of Australia, *Senate Finance and Public Administration Legislation Committee*, pp. 8 and 10. NB Whilst the government-majority committee recommended the bill be passed, the committee’s report also included dissenting reports from Labor and Greens senators as well as from Senator Patrick. Labor proposed that if

COAG Legislation Amendment Bill 2021 [Provisions] lapsed at prorogation of the 46th Parliament.

Due to ongoing concerns about the transparency and accountability of National Cabinet and the executive's persistence in claiming cabinet confidentiality, Senator Patrick initiated the following motion which was agreed to by the Senate on 23 November 2021:

That the Senate—

- a) has rejected public interest immunity claims made on the grounds of cabinet confidentiality with respect to documents or information related to the 'National Cabinet';
- b) will not countenance public interest immunity claims made on the grounds that provision of a document or information related to the National Cabinet ordered by the Senate, or sought by a Senate committee or a senator, would reveal cabinet deliberations;
- c) directs the chairs of committees to draw this resolution to the attention of witnesses who seek to raise claims on this unacceptable ground;
- d) requires those witnesses to:
 - i. provide the documents or information, or
 - ii. articulate a public interest immunity claim on a ground which may be acceptable to the Senate and to specify the harm to the public interest that could result from the disclosure; and
- e) resolves that a response to a Senate order for the production of documents that relies on this unacceptable ground is not compliance with the order nor does it constitute a satisfactory explanation for why the order has not been complied with, including for the purposes of standing order 164(3).⁸²

The following day, Senator Patrick initiated an OPD which was agreed to by the Senate for all 'documents required by any Senate order, committee resolution or question on notice to which a claim of public interest immunity was made on the unacceptable

Schedule 3, which would extend cabinet exemptions to National Cabinet, was omitted, the bill would not be opposed. Similarly, both the Greens and Senator Patrick recommended that Schedule 3 of the bill not be passed. At this point in time, the Government has been unable to proceed with the bill due to insufficient support in the Senate for the bill in its current form.

⁸² *Journals of the Senate*, No. 127, 23 November 2021, p. 4279.

ground that material related to the National Cabinet is subject to Cabinet confidentiality' by 30 November 2021.⁸³ In response, the duty minister, Senator Duniam reiterated that the Government was of the view that National Cabinet was a committee of cabinet and therefore its documents and deliberations should remain confidential.⁸⁴ Senator Patrick argued that the actions of the executive in continuing to claim PII on the basis of cabinet-in-confidence despite the Senate's rejection of them were disrespectful. He stated the claims are:

not just in defiance of Justice White's decision that national cabinet is not a cabinet but are also in defiance of a Senate resolution that says that particular public interest immunity in relation to national cabinet is not to be advanced.⁸⁵

On the first sitting day of Parliament in 2022, on 8 February, Senator Patrick again moved a motion in the Senate rejecting the Government's PII claim and requiring the ministers to produce the documents, which was agreed to. Additionally, in an uncommon move, Senator Patrick's motion also proposed to apply a number of procedural restrictions on three ministers to put pressure on the Government to comply with the order. These procedural restrictions attempted to prevent the ministers from exercising the following procedural rights provided to executive senators by the standing orders to:

- a) move a motion connected with the conduct of the business of the Senate at any time without notice;
- b) move that a bill be declared urgent and, if the motion is agreed to, move further motions concerning the time allocated for consideration of the bill;
- c) move at any time that the Senate adjourn;
- d) move for the adjournment of debate, having spoken in the debate;
- e) move that the question be now put on more than one occasion, and after having spoken in the debate;
- f) receive precedence in debate over other senators when they seek the call; and

⁸³ *Journals of the Senate*, No. 128, 24 November 2021, p. 4302.

⁸⁴ Senator the Hon Jonathon Duniam, Parliamentary debates, *Senate Official Hansard*, Commonwealth of Australia, Canberra, 24 November 2021, p. 6646.

⁸⁵ Senator Patrick, Parliamentary debates, *Senate Official Hansard*, Commonwealth of Australia, Canberra, 2 December 2021, p. 7123.

g) present documents.⁸⁶

This part of the motion was negated in a vote of 27 to 30.⁸⁷ Nonetheless, it appears Senator Patrick's motion had no impact on the Government's position in relation to this matter. In a report on outstanding orders for documents as at March 2022 tabled in the Senate on 21 March, the Government reiterated its position that it believed the cabinet-in-confidence PII claim in relation to National Cabinet to be valid.⁸⁸ It is clear that the executive will continue to resist these orders of the Senate and evade its scrutiny until such a time as the Senate feels it appropriate to apply a penalty for the refusal to comply (which is has the power to do if it chooses).

CONCLUSION: IMPLICATIONS FOR THE SENATE

Cabinet confidentiality remains a contested concept and continues to have an impact on the Parliament's ability to access certain information, raising questions about the compatibility of cabinet confidentiality and the accountability of the executive. The contestation reflects the differing interests of Cabinet whose aim is to ensure confidential deliberation, the interests of the Parliament in holding the executive to account, and the public's interest in access to information which, through transparency, leads to confidence in the democratic system of responsible government. Therefore, any attempt to expand executive power should be closely scrutinised as it has the potential to undermine the strength of Australia's parliamentary democracy and principles of responsible government.

Ultimately, it is for the Senate to determine the validity of claims to withhold documents in the public interest, not the Government. Through its core role in parliamentary oversight of executive power, there is no class of documents that the Senate cannot order to be produced. Whilst the Senate recognises that there are instances where documents should be kept confidential, the ability to make claims of PII should not be misused to obfuscate, deny relevant information from parliamentary or public view, or subvert the work of the Senate. However, the Senate appears to be

⁸⁶ *Senate Official Hansard*, 8 February 2022, p. 58.

⁸⁷ *Senate Official Hansard*, 8 February 2022, p. 60.

⁸⁸ Senator the Hon Simon Birmingham, Leader of the Government in the Senate, *Orders for the Production of Documents Report – March 2022*, 21 March 2022, p. 6.

particularly cautious in relation to applying a penalty for such actions by the executive.⁸⁹

The crux of the issue lies within the notion that the foundation of Westminster democratic governance is built upon responsible and accountable government. Whilst there may be some limited exceptions, as a general principle the Government must be accountable to parliament and, by extension, to the public. When it comes to claiming PII, it must genuinely and legitimately be made in the public interest and not as a means to unnecessarily conceal government decision-making. Indeed, as Odgers states:

While the public interest and the rights of individuals may be harmed by the enforced disclosure of information, it may well be considered that, in a free state, the greater danger lies in the executive government acting as the judge in its own cause, and having the capacity to conceal its activities, and, potentially, misgovernment from public scrutiny.⁹⁰

This concern is clearly reflected in the attempts of the executive to broaden the scope of cabinet-in-confidence and refusal to comply with Senate orders on the matter of National Cabinet.

In the case explored in this article, extending the conventions of Cabinet to National Cabinet seems inappropriate given the nature and purpose of the intergovernmental body. This is a sentiment which has been shared by many academics and legal experts. The notion that National Cabinet is a committee of Cabinet simply does not pass the proverbial pub test—in other words, it does not meet public expectations of responsible government and reasonable transparency. National Cabinet lacks the core principles upon which a cabinet justifies confidentiality which are collective responsibility and solidarity. Furthermore, premiers and chief ministers are accountable to their own parliaments, cabinets and voters as opposed to being accountable to the Prime Minister or Cabinet. Appropriately, however, there remain avenues to request that documents remain confidential under PII on a case-by-case basis without the need for attempts to apply blanket confidentiality provisions.⁹¹

⁸⁹ Note: an explanation of some of the practical difficulties in the use of this power can be found in Odgers, *Odgers' Australian Senate Practice*, pp. 672–675.

⁹⁰ Odgers, *Odgers' Australian Senate Practice*, p. 676.

⁹¹ For example, as previously mentioned: An alternative potentially acceptable ground for claiming PII that may be applicable in the context of National Cabinet deliberations and documents is the potential to prejudice relations

Providing a reasonable explanation that states the ground and details the harm of releasing the document(s) goes a long way in seeking the consideration of the Senate, as per its order of continuing effect of 13 May 2009.

The controversy surrounding the treatment of National Cabinet and its relationship to the executive and legislature has yet to be concluded. There will no doubt be continued debate around accountability and parliamentary scrutiny, not only of the intergovernmental body, but also of the actions of the executive in its attempts to extend cabinet confidentiality to National Cabinet and its resistance of OPD. The Senate's decision to reject PII claims that use cabinet confidentiality in relation to the deliberations of National Cabinet demonstrates a rejection of inadequately justified attempts to conceal information and reinforces the power of the Senate to make decisions to determine the validity of refusals to produce documents. How far the Senate is willing to go in backing its decisions and commitment to executive accountability will be something to watch as it still holds a number of procedural cards to play if the executive continues to challenge the Senate's Constitutional role to scrutinise the executive.

between the Commonwealth and the states. For further information, see: Odgers, *Odgers' Australian Senate Practice*, p. 666. Whilst an in-depth analysis of this ground was outside the scope of this article, it would be an interesting avenue to consider in a future article.