From: Luis Izzo
Sent: Tuesday, 15 August 2023 9:02 AM
To: Chambers - Hatcher J
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Subject: RE: B2023/538 Application by UWU, AEU and IEUA re Early Childhood Education and Care Sector - hearing information
Attachments: 194 CLR 355.pdf; 249 CLR 645.pdf

OFFICIAL

Dear Associate

I refer to the above proceedings which are listed for hearing tomorrow.

Attached are the following two authorities, which ACCI may wish to take the Bench to during the course of the hearing:

- *Project Blue Sky Inc and Ors v Australian Broadcasting Authority* (1998) 194 CLR 355
- *Kline v Official Secretary to the Governor-General and Anor* (2013) 249 CLR 645

I would be grateful if the authorities can be made available to the members of the Bench.

Yours faithfully

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PROJECT BLUE SKY INC AND OTHERS .... APPELLANTS;
APPLICANTS,

AND

AUSTRALIAN BROADCASTING AUTHORITY RESPONDENT.
RESPONDENT,

[1998] HCA 28

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

Broadcasting — Television — Commercial licences — Determination of standards by Australian Broadcasting Authority — Standards relating to Australian content of programs — Functions of Authority to be performed consistently with international agreements — International agreement providing for access rights to Australian market and treatment no less favourable than that accorded to Australians — Whether standards invalid where inconsistency — Breach of Act not involving invalid conduct — Right of interested party to seek declaration of breach — Broadcasting Services Act 1992 *(Cth), ss* 122(1)*(a)*, (2)*(b)*, (4), 158*(j)*, 160*(d)*.

H C OF A
1997-1998
Sept 29
1997
April 28
1998
Brennan CJ,
McHugh,
Gummow,
Kirby and
Hayne JJ

Section 158(j) of the *Broadcasting Services Act* 1992 (Cth) provided that a primary function of the Australian Broadcasting Authority (the ABA) was to develop program standards relating to broadcasting in Australia. Section 122(1)(a) required the ABA to determine standards to be observed by commercial television broadcasting licensees. Section 122(2)(b) provided that such standards were to relate to "the Australian content of programs". The Act did not define that phrase. Section 122(4) provided that the standards must not be inconsistent with the Act or the regulations. Section 160(d) required the ABA to perform its functions in a manner consistent with Australia's obligations under any agreement between Australia and a foreign country.

The ABA determined an Australian Content Standard with effect from 1 January 1996 (the Standard), by cl 9 of which Australian programs had to comprise at least 50 per cent of all broadcasts between 6 am and midnight until the end of 1997 and 55 per cent thereafter. The Standard contained a detailed definition of "Australian program" which included one that was produced under the creative control of Australians who ensure an Australian perspective. Australia and New Zealand were parties to the Australia New Zealand Closer Economic Relations Trade Agreement 1983. Article 4 of the 1988 Trade in Services Protocol to that Agreement stated that each Member State should grant to persons of the other "and services provided by them access rights in its market no less favourable than those allowed to its own persons and services provided by them". Article 5(1) provided that each Member State should accord to persons of the other "and services provided by them treatment no less favourable than that accorded in like circumstances to its persons and services provided by them". Six New Zealand companies which had the object of encouraging the growth of the New Zealand film and television industry contended that the Standard was invalid because cl 9 was inconsistent with Arts 4 and 5 of the Protocol and hence ss 160(d) and 122(4) had not been complied with.

Held, by McHugh, Gummow, Kirby and Hayne JJ, Brennan CJ dissenting, that "the Australian content of programs" in s 122(2)(b) was a flexible expression that included matter reflecting Australian identity, character and culture. A program would contain Australian content if it showed aspects of life in Australia or the activities of Australians or issues concerning Australia or Australians or if the participants, creators or providers were Australian. The Standard was thus a standard which by the ABA was authorised to determine by s 122(1)(b).

Held, further, by McHugh, Gummow, Kirby and Hayne JJ (1) that s 122(1) and (2) must not be given a mere grammatical meaning in isolation from s 122(4) and the mandatory direction in s 160(d). Hence the ABA was obliged to determine Australian content standards only to the extent that they were consistent with Australia's obligations under international agreements. Clause 9 of the Standard was inconsistent with Arts 4 and 5 of the Protocol, s 160(d) was not satisfied and, accordingly, s 122(4) prohibited the making of cl 9.

(2) That an act done in breach of a condition regulating the exercise of a statutory power was not necessarily invalid. Whether it was depended on whether it was a purpose of the legislation to invalidate any act done in breach of the condition. It was not a purpose of the Act that a breach of s 160(d) was to invalidate any act done in breach of that section, and hence acts done in breach of s 160(d) were not invalid.

Tasker v Fullwood [1978] 1 NSWLR 20, applied.

Per McHugh, Gummow, Kirby and Hayne JJ. Although an act in breach of s 160(d) is not invalid, it is a breach of the Act and therefore unlawful and thus may give rise to an entitlement in a person with sufficient interest to sue for a declaration that the ABA was in breach of the Act and in an appropriate case to obtain an injunction restraining action based on the unlawful conduct.

Per Brennan CJ (dissenting) (1) The phrase "the Australian content of programs" in s 122(1)(b) cannot be used to classify programs by their provenance. The Standard does this and hence is invalid as not being authorised by s 122(1)(b).

(2) Assuming that s 122(1)(b) authorised the determination of the Standard by the ABA, cl 9 of the Standard is inconsistent with Arts 4 and 5 of the Protocol and hence with s 160(d). The ambit or existence of the power exercisable by the ABA under s 122(1)(a) is limited accordingly. The making of the Standard was beyond power and accordingly it was invalid. It is irrelevant whether s 160(d) is mandatory or directory.

Decision of the Federal Court of Australia (Full Court): *Australian Broadcasting Authority v Project Blue Sky Inc* (1996) 71 FCR 465, reversed.

The Australian Broadcasting Authority (the ABA) determined an Australian Content Standard in relation to the content of commercial

Corrigendum: "s 122(1)(b)" should be changed to read "s 122(2)(b)".

television broadcasts pursuant to s 122(1)(a) of the *Broadcasting Services Act* 1992 (Cth) on 15 December 1995. Project Blue Sky Inc and five other New Zealand companies concerned to promote the film and television industry in New Zealand on that day commenced proceedings in the High Court of Australia seeking to set aside the determination, an order that the ABA determine an Australian Content Standard under s 122(1)(a) according to law and an order restraining the ABA from giving effect to the determination. On 14 February 1996, Kirby J remitted the proceeding to the Federal Court of Australia by consent. Davies J held that the determination was invalid to the extent that it was inconsistent with Arts 4 and 5 of the Protocol on Trade in Services to the Australia New Zealand Closer Economic Trade Agreement (ATS 1988 No 20). He set aside the determination with effect from 31 December 1996 unless the determination was revoked or varied according to law. A Full Court (Wilcox and Finn JJ, Northrop J dissenting) allowed an appeal by the ABA and upheld the validity of the Standard (1). The majority held that there was an irreconcilable conflict between s 122(2)(b) and s 160(d) of the Act, and regarded the former as a special provision overriding the general provision. Northrop J considered that the Standard and the Protocol, and not the statutory provisions, were inconsistent. Like Davies J, he considered that it was not necessarily the case that ABA could not make a determination under s 122 which was consistent with Australia's obligations under the Protocol. Project Blue Sky Inc and the five other New Zealand companies appealed from the judgment of the Full Court to the High Court, by special leave granted by Dawson, Toohey and Kirby JJ.

R J Ellicott QC (with him *D M Yates* SC and *A J Slink*), for the appellants. By providing that "standards must not be inconsistent with this Act" s 122(4) of the *Broadcasting Services Act* clearly indicates that s 122 is not to be construed independently of the rest of the Act, here s 160(d), which in turn requires the ABA to perform its functions consistently with Australia's international obligations. These matters expressly limit the manner in which its function under s 122 is to be performed. How the ABA is to determine a standard consistently with the Protocol is a matter for it, but whatever it does, it must give to New Zealanders and their services no less favourable treatment and Australian market access. The standards must "relate to" the Australian content of programs. These are wide words (2). They enable

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(1) *Australian Broadcasting Authority v Project Blue Sky Inc* (1996) 71 FCR 465.

(2) *Tooheys Ltd v Commissioner of Stamp Duties (NSW)* (1961) 105 CLR 602 at 620; *Attrill v Richmond River Shire Council* (1995) 38 NSWLR 545 at 553-555; *Port of Geelong Authority v The "Bass Reefer"* (1992) 37 FCR 374 at 381; *Empire Shipping Co Inc v Owners of Ship "Shin Kobe Maru"* (1991) 32 FCR 78 at 94; *Gatoil International Inc v Arkwight-Boston Manufacturers Mutual Insurance Co* [1985] AC 255 at 270-271.

the ABA to fix Australian program content by reference to various criteria, such as the nature and content of programs and they can include fixing content by reference to the televising of non-Australian programs. We do not say that if Australian program content is ten hours in relation to a particular longer time period, half must be New Zealand program content. There is no fixed notion of Australian program content. What the relevant Australian content is as a proportion of a total period can be affected by a number of considerations. When the ABA determines the Australian program content, Australia's obligations under Arts 4 and 5 of the Protocol must be taken into account. There is no conflict between s 122(2)(b) and s 160(d). The manner in which the ABA chose to perform its statutory task is the matter in issue. The question does not concern inconsistent statutory provisions which cannot be reconciled by ordinary interpretation. Section 122 is not a more specific provision governing or overriding the more general s 160(d). If anything, s 160(d) is more specific — it is a direct command that obligations undertaken by Australia under an international agreement must be applied in domestic law. Such a provision is not unusual (3).

R V Gyles QC (with him *N E Abadee*), for the respondent. If the Standard is not in accordance with the Protocol, it is not possible for the ABA to comply with both its obligation under s 122(2)(b) to determine standards that relate to the Australian content of programs and its obligation under s 160(d) to set a standard that is consistent with the Protocol. The appellants do not suggest how ABA could determine a standard which complies with both. The involvement of Australians in the process of producing programs is a fundamental aspect of Australian content. Section 122 does not authorise the ABA to set a standard relating to programs made by New Zealanders or to New Zealand program content. [BRENNAN CJ. If a standard related to both Australian and New Zealand content, would that not be authorised by s 122?] Section 122 does not permit the ABA to fix a standard relating to New Zealand content. Section 160(d) provides no warrant to the ABA to fix a New Zealand standard and s 122(4) does not give s 160(d) greater force or effect. Section 160(d) does not have the effect of amending s 122 so as to require or permit the ABA to set a standard that does not relate to Australian program content. There is an irreconcilable conflict between the operation of s 122(2)(b) and s 160(d) (4). The conflict is to be resolved as a matter of statutory construction by giving primacy to s 122 as the specific provision. The parliamentary objective of Australian preference found in s 122 cannot

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(3) *Tasman Timber Ltd v Minister for Industry and Commerce* (1983) 67 FLR 12 at 30; 46 ALR 149 at 169.

(4) *Royal Automobile Club of Australia v Sydney City Council* (1992) 27 NSWLR 282 at 294-295; *Parramatta City Council v Stauffer Chemical Co (Aust) Pty Ltd* (1971) 2 NSWLR 500 at 510-511.

be read down by the general provisions of s 160. The more general command yields to the particular.

S J Gageler, by leave as amicus curiae for eleven participants in the Australian film and television industry. It is a matter of construction whether failure to comply with a statutory requirement results in invalidity (5). Section 160(d) does not make compliance with Australia's international obligations a condition to the exercise of power under s 122. Want of compliance with s 160(d) does not result in the invalidity of a standard. The standard is not impugned or capable of being impugned by a court. Non-compliance would be a matter for Parliament. To say whether s 160(d) is mandatory or directory is to state the conclusion whether a breach gives rise to invalidity (6). A directory provision does not necessarily require substantial compliance (7). Total disregard of a statutory requirement has not always resulted in invalidity (8). Whatever limitation s 160(d) imposes, it is concerned with the manner of exercise under s 122 of a function or power of the ABA and not the scope of the power or a limitation on it. As to the distinction drawn, see *Edelsten v Health Insurance Commission* (9) and *Mercantile Mutual Life Insurance Co Ltd v Australian Securities Commission* (10). The relevant function of the ABA here is in s 158(j) which requires it to develop program standards for broadcasting in Australia. Section 122(4) does not suggest that s 160 is mandatory; it poses but does not answer the question of what consistency with the Act means. Section 122(4) is concerned with standards — the outcome of the process under s 122(1)(a) — and not with the conduct of the process.

R V Gyles QC, by leave.

R J Ellicott QC, in reply.

Cur adv vult

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(5) *Attorney-General (NSW); Ex rel Franklins Stores Pty Ltd v Lizelle Pty Ltd* [1977] 2 NSWLR 955 at 963-964; *Tasker v Fullwood* [1978] 1 NSWLR 20 at 23-24; *McCrae v Coulton* (1986) 7 NSWLR 644 at 661; *Yapeen Holdings Pty Ltd v Calardu Pty Ltd* (1992) 36 FCR 478 at 494; *Formosa v Secretary, Department of Social Security* (1988) 46 FCR 117 at 121-122.

(6) *Attorney-General (NSW); Ex rel Franklins Stores Pty Ltd v Lizelle Pty Ltd* [1977] 2 NSWLR 955 at 963-964; *Formosa v Secretary, Department of Social Security* (1988) 46 FCR 117 at 122; *Leichhardt Municipal Council v Minister for Planning* (1992) 78 LGERA 306 at 338.

(7) *Hunter Resources Ltd v Melville* (1988) 164 CLR 234 at 250; *Yates Security Services Pty Ltd v Keating* (1990) 25 FCR 1 at 24-25.

(8) *Australian Broadcasting Corporation v Redmore Pty Ltd* (1989) 166 CLR 454; *Hunter Resources Ltd v Melville Ltd* (1988) 164 CLR 234 at 252; Pearce and Geddes, *Statutory Interpretation in Australia*, 4th ed (1996), pp 277-285.

(9) (1990) 27 FCR 56 at 63.

(10) (1993) 40 FCR 409 at 422.

28 April 1998

The following written judgments were delivered:—

1 BRENNAN CJ. The Australian Broadcasting Authority (the ABA) has a number of "primary functions" which are listed in s 158 of the *Broadcasting Services Act* 1992 (Cth) (the Act), including, inter alia:

> "(h) to assist broadcasting service providers to develop codes of practice that, as far as possible, are in accordance with community standards; and
> (i) to monitor compliance with those codes of practice; and
> (j) to develop program standards relating to broadcasting in Australia; and
> (k) to monitor compliance with those standards."

Section 159 allows for "additional functions" which may be conferred on it by the Act or another Act. Section 160 imposes general obligations on the ABA in these terms:

> "The ABA is to perform its functions in a manner consistent with:
> (a) the objects of this Act and the regulatory policy described in section 4; and
> (b) any general policies of the Government notified by the Minister under section 161; and
> (c) any directions given by the Minister in accordance with this Act; and
> (d) Australia's obligations under any convention to which Australia is a party or any agreement between Australia and a foreign country."

In these proceedings, the appellants (to whom I shall refer as "Blue Sky"), which have the objective of encouraging the profitable growth of the New Zealand film and television industry, challenge the validity of a standard determined by the ABA on the ground that the ABA has not performed its function consistently with Australia's obligations under an "agreement between Australia and a foreign country". The agreement relied on is the Protocol on Trade in Services to the Australia New Zealand Closer Economic Relations Trade Agreement. The Protocol came into force on 1 January 1989. Article 4 of the Protocol reads as follows:

> "Each Member State shall grant to persons of the other Member State and services provided by them access rights in its market no less favourable than those allowed to its own persons and services provided by them."

Article 5(1) reads as follows:

> "Each Member State shall accord to persons of the other Member State and services provided by them treatment no less favourable

than that accorded in like circumstances to its persons and services provided by them.''

2 Blue Sky contends that, by reason of Arts 4 and 5(1), Australia is under an obligation not to create or maintain any legal impediment which would adversely affect the capacity of the New Zealand film and television industry to compete equally with the Australian industry in the Australian market for the broadcasting of film and television products.

3 The impugned standard, known as the Australian Content Standard, was determined by the ABA on 15 December 1995 in purported exercise of the power conferred on the ABA by s 122(1)(a) of the Act. Part 5 of the Australian Content Standard, headed ''Transmission Quota'' contains but one clause: cl 9, headed ''Australian transmission quota''. Clause 9 reads:

> ''(1) Subject to subclause (3), until the end of 1997, Australian programs must be at least 50% of all programming broadcast between 6.00am and midnight in a year that was made without financial assistance from the television production fund.
>
> (2) Subject to subclause (3), from the beginning of 1998, Australian programs must be at least 55% of all programming broadcast between 6.00am and midnight in a year that was made without financial assistance from the television production fund.
>
> (3) If an Australian program:
>
> (a) is first release sports coverage; and
>
> (b) begins before midnight and ends on the next day;
>
> the part of the program broadcast between midnight and 2.00am is taken to have been broadcast between 6.00am and midnight.''

The quotas specified in cl 9 guarantee minimum periods between 6 am and midnight during which Australian programs are to be broadcast. New Zealand programs are left to compete with all other programs (including Australian programs) for the remainder of the periods between 6 am and midnight. Even if New Zealand programs were successful in obtaining transmission for the entire 50 per cent of the relevant periods which, until the end of 1997, were available after the Australian program quota was satisfied, the Australian Content Standard would preclude their achieving more than 45 per cent from the beginning of 1998. The definition of an Australian program is contained in cl 7 which reads:

> ''(1) A program is an Australian program if:
>
> (a) it is produced under the creative control of Australians who ensure an Australian perspective, as only evidenced by the program's compliance with subclause (2), subclause (3) or subclause (4); and
>
> (b) it was made without financial assistance from the television production fund.
>
> (2) A program is an Australian program if:

(a) the Minister for Communications and the Arts has issued a final certificate under section 124ZAC of Division 10BA of Part III of the *Income Tax Assessment Act* 1936 in relation to the program; and

(b) the certificate is in force.

(3) A program is an Australian program if it has been made pursuant to an agreement or arrangement between the Government of Australia or an authority of the Government of Australia and the Government of another country or an authority of the Government of another country.

(4) Subject to subclause (5), a program is an Australian program if:

(a) the producer of the program is, or the producers of the program are, Australian (whether or not the program is produced in conjunction with a co-producer, or an executive producer, who is not an Australian); and

(b) either:

(i) the director of the program is, or the directors of the program are, Australian; or

(ii) the writer of the program is, or the writers of the program are, Australian;

and

(c) not less than 50% of the leading actors or on-screen presenters appearing in the program are Australians; and

(d) in the case of a drama program — not less than 75% of the major supporting cast appearing in the program are Australians; and

(e) the program:

(i) is produced and post-produced in Australia but may be filmed anywhere; and

(ii) in the case of a news, current affairs or sports program that is filmed outside Australia, may be produced or post-produced outside Australia if to do otherwise would be impractical.

(5) If an Australian program:

(a) is comprised of segments which, if they were individual programs, would not comply with subclause (4); and

(b) is not a news, current affairs or sports program;

only those segments that, if they were individual programs, would comply with subclause (4) are taken to be Australian programs."

4 The Australian Content Standard thus provides a minimum quota for the transmission of programs made in compliance with sub-cll (2), (3) or (4) of cl 7, that is, programs classified by the circumstances in which they were made. It is the provenance of a program, not its subject matter, which determines whether it is an "Australian program" for the purposes of the Australian Content Standard. The Australian Content Standard gives a competitive advantage to

KLINE .... APPELLANT;
APPLICANT,

AND

OFFICIAL SECRETARY TO THE
GOVERNOR-GENERAL AND
ANOTHER .... RESPONDENTS.
RESPONDENTS;

[2013] HCA 52

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

HC of A
2013
Oct 30;
Dec 6
2013

French CJ,
Crennan,
Kiefel,
Bell and
Gageler JJ

Administrative Law (Cth) Ð Freedom of information Ð Documents held by Official Secretary to Governor-General Ð Exception from disclosure unless relating to matters of an administrative nature Ð Documents relating to nomination for award in Order of Australia Ð Governor-General Act 1974 (Cth), s 6(1) Ð Freedom of Information Act 1982 (Cth), ss 4(1) ªagencyº, ªprescribed authorityº, 6A

Section 6(1) of the *Governor-General Act 1974* (Cth) created the office of Official Secretary to the Governor-General. Section 4(1) of the *Freedom of Information Act 1982* (Cth) included in the definition of ªprescribed authorityº for the purposes of the Act the person holding, or performing the duties of, an office established by an enactment. That Act applied to ªagenciesº, which by s 4(1) were defined to include prescribed authorities. Section 11(1)(a) provided that, subject to the Act, every person had a legally enforceable right to obtain access in accordance with the Act to a document of an agency, other than an exempt document. Section 6A provided (1) that the Act did not apply to any request for access to a document of the Official Secretary to the Governor-General unless the document related to ªmatters of an administrative natureº; and (2) that, for the purposes of the Act, a document in the possession of a person employed under s 13 of the *Governor-General Act* that was in his or her possession by reason of his or her employment under that section should be taken to be in the possession of the Official Secretary.

A person made a request under s 15 of the *Freedom of Information Act* for access to certain categories of documents held by the Official Secretary relating to certain nominations submitted by that person for the making of an award in the Order of Australia. An authorised representative of the Official Secretary refused the request, stating that no documents relating to matters of an administrative nature had been identified.

Held, (1) that documents relating to the Governor-General's substantive powers and functions were excluded from disclosure by s 6A(1). The exception of documents which related to “matters of an administrative nature” referred to documents concerning the management and administration of the office resources of the Official Secretary.

(2) That the documents sought by the applicant, other than certain documents which were available to the general public, were excluded from disclosure by s 6A(1).

Decision of the Federal Court of Australia (Full Court): *Kline v Official Secretary to the Governor-General* (2012) 208 FCR 89, affirmed.

APPEAL from the Federal Court of Australia.

Karen Kline applied to the Official Secretary to the Governor-General under the *Freedom of Information Act 1982* (Cth) for access to her nomination forms for a named person “for an Order of Australia” sent in 2007 and 2009 and all accompanying material, all correspondence held by the Official Secretary relating to those nominations, a list of which of the nomination documents were presented to the Council of the Order, working manuals, policy guidelines and criteria relating to the administration of awards within the Order, documents relating to review processes, and all file notes from the Australian Honours and Awards Secretariat relating to her nominations. The Deputy Official Secretary, an authorised person under s 23 of the Act, notified the applicant that certain of the documents requested did not exist and that the request identified no documents relating to matters of an administrative nature. Hence the request was refused. The applicant applied to the Freedom of Information Commissioner for review of that decision under s 54L of the Act. The Commissioner (Dr James Popple) affirmed the decision. The applicant then applied to the Administrative Appeals Tribunal for review of the Commissioner's decision. The Tribunal (Deputy President P E Hack SC) affirmed the decision on the ground that none of the documents in question was a document that related to matters of an administrative nature within the meaning of s 6A of the Act (1). The applicant appealed from that decision, under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth), to a Full Court of the Federal Court of Australia (Keane CJ, Besanko and Robertson JJ) which dismissed the appeal with costs (2). She then applied for special leave to appeal to the High Court from the judgment of the Full Court. Special leave was granted by French CJ and Gageler J, limited to the grounds set out in para [5] of the judgment of the Court hereunder. The respondent

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(1) *Kline v Official Secretary to the Governor-General* (2012) 127 ALD 639.

(2) *Kline v Official Secretary to the Governor-General* (2012) 208 FCR 89.

gave notices of a constitutional matter under s 78B of the Judiciary Act 1903. No State or Territory intervened in the appeal.

R Merkel QC (with him E M Nekvapil), for the appellant. Two questions of construction arise: what is meant by “matters of an administrative nature” in s 6A of the Freedom of Information Act and what is the degree of connection required for a document to “relate to such matters”? The ordinary meaning of “administrative” is “pertaining to management of affairs” (3). The boundary between documents that do and do not relate to matters of an administrative nature depends on an interpretation that best gives effect to and promotes the legislative purposes of s 6A. The legislative history of ss 5 and 6 is significant. [He referred to the Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978, pp 158-160.] Parliament has sought in those sections to pursue the objects of the Act identified in s 3 while protecting a common public interest in the independent discharge of the substantive functions and powers of the relevant bodies. [He referred to Herijanto v Refugee Review Tribunal (4); Herijanto v Refugee Review Tribunal [No 2] (5); Hennessy v Broken Hill Pty Co Ltd (6); Fingleton v The Queen (7); and MacKeigan v Hickman (8).] When s 6A was enacted the notion that decisions of a Governor or Governor-General were unreviewable had been rejected (9). The Act contains a finely calibrated scheme to balance the general public interest favouring access to information against specific countervailing public interest. Provisions such as ss 11, 11A, 22, 45 and 47E and others in Pt IV carefully map out the specific matters Parliament intended to countervail the public interest in favour of disclosure. The documents sought include many that do not disclose the decision-making process. The Full Court should have held that the terms of the request are capable of covering documents that “relate to matters of an administrative nature”. Many of the documents precede the decision-making stage. The decision of the Full Court should be set aside and the matter should be remitted for the Administrative Appeals Tribunal to consider whether particular documents fall within the exclusion in s 6A and, if they do, whether they are exempt under Pt IV.

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(3) Shorter Oxford Dictionary, 6th ed (2007).
(4) (2000) 74 ALJR 698 at 700-702 [13]-[23]; 170 ALR 379 at 382-384.
(5) (2000) 74 ALJR 703 at 704 [10].
(6) (1926) 38 CLR 342 at 348-349.
(7) (2005) 227 CLR 166 at 190-191.
(8) [1989] 2 SCR 796 at 826, 832-833.
(9) R v Toohey; Ex parte Northern Land Council (1981) 151 CLR 170 at 217-222; FAI Insurances Ltd v Winneke (1982) 151 CLR 342. See also R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs [No 2] [2008] QB 365 at 397-399.

J T Gleeson SC, Solicitor-General for the Commonwealth, (with him N Kidson and C L Lenehan), for the first respondent. The Governor-General is outside the s 4 definitions of “agency” and “prescribed authority”. Hence the processes of “government” which the Freedom of Information Act opens to the public do not include the exercise of any of the functions of the Governor-General. The statutory function of the Official Secretary is to “assist” the Governor-General (10). He and his staff provide the support which enables the Governor-General to perform the whole range of her functions. The Official Secretary falls within the definition of “prescribed agency” in s 4 of that Act. He thus is subject to the requirements of s 8. But the duty which would otherwise arise under s 11A(3) to comply with requests for access to documents has been replaced by the general rule of s 6A. He has no duty to respond to such requests save where the document “relates to matters of an administrative nature”. This general rule is necessary to ensure that the Governor-General remains outside the Act. The characterisation question is whether there is a relevant relationship between the document and a subject matter which is properly described as being of an administrative nature. A matter will be of an administrative nature only if it solely concerns the management and administration of the Official Secretary's Office that is necessary for, but incidental to, the performance of the support function or the vice-regal function or both. This construction leaves both the immunity for the Governor-General and the general rule of s 6A to do their proper work so that things done in performance of the support function and the vice-regal function shall not be subject to requests for access. The scope of the similar exception for courts under s 5 was correctly explained in the 1978 Senate Standing Committee Report. The phrase has a similar meaning in ss 6 and 6A. The explanation of s 5 (and necessarily s 6) in Bienstein v Family Court of Australia (11), which requires the examination of each document requested to determine whether its availability would not impinge upon the independence of courts or tribunals, is wrong. It involves an evaluative judgment by the person who processes the request of the likely effect of disclosure on the independence of the court or tribunal. It gives no guidance of how the assessment is to be carried out, what factors are relevant, or the degree to which judicial independence must be affected for a document to retain the prima facie immunity from disclosure. Parliament would not intend ss 5 and 6 to operate in such an indeterminate and unpredictable manner. The approach taken in Bienstein's case should not be adopted in respect of s 6A. The

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(10) Governor-General Act 1974 (Cth).

(11) (2008) 170 FCR 382.

legislative history of the provisions is inconsistent with the appellant's submissions. Parliament's concern was with the disclosure of documents relating to administrative efficiency.

The Governor-General is the Chancellor of the Order of Australia. Under the letters patent, she is responsibile for the independent administration of the Order. Everything that occurs in the process of the receipt of nominations, consulting referees, making inquiries of other persons, placing of material before the Council, through to the ultimate recommendation to the Governor-General and the making and announcement of the decisions, is done in that administration. The central role in that process of the Secretary of the Order (who is the Official Secretary) takes place under the direction of the Governor-General as part of that administration. As he provides “support”, the Governor-General's function is advanced. The two are intertwined. All of this lies outside the *Freedom of Information Act* Each of the documents still pressed by the appellant, by their description and without need to inspect the document, cannot be said to relate to an administrative matter. Each would reveal steps in the process by which in the usual case, or the particular case, nominations progress towards a final decision as part of the administration of the Order for which the Governor-General has ultimate legal responsibility.

The second respondent, the Administrative Appeals Tribunal, entered a submitting appearance.

R Merkel QC, in reply. The first respondent construes “documents that relate to matters of an administrative nature” in relation to a court, tribunal and the Official Secretary in ss 5, 6 and 6A of the Act as meaning documents that relate solely to the management and administration of the registry of the court or tribunal or the office of the Official Secretary (as the case may be); and do not relate to their functions of assisting the relevant court etc. The appellant construes the same words as meaning documents that: relate to the administrative tasks carried out by or within the registry of the court or tribunal, or the Office of the Official Secretary, to support or assist the exercise of the powers or the discharge of the functions of the court etc; and do not disclose the decision-making process involved in the exercise of those powers or the discharge of those functions by the court etc in a particular matter or context. The parties' respective constructions seek to answer the question: How far does 6A go in pursuit of the purpose or object set out in s 3 of the Act? The appellant's answer promotes the purpose or object in s 3 while still giving effect to the competing public interest reflected in s 6A (and also in ss 5 and 6) of protecting the independence and impartiality of the Governor-General (and also the courts, prescribed tribunals and their members). By contrast, the first respondent's answer gives less effect to the purpose or object in s 3, without providing any greater protection to the competing public interest. If the Governor-General's functions are wholly outside the objects of the Act there is no basis for including the Official Secretary within its operation in the light of the proximity between the Official Secretary and the Governor-General identified in the first respondent's contentions.

Cur adv vult

6 December 2013

The following written judgments were delivered: —

1 FRENCH CJ, CRENNAN, KIEFEL AND BELL JJ. The appellant, Ms Kline, made a request under s 15 of the Freedom of Information Act 1982 (Cth) (the FOI Act) for access to certain categories of documents held by the first respondent, the Official Secretary to the Governor-General of the Commonwealth of Australia (the Official Secretary). The second respondent, the Administrative Appeals Tribunal (the Tribunal), filed an appearance submitting to any order the Court may make save as to costs.

2 The documents in the request related to the Australian system of honours, the Order of Australia. They included two nomination forms for the making of an award and correspondence in relation to those nominations, criteria for making awards, working manuals, policy guidelines, and documents relating to review processes. Subsequently, the appellant expanded her request to include an additional category of documents, being “all file notes from the Secretariat” contained in the nominations, which she made in 2007 and 2009.

3 The decision of the Official Secretary (12), an “agency” subject to the operation of the FOI Act (13), was conveyed in writing. In that communication it was stated that some of the documents requested by the appellant did not exist. In relation to the balance, it was said that “no documents relating to matters of an administrative nature” had been identified, being the only class of documents of the Official Secretary which are subject to obligations under the FOI Act (14). The letter also stated that the appellant would be provided with one copy of each of the two nominations she had made, but as those documents did not relate to matters of an administrative nature, they were not subject to the FOI Act.

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(12) Authorised under s 23 of the FOI Act.

(13) FOI Act, s 4(1).

(14) See FOI Act, s 6A(1).

4 On review, under s 55K of the FOI Act, the Australian Information Commissioner (the Commissioner) affirmed the Official Secretary's decision to refuse the appellant access to the documents she had requested. The appellant then appealed to the Tribunal, which affirmed the Official Secretary's decision (15). On an appeal on a question of law (16), the Full Court of the Federal Court of Australia (17) upheld the Tribunal's decision (18).

This appeal

5 A panel granted special leave to appeal limited to the following grounds:

> ªThat the Federal Court erred:
>
> (a) in holding that the Freedom of Information Act 1982 (Cth) (the FOI Act) did not apply to the [appellant's] requests for access to documents made on 26 and 30 January 2011 by reason of s 6A of that Act;
>
> (b) in holding that any document that `relates to [a] substantive power or function' of the Governor General is not a document that `relates to matters of an administrative nature' within the meaning of s 6A, and is thereby excluded from the coverage of the Act; or
>
> (c) in characterizing each document the subject of the requests as a document that `relates to [a] substantive power or function' of the Governor General.º

6 The grounds show that the disposition of this appeal depends on the proper construction of s 6A of the FOI Act, set out below.

The Order of Australia

7 The Order of Australia was established by Letters Patent dated 14 February 1975, in which it was recited: ªit is desirable that there be established an Australian society of honour for the purpose of according recognition to Australian citizens and other persons for achievement or for meritorious service.º Accordingly, the Letters Patent established ªa society of honour to be known as the `Order of Australia'º. The Constitution of the Order of Australia (19) (the Constitution), as amended, provides that the Governor-General shall be the Chancellor of the Order and the Principal Companion in the General Division (20), taking precedence, after the Sovereign, over all

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(15) Kline v Official Secretary to the Governor-General (2012) 127 ALD 639.

(16) Under s 44(1) of the Administrative Appeals Tribunal Act 1975 (Cth).

(17) Sitting pursuant to the Administrative Appeals Tribunal Act 1975 (Cth), s 44(3)(b).

(18) Kline v Official Secretary to the Governor-General (2012) 208 FCR 89.

(19) Schedule to the Letters Patent.

(20) The Constitution, s 2(1).

other members of the Order (21). The Governor-General ªis charged with the administration of the Orderº (22), a reference to the Governor-General's overall responsibility in respect of the Order. The Order has a General Division, which is relevant to these proceedings, and a Military Division (23).

8 The Constitution also provides for an independent Council for the Order consisting of nineteen members (24) and for the receipt of nominations from individuals or groups in the Australian community by the Secretary of the Order (25), described as appointed by the Governor-General (26). The Council is empowered to consider nominations to the General Division (27), make recommendations to the Governor-General in relation to those nominations, and advise the Governor-General on such matters concerning the Order as the Governor-General may refer to the Council for its consideration (28). It was not contested that research and inquiry carried out in the Office of the Official Secretary formed the basis of the Council's consideration of any nomination. Apart from receiving nominations, the functions of the Secretary of the Order also include maintaining the records of the Order and the Council and performing such other functions in respect of the Order as directed by the Governor-General (29). By convention and practice, the Official Secretary is the Secretary of the Order.

9 The procedure in respect of a nomination for an appointment or award in the Order of Australia was summarised by the Full Court (30) and does not need to be repeated here, save to note that the nomination forms contain criteria and state that all nominations are ªstrictly confidentialº. Appointments to the Order and awards of the Medal of the Order are made ªwith the approval of The Sovereign, by Instrument signed by the Governor-General and sealed with the Seal of the Orderº (31). The features of the Order described above ensure that the grant of honours in the General Division is rendered independent of government and politics.

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(21) The Constitution, s 2A(1).
(22) The Constitution, s 3.
(23) The Constitution, s 1(1).
(24) The Constitution, s 4.
(25) The Constitution, s 19.
(26) The Constitution, s 6(1).
(27) Appointments to the Order and awards of the Medal of the Order in the Military Division are made by the Governor-General on the recommendation of the Minister for Defence.
(28) The Constitution, s 5.
(29) The Constitution, s 6(2).
(30) Kline v Official Secretary to the Governor-General (2012) 208 FCR 89 at 92 [11].
(31) The Constitution, s 9.

Relevant legislative provisions

10 This appeal concerns the proper construction of s 6A of the FOI Act. In particular, it concerns the meaning of the phrase ªunless the document relates to matters of an administrative natureº in s 6A(1), which identifies the only documents of the Official Secretary which are subject to the operation of the FOI Act. Before turning to the text of s 6A and the statutory scheme of which it is a part, it is convenient to say something more about the Governor-General and the statutory functions of the Official Secretary.

The Governor-General

11 Section 61 in Ch II of the *Australian Constitution* vests the executive power of the Commonwealth in the Queen and provides that such power is exercisable by her representative in Australia, the Governor-General. The grant of honours, once regarded as part of the prerogative of the Crown (32), is now encompassed in the executive power conferred by s 61 (33). These proceedings are not concerned with any of the many powers or functions of the Governor-General which involve acting on the advice of the Executive Council (34). Whilst it is accurate to describe the role of the Governor-General as having evolved since Federation (35), Governors-General have exercised a range of constitutional (36), statutory, ceremonial and community responsibilities. The Governor-General's role in respect of the Order reflects ceremonial and community responsibilities, as well as the Governor-General's constitutional position as the representative of the Sovereign in Australia.

12 Sections 6-19 of the *Governor-General Act 1974* (Cth) make provision for the office and functions of the Official Secretary. Relevantly, s 6 provides:

> ª(1) There shall be an Official Secretary, who shall be appointed by the Governor-General.

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(32) *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs [No 2]* [2008] QB 365 at 398-399 [44]-[46].

(33) *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195 at 226 [86]; *Williams v The Commonwealth* (2012) 248 CLR 156 at 185 [24] per French CJ; at 227-228 [123] per Gummow and Bell JJ; at 370 [582] per Kiefel J.

(34) As to which see *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 219 per Mason J; see also *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342.

(35) Winterton, ªThe Evolving Role of the Australian Governor-Generalº, in Groves (ed), *Law and Government in Australia* (2005), p 44; Boyce, *The Queen's Other Realms* (2008), pp 119-121, 124-138.

(36) *Constitution*, ss 5, 32, 57, 58, 60, 61, 64, 70, 72, 103, 128.

> (2) The Official Secretary, together with the staff employed under section 13, constitute the Office of Official Secretary to the Governor-General.
>
> (3) The function of the Office is to assist the Governor-General.º

13 Section 13 provides that the Official Secretary may employ a person as ªa member of the Governor-General's staffº. Section 6A(2) of the FOI Act provides that a document in the possession of a person so employed, by reason of that person's employment, is taken to be in the possession of the Official Secretary for the purposes of the FOI Act. The Official Secretary determines the remuneration of staff (37) and may terminate the employment of a member of staff (38). The Official Secretary is required to prepare and furnish an annual report on the performance of the functions and duties of the Official Secretary, which is ultimately laid before both Houses of Parliament (39). The Official Secretary also has statutory responsibilities under the Financial Management and Accountability Act 1997 (Cth). The evidence showed that the Governor-General is assisted and supported by the Office of the Official Secretary in two ways. First, the Office assists and supports the Governor-General in respect of all aspects of the Governor-General's role, which includes assisting and supporting the Governor-General's discharge of substantive powers and functions in respect of the Order. Secondly, the Governor-General is assisted and supported by the management and administration of office resources, such as financial and human resources and information technology. The distinction between the two forms of support will need to be borne in mind when approaching the task of construing s 6A(1).

The FOI Act

14 The general objects of the FOI Act are to give the Australian community access to information held by the Commonwealth Government, thereby ªpromoting better-informed decision-makingº and permitting ªincreasing scrutinyº of the Government's activities (40). Those objects are to be achieved by requiring ªagenciesº which are subject to the operation of the FOI Act (41) to ªpublish ¼ informationº and to ªprovid[e] ¼ access to documentsº (42). The powers and functions given by the FOI Act to achieve its objects are to

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(37) Governor-General Act 1974 (Cth), s 14.
(38) Governor-General Act 1974 (Cth), s 15(1).
(39) Governor-General Act 1974 (Cth), s 19.
(40) FOI Act, s 3(2).
(41) FOI Act, ss 4, 7.
(42) FOI Act, s 3(1).

be performed and exercised, as far as possible, promptly and at the lowest reasonable cost (43).

15 Relevantly, “agency” is defined to include “a Department” or “a prescribed authority”, which latter term is defined, in turn, to include the person holding, or performing the duties of, an office established by an enactment (44). Whilst neither the Governor-General, the Council for the Order, nor the Office of the Official Secretary is “a prescribed authority”, the Official Secretary is (45), and is therefore an “agency” for the purposes of the FOI Act.

16 The statutory obligations to give access to certain documents (46) and to publish certain information (47) are then qualified by specified exemptions. Relevantly, courts, specified tribunals and the Official Secretary are excluded from the statutory obligation to grant access to a document “unless the document relates to matters of an administrative nature” (48). In addition, a document of a Minister that is not an “official document of a Minister” is exempt from the operation of the FOI Act (49).

17 Division 2 of Pt II of the FOI Act (50) identifies information which agencies must publish, which includes “operational information” (51), about which more will be said later. Part III (52) governs the access which must be given to documents. Relevantly, s 11 provides that a person has a legally enforceable right to obtain access to a document of an agency, other than an exempt document. A person seeking access to a document must make a “request” (53), which may be refused if the document cannot be found or does not exist (54) or if the work involved in processing the request would substantially and unreasonably direct the resources of the agency from its other operations (55). Division 2 of Pt IV (56) provides for a diverse group of exemptions from the obligations imposed by the FOI Act. Relevantly included as

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(43) FOI Act, s 3(4).
(44) FOI Act, s 4(1).
(45) FOI Act, s 4(1), para (c) of the definition of “prescribed authority”.
(46) FOI Act, ss 11, 11A(3).
(47) FOI Act, s 7A.
(48) FOI Act, ss 5, 6, 6A(1).
(49) FOI Act, s 4(1), definition of “official document of a Minister” and s 11(1)(b).
(50) FOI Act, ss 8-8E.
(51) FOI Act, ss 7A, 8A.
(52) FOI Act, ss 11-31.
(53) FOI Act, ss 11A, 15, 16, 17.
(54) FOI Act, s 24A.
(55) FOI Act, ss 24, 24AA, 24AB.
(56) FOI Act, ss 33-47A.

exempt are “[d]ocuments containing material obtained in confidence” (57). Division 3 of Pt IV (58) contains a scheme of conditional exemptions, including documents disclosing “deliberative matter” (59), where there is a public interest to be served by non-disclosure.

18 The crucial provision for the purposes of these proceedings is s 6A (60), which provides:

> “(1) This Act does not apply to any request for access to a document of the Official Secretary to the Governor-General unless the document relates to matters of an administrative nature.
>
> (2) For the purposes of this Act, a document in the possession of a person employed under section 13 of the Governor-General Act 1974 that is in his or her possession by reason of his or her employment under that section shall be taken to be in the possession of the Official Secretary to the Governor-General.”

(Emphasis added.)

19 It should be noted that the drafting technique emphasised above is used elsewhere in the FOI Act. Sections 5 and 6 deem a federal court (61) or a specified tribunal, authority or body (62) to be a “prescribed authority”. However, the FOI Act does not apply to any request for access to a document of either a court or a specified tribunal, authority or body “unless the document relates to matters of an administrative nature”.

20 It can also be noted that Sch 1 to the FOI Act, entitled “Courts and tribunals exempt in respect of non-administrative matters”, exempts three entities from the operation of the Act. Pursuant to s 7, Pt I of Sch 2 lists agencies which are also exempt, and Pt II of Sch 2 lists agencies which are exempt from granting a right of access to particular documents.

The decision of the Tribunal

21 The Tribunal affirmed the decision of the Official Secretary to refuse the appellant access to documents which were the subject of her request. In accordance with an agreement reached between the parties, the Tribunal did not scrutinise the requested documents in detail. The Tribunal noted that if any categories of documents to which the appellant had requested access did not fall within the exception in s 6A(1), it would be necessary to consider at a further hearing whether

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(57) FOI Act, s 45.

(58) FOI Act, ss 47B-47J.

(59) FOI Act, s 47C.

(60) Introduced in 1984 by the Public Service Reform Act 1984 (Cth), s 154.

(61) See, eg, Constitution, s 71 and Federal Court of Australia Act 1976 (Cth), s 5.

(62) Encompassed by Constitution, Ch II.

such documents were exempt from disclosure by reference to some other provision of the FOI Act. The Tribunal found that the Official Secretary held some documents which fell within the categories the appellant had requested.

22 The Tribunal considered that documents generated in connection with the conferral of honours in the Order related to substantive functions of the Governor-General. Accordingly, as the documents requested “squarely relate[d] to the operation of the system of honours” (63), the Tribunal considered that none of the documents, or categories of documents, related to “matters of an administrative nature” within the meaning of s 6A(1) of the FOI Act. The Tribunal affirmed the decision under review.

The decision of the Full Court

23 The Full Court held that the relevant distinction drawn by s 6A(1) of the FOI Act, between “matters of an administrative nature” and matters which were not of such a nature, reflected a distinction between the substantive powers and functions of the Governor-General and the “apparatus” for the exercise of those powers or functions, which was merely supportive (64). The Full Court considered that the terms of the appellant's request for documents referred to a substantive power or function, namely the administration of the Order of Australia. In particular, that substantive power or function involved nominations for appointments and awards, and consideration of those nominations, which culminated in a decision of whether or not to appoint or award a particular person. It followed that the appellant's request sought access to documents relating to that substantive power, which were excluded from disclosure under s 6A(1) of the FOI Act.

24 In reviewing the Tribunal's decision and dismissing the appeal before it, the Full Court found that it was sufficient for the Tribunal to determine whether the categories of documents identified in the appellant's request were documents relating to “matters of an administrative nature”. It was not necessary, in the Full Court's view, for the Tribunal to examine each document individually as “the character of the documents was apparent from the terms of the request” (65).

Submissions

25 On behalf of the appellant it was contended that the question before the Tribunal was whether the appellant's request for access to

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(63) Kline v Official Secretary to the Governor-General (2012) 127 ALD 639 at 644-645 [24].

(64) Kline v Official Secretary to the Governor-General (2012) 208 FCR 89 at 95 [21].

(65) Kline v Official Secretary to the Governor-General (2012) 208 FCR 89 at 97 [29].

documents of the Official Secretary was capable of covering documents which related to matters of an administrative nature. If the appellant succeeded on that issue, the exclusion from the operation of the FOI Act, contained in s 6A(1), would not apply to the documents. The matter should then be remitted to the Tribunal to consider whether any (or any part) of some 400 documents (comprising about 1,500 pages), which were covered by the appellant's request, were excluded from disclosure by virtue of some provision of the FOI Act other than s 6A(1), such as provisions exempting confidential documents from disclosure. In oral argument, it was further submitted that such inspection might also show that the documents requested did indeed fall within the exclusion provided by s 6A(1), because they disclosed some aspect of the decision-making processes relevant to the Order.

26 Appealing to text, context and legislative history, it was contended for the appellant that the exception in s 6A(1) should be construed widely, such that the only documents of the Official Secretary excluded from the operation of the FOI Act were documents which disclosed any aspect of the decision-making process in respect of a particular nomination for the Order. A correlative submission was that documents unrelated to that decision-making process “prima facie would be administrative and not disclose anything confidential”. The distinction between the two categories was said to identify the boundary between what s 6A(1) excluded and what it included, for the purposes of access to documents under the FOI Act.

27 Contextual matters relied upon by the appellant in support of those submissions included the examples given to illustrate the “operational information” required to be published (66), as defined under s 8A (67), and the distinct exemption of agencies such as the Australian Security Intelligence Organisation (ASIO) from the statutory scheme under the FOI Act, compared with the inclusion of the Official Secretary. The underlying purpose and operation of ss 5 and 6 of the FOI Act were said to be analogous to the underlying purpose and operation of s 6A, elucidated, it was submitted, by Bienstein v Family Court of Australia (68).

28 Relying on some analogy between functions of the Governor-General and judicial officers, as holders of independent office, the appellant identified the public interest underpinning s 6A(1) as the public interest in the independent and impartial discharge of the

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(66) FOI Act, s 8(2)(j).

(67) These were an agency's rules, guidelines, practices and precedents relating to “decisions or recommendations affecting members of the public (or any particular person or entity, or class of persons or entities)”. See FOI Act, s 8A(1).

(68) (2008) 170 FCR 382.

substantive powers and functions of the Governor-General, as decision-maker, and in this case as decision-maker in respect of the Order. That led to a submission that secrecy or confidentiality in respect of the Governor-General's responsibilities concerning the Order was not the dominant public interest protected by s 6A, because that interest was specifically covered by other provisions in the FOI Act.

29 The competing contention of the first respondent was that the exception in s 6A(1) should be construed narrowly. It was submitted that s 6A(1) operates to oblige the Official Secretary only to give access to documents under the FOI Act which involved the management or administration of the Office. That limited purpose was said to be clear from the text of s 6A(1) and its wider context. The wider context included the circumstance that the Governor-General was excluded from all statutory obligations imposed by the FOI Act, and the Official Secretary was only covered by s 6A to the same limited extent as courts and tribunals were covered by ss 5 and 6. The exception in s 6A(1), so construed, was said to adequately serve the object of “public scrutiny” of the Government's processes and activities identified in the FOI Act (69).

30 Further, the purposive construction of the exception in s 6A(1), proffered by the first respondent, was said to be supported by a number of factors: the heterogeneous nature of the Governor-General's substantive powers and functions; the function of the Official Secretary to assist and support the Governor-General in relation to all of those diverse powers and functions; and extrinsic materials containing statements regarding the legislative purpose underpinning ss 5 and 6.

31 Generally, it was submitted that the appellant was not seeking documents which related to the management or administration of the Office, such as the office resources. Rather, the appellant was seeking documents which would elucidate the failure of her two nominations, whilst eschewing any right to be given access to any documents which disclosed the precise reasons for that failure.

“Matters of an administrative nature”

32 The task of construing s 6A(1) of the FOI Act is governed by what has been said in this Court recently about the importance of the text of a statute, the meaning and effect of which are not to be displaced by statements in secondary materials (70). A purposive construction of

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(69) FOI Act, s 3(2).

(70) Northern Territory v Collins (2008) 235 CLR 619 at 642 [99]; Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27 at 47 [47]; Saeed v Minister for Immigration and Citizenship (2010) 241 CLR 252 at 265 [33].

s 6A(1) accords with s 15AA of the Acts Interpretation Act 1901 (Cth). Further, cognate expressions in a statute should be given the same meaning unless the context requires a different result (71).

33 A preliminary consideration of considerable contextual significance is that the Governor-General is not subject to the operation of the FOI Act. Stating the same point positively, and utilising the nomenclature of the FOI Act, the Governor-General is exempted from the operation of that Act. The Governor-General does not fall within the definition of an “agency” or “prescribed authority” in the FOI Act. The Governor-General is appointed by Letters Patent, pursuant to s 2 of the Australian Constitution, and therefore does not hold office in accordance with the provisions of an enactment of the federal Parliament or an Order-in-Council (72). Similarly, the federal Parliament (73) and Justices of the High Court of Australia are not subject to the operation of the FOI Act. Further, holders of federal judicial office and holders of office in specified federal tribunals, authorities and bodies are expressly exempted from the operation of the provisions of the FOI Act (74). In summary, certain individuals, including the Governor-General, who hold independent offices pursuant to the Australian Constitution or a federal enactment, requiring the impartial discharge of the powers and functions of such office, are not subject to the operation of the FOI Act.

34 Thus the processes and activities of government, which are opened to increased public scrutiny by the operation of the FOI Act, do not include those associated with the exercise of the Governor-General's substantive powers and functions, many (even most) of which are exercised in public. Similarly, the FOI Act does not expose to public scrutiny the discharge of the substantive powers and functions of judicial officers or holders of quasi-judicial office to the extent that they have not been discharged in an open court or a public forum. Independence from government and the public is important in relation to the exercise of the various responsibilities of the Governor-General, including, but not limited to, the making of decisions. Furthermore, freedom from interference or scrutiny by members of the public (or other branches of government) is an essential aspect of the making of decisions in relation to the General Division of the Order.

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(71) Registrar of Titles (WA) v Franzon (1975) 132 CLR 611 at 618 per Mason J.

(72) FOI Act, s 4(1), definition of “prescribed authority”.

(73) Documents in the possession of a Minister in his or her capacity as a member of Parliament are not subject to the operation of the FOI Act: see FOI Act, s 11(1)(b) and the definition of “official document of a Minister” in s 4(1).

(74) FOI Act, ss 5(1)(b), 6(b).

35 The first matter of textual significance is that the Official Secretary is “a prescribed authority” subject to the operation of the FOI Act as a person holding, or performing, the duties of that office under the Governor-General Act 1974 (Cth).

36 The next matter of textual significance is that s 6A(1), and ss 5(1) and 6, reveal a plain intention to constrain the extent to which the FOI Act pursues its purposes and objects against persons (or entities) providing administrative support to individuals who hold independent offices and are not subject to the operation of the FOI Act. The Official Secretary, like courts and other bodies governed by the FOI Act, is only required to grant access to a limited class of documents, characterised by a relationship between the document and subject matter of an “administrative nature”. The meaning of that statutory characterisation cannot be determined without some reference to the FOI Act as a whole (75), and the circumstance that the documents to which access must be granted are an exception to the position that the Governor-General is not subject to the operation of the FOI Act.

37 The FOI Act does not pursue its objects, as legislative purposes, at any cost (76). The statutory scheme is complex in achieving a balance between the exposure of some government processes and activities to increased public participation and scrutiny, by making information freely available to persons on request, and exempting other government processes and activities from public participation and scrutiny, in order to secure a competing or conflicting public interest in non-disclosure. A clear example is the exemption of ASIO from the operation of the FOI Act.

38 The Governor-General, in common with judges, takes an oath to undertake his or her functions without fear or favour. However, as mentioned, the position of the Governor-General calls for the exercise of a multiplicity of powers and functions, many (but not all) of which are undertaken in public, and some (but few) of which involve making decisions other than on the advice of a Minister or the Executive Council.

39 The responsibility of the Governor-General for the administration of the Order is a sui generis role involving processes and decision-making triggered by the nomination of a person for an appointment or award. The proper independent discharge of the Governor-General's responsibility for the administration of the Order requires full and frank

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(75) Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355 at 381 [69].

(76) Carr v Western Australia (2007) 232 CLR 138 at 143 [5], cited with approval in Construction Forestry Mining and Energy Union v Mammoet Australia Pty Ltd (2013) 248 CLR 619 at 632-633 [40]-[41].

assistance to the Governor-General from the Council for the Order. The Council, in turn, requires full and frank assistance from the Office of the Official Secretary. The possibilities of giving offence to failed nominees, defamation, or political controversy in the administration of the General Division of the Order are all avoided by the confidentiality of the selection process, which culminates in public announcement, in due course, of appointments and awards in the Order. The Office supports the Council and the Governor-General in completing the selection process.

40 However, the task of statutory construction here is not resolved by asking whether any particular document relates to processes and activities “supporting” the role of the Governor-General, because documents answering that description fall within both the exclusion, and the exception, in s 6A(1).

41 The “non-application” of the FOI Act to requests for access to documents of the Official Secretary, as stated in s 6A(1), inevitably refers to a class of documents relating to matters which are not “of an administrative nature”. In conformity with the exclusion of the Governor-General from the operation of the FOI Act, those documents relate to the discharge of the Governor-General's substantive powers and functions. By contrast, the exception of a class of document which relates to “matters of an administrative nature” connotes documents which concern the management and administration of office resources, examples of which were given above (77). This is a common enough connotation of the epithet “administrative” (78). The Full Court apprehended this distinction in s 6A(1) correctly, referring to the latter class of documents as relating to the office “apparatus” which supported the exercise of the Governor-General's substantive powers and functions.

42 The preceding construction of s 6A(1) governs its operation and application in relation to the range of diverse powers and functions of the Governor-General in respect of which the Official Secretary may be called upon to provide assistance and support. The limited construction adopted by the Full Court of the class of documents relating to “matters of an administrative nature” is appropriate because s 6A(1) must apply equally to powers and functions whose exercise is of the greatest sensitivity, requiring high levels of confidentiality, as it must apply to powers and functions of lesser sensitivity. The correctness of the construction of s 6A(1) adopted by the Full Court is illustrated by the specific case of its application in relation to the Order. In that

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(77) See [13].

(78) Burns v Australian National University (1982) 61 FLR 76 at 83-84; 40 ALR 707 at 713-714.

application it strikes a balance between the public interest in maintaining an Australian system of honours and the public interest in efficient public administration, which is supported by the scrutiny for which the FOI Act provides.

43 The first public interest or purpose is achieved by the exclusion from disclosure of documents relating to non-administrative matters. In relation to the Order, these must include all unpublished documents associated with the administration (that is, the operation) of the Order, involving, as it does, a confidential selection process in respect of all nominations received within a particular period.

44 The second public interest and purpose is achieved by exposing to public scrutiny documents of the Official Secretary which fall within the exception. The operation of the exception in relation to the Order must be governed by its general construction in application to that particular case. So applied, the exception can only be read as referring to documents relating to the management and administration of the resources of the Office and is consistent with the general non-application of the FOI Act to requests for access to documents of the Official Secretary.

45 The analogous exclusion of federal courts and specified tribunals, authorities and bodies from the general operation of the FOI Act, except for documents which relate to matters of an administrative nature, also involves a balance of conflicting public interests. There is a long-recognised public interest in the protection of judicial independence to enable holders of judicial office to exercise authority without fear or favour — judges work in public, are obliged to give reasons, and are subject to appellate review (79). However, not every action undertaken by a judge in the discharge of the substantive powers and functions of adjudication is undertaken in public. For example, revision of an unrevised transcript of proceedings heard in open court may occur in chambers. That task is referable to the exercise of judicial, rather than administrative, powers and functions (80).

46 Similar policy considerations apply in respect of specified tribunals, authorities or bodies. Holders of office in such bodies also exercise authority without fear or favour. Determinations are made in public, but distinct conciliatory functions may depend for their success on confidentiality so as to ensure full and frank private discussions designed to effect the settlement of, for example, an industrial dispute.

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(79) Fingleton v The Queen (2005) 227 CLR 166 at 186 [38]-[39] per Gleeson CJ; Herijanto v Refugee Review Tribunal (2000) 74 ALJR 698 at 700-701 [13]-[16]; 170 ALR 379 at 382-383 per Gaudron J.

(80) Loughnan v Altman (1992) 39 FCR 90.

47 Accordingly, the only documents which courts and specified tribunals, authorities and bodies are obliged to open to increased public scrutiny are those documents relating to the management and administration of registry and office resources.

48 Whilst the proper construction of s 6A(1) plainly emerges from a consideration of the textual and contextual matters discussed, that construction is fortified by resort to statements in relevant secondary materials.

49 In brief, s 6A(1) of the FOI Act, which was inserted in 1984, drew upon the language of ss 5(1) and 6, which were included in the FOI Act as originally enacted. In the relevant parliamentary debates, Senator Evans described the operation of ss 5 and 6 and explained their object. He said (81):

> “[C]ourts, judicial offices, certain industrial tribunals and their registries … are not exempt from the operation of the [FOI] Act so far as their administrative procedures, properly so-called, are concerned.”

50 The Senator went on to explain that the inclusion of ss 5 and 6 would secure a legitimate public interest in “efficient administration” and was not intended to intrude on the independence of the judiciary (82).

51 In *Bienstein* (83), the respondent denied the applicant's request for access to all documents relating to the case management of her matters before it. It was decided in *Bienstein* that ss 5 and 6 of the FOI Act were not intended to extend so far as requiring the giving of access to documents that would put judicial independence, or the independence of other institutions, at risk (84). However, it was also decided that the verbiage “relates to matters of an administrative nature”, as it occurs in s 5 of the FOI Act, can include documents relating to judicial functions and decision-making. The next step in the reasoning was that documents which would not impinge on the independence essential to the exercise of judicial or decision-making functions were documents relating to matters of an administrative nature (85). That reasoning was relied on by the appellant to support the proposition that the only documents of the Official Secretary which were excluded from disclosure under s 6A(1) were documents relating to the substantive powers and functions of the Governor-General *as decision-maker*. That aspect of the reasoning in *Bienstein* is erroneous. First, the references

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(81) Australia, Senate, *Parliamentary Debates* (Hansard), 7 May 1981, p 1768.
(82) Australia, Senate, *Parliamentary Debates* (Hansard), 7 May 1981, p 1768.
(83) (2008) 170 FCR 382.
(84) (2008) 170 FCR 382 at 400 [54].
(85) (2008) 170 FCR 382 at 399-400 [53]-[54].

in the extrinsic materials to examples of “administrative matters”, such as the number of sitting days of a court, were misread in *Bienstein* as suggesting that even documents held by a court which related to individual cases might be characterised as documents “relating to ‘matters of an administrative nature’” (86). Secondly, it was decided that since some powers and functions of a judicial officer were administrative in nature, those administrative powers and functions which were not closely related to judicial independence would not need protection from the operation of the FOI Act (87). However, that reasoning, deriving from the different factual circumstances in *Fingleton v The Queen* (88), accords no weight to the circumstance that a judicial officer is not subject to the operation of the FOI Act. Only a registry or office of a court or specified tribunal is subject to the operation of the FOI Act, and then only in respect of documents relating to administrative matters. The approach in *Bienstein*, relied on by the appellant, is not apt for application to s 6A(1). That approach would not accord proper weight to the circumstance that the Governor-General is not subject to the operation of the FOI Act and would result in an impractical and unwieldy approach to the application of s 6A(1), contrary to the provision that public access to information is to be achieved promptly and at the lowest reasonable cost (89).

Application of s 6A(1) to the appellant's request

Correspondence and file notes relating to nominations

52 Correspondence and file notes relating to the appellant's nominations are directly related to the Governor-General's exercise of substantive powers and functions in respect of the Order. These are excluded from disclosure as they do not fall within the exception in s 6A(1) of the FOI Act.

Criteria for making awards

53 Relevant criteria for the making of awards are explained in the nomination form, which is a document that is available to the public.

Working manuals and policy guidelines

54 To the extent that relevant criteria are further explained in working manuals or policy guidelines, the evidence showed that those documents were used in processes and activities concerned with the Governor-General's exercise of substantive powers and functions in respect of the Order. Those are excluded from disclosure, as they do not fall within the exception in s 6A(1).

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(86) (2008) 170 FCR 382 at 399 [53].
(87) (2008) 170 FCR 382 at 403 [67].
(88) (2005) 227 CLR 166.
(89) FOI Act, s 3(4).

55 It has been mentioned that s 8 of the FOI Act obliges publication of an agency's ªoperational informationº, being information held by the agency to assist the agency in ªmaking decisions or recommendations affecting members of the publicº (90). The appellant drew comfort from the circumstance that an agency's ªguidelinesº and ªpractices and precedents relating to [the agency's] decisions and recommendationsº are cited as examples of the kinds of documents covered by the expression ªoperational informationº. However, the Governor-General's information relevant to decisions made in respect of the Order is not subject to the operation of the FOI Act. Further, the Official Secretary does not make decisions or recommendations affecting members of the public; recommendations in respect of the General Division of the Order are made by the Council for the Order and ultimate decisions as to the appointment or the making of awards repose with the Chancellor of the Order, the Governor-General.

Documents relating to review processes

56 No documents relating to review processes are in existence, but the Official Secretary accepted that if such documents were brought into existence, they would be available to the public without recourse to the FOI Act.

Conclusion and orders

57 There was no error in the Tribunal's decision. Accordingly, the grounds of appeal in respect of the decision of the Full Court were not made out. The appeal should be dismissed with costs.

GAGELER J.

Introduction

58 The *Freedom of Information Act 1982* (Cth) (the FOI Act) confers rights to obtain, on request, access to documents in the possession of ªagenciesº as well as official documents in the possession of Ministers of State of the Commonwealth. Departments of State of the Commonwealth and ªprescribed authoritiesº are agencies. Most bodies established by Acts of the Commonwealth Parliament are prescribed authorities, as are most persons holding offices established by Acts of the Commonwealth Parliament.

59 Courts (but not judges) are deemed to be prescribed authorities. Specified industrial bodies such as the Australian Industrial Relations Commission (but not their members) are similarly deemed to be prescribed authorities. The Official Secretary to the Governor-General, by virtue of holding an office established by the *Governor-General Act 1974* (Cth), is also a prescribed authority. The Governor-General is not.

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(90) FOI Act, s 8A.

60 The FOI Act is expressed (in ss 5, 6 and 6A respectively) to have no application to a request for access to a document in the possession of a court, a specified industrial body or the Official Secretary ªunless the document relates to matters of an administrative natureº.

61 The question of statutory construction on which this appeal turns is: when is a document a document that ªrelates to matters of an administrative natureº?

Legislative history

62 In answering that question, ªa page of history is worth a volume of logicº (91).

63 Sections 5 and 6 were in the FOI Act as originally enacted in 1982. They were inserted into the Bill for the FOI Act by amendment in the Senate in 1981 (92). The purpose of the amendment was to give effect to recommendations made by the Senate Standing Committee on Constitutional and Legal Affairs in 1979 (93).

64 The Senate Standing Committee had recommended amending what had been proposed in the original form of the Bill as a wholesale exemption of courts and industrial bodies from the FOI Act so as to limit the exemption in respect of courts ªto documents of a non-administrative characterº (94) and in respect of industrial bodies to ªtheir non-administrative functions onlyº (95). Explaining the reasons for its recommendation to limit the exemption in respect of courts, the Senate Standing Committee said (96):

> ªThere is obviously very good reason for governments not imposing requirements which would interfere with the independence of the judiciary and the proper administration of justice. It would not be appropriate for freedom of information legislation to

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(91) cf *New York Trust Co v Eisner* (1921) 256 US 345 at 349.

(92) Australia, Senate, *Parliamentary Debates* (Hansard), 7 May 1981, pp 1767-1776.

(93) Australia, Senate Standing Committee on Constitutional and Legal Affairs, *Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978, and aspects of the Archives Bill 1978* (1979), pp 158 [12.29]-[12.30], 159-160 [12.33]-[12.34].

(94) Australia, Senate Standing Committee on Constitutional and Legal Affairs, *Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978, and aspects of the Archives Bill 1978* (1979), p 158 [12.30].

(95) Australia, Senate Standing Committee on Constitutional and Legal Affairs, *Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978, and aspects of the Archives Bill 1978* (1979), p 160 [12.34].

(96) Australia, Senate Standing Committee on Constitutional and Legal Affairs, *Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978, and aspects of the Archives Bill 1978* (1979), p 158 [12.29].

> be the vehicle for obtaining access, where this was otherwise unavailable, to court documents filed by parties to litigation. Nor would it be appropriate for this legislation to operate in any way as a substitute or supplement for discovery procedures presently administered by the courts.”

The Senate Standing Committee continued (97):

> “However, there are other documents of a more clearly administrative character associated with the functioning of registries and collection of statistics on a host of matters associated with judicial administration which, equally clearly, should be opened up to public gaze. These would include such matters as the number of sitting days, the number of cases determined, the number of cases withdrawn, the cases which were subsequently appealed and the occasions on which bail was awarded. The very existence within the Commonwealth Attorney-General's Department of a Division of Judicial Administration is testimony to the ability to distinguish between the judicial and administrative aspects of the operation of the courts.”

65 What was the Division of Judicial Administration within the Attorney-General's Department doing in 1979 to allow its “very existence” to be “testimony to the ability to distinguish between the judicial and administrative aspects of the operation of the courts”? The answer was apparent from the Annual Report of the Attorney-General's Department (98). In anticipation of the enactment of the *High Court of Australia Act 1979* (Cth), the Division was providing “administrative assistance in the development of an independent system of judicial administration” as well as providing “assistance in the detailed planning, furnishing and the general fitting out of the High Court building in Canberra and in matters associated with the move of the High Court to Canberra” (99). The Attorney-General's Department was in the meantime providing staff and “management services” for the Sydney and Melbourne registries of the High Court as well as “registry services”, in addition to providing ongoing “management services and general administrative assistance” to the Federal Court as well as staffing and maintaining registries of the Family Court (100).

66 With the commencement of the *High Court of Australia Act 1979* (Cth) in 1980, it became the responsibility of the High Court itself to

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(97) Australia, Senate Standing Committee on Constitutional and Legal Affairs, *Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978, and aspects of the Archives Bill 1978* (1979), p 158 [12.29].

(98) Australia, Attorney-General's Department, *Annual Report 1978-1979* (1979).

(99) Australia, Attorney-General's Department, *Annual Report 1978-1979* (1979), p 43.

(100) Australia, Attorney-General's Department, *Annual Report 1978-1979* (1979), p 44.

ªadminister its own affairsº (s 17(1)) and for that purpose the High Court was given power ªto do all things ¼ necessary or convenient to be done for or in connection with the administration of its affairsº including, without limitation, power to: enter into contracts; acquire, hold and dispose of property; take on hire, exchange, and accept on deposit or loan, library material and also furnishings, equipment and goods needed for the purposes of the Court; and control and manage any land or building occupied by the Court and any adjacent land or building that is part of the precincts of the Court (s 17(2)).

67 Speaking in favour of the relevant amendment to the Bill for the FOI Act in the Senate in 1981, Senator Evans drew attention to the then recent enactment of the High Court of Australia Act 1979 (Cth) when he said (101):

> ªThe utility, or indeed the necessity, for an exemption for administrative questions of this kind is in fact made more obvious by the recent change in the legislation governing the High Court of Australia. These sorts of administrative questions are now clearly within the Court's jurisdiction, whereas previously the majority of administrative matters of this kind were performed by or through the Attorney-General's Department and as such were the subject of ordinary access procedures so far as information was concerned.º

68 The word ªadministrativeº was obviously being used by the Senate Standing Committee in 1979 and by Senator Evans in 1981 in a sense narrower and more specific than the same word had earlier been used in the Administrative Decisions (Judicial Review) Act 1977 (Cth) as part of the definition of a decision to which that Act was to apply. The focus of the amendment to the Bill for the FOI Act recommended in 1979 and implemented in 1981 was not on the separation of judicial power from executive power ± after all, the same distinction between ªadministrativeº and ªnon-administrativeº was being employed in respect of industrial bodies which did not exercise judicial power. The focus was more prosaically on ensuring inclusion within the scope of the FOI Act of documents in the possession of courts and industrial bodies which related to matters of organisation and management of the kind which in 1979 were still being provided to the High Court by the Division of Judicial Administration within the Attorney-General's Department and of the kind which by 1981 had been taken over by the High Court itself with the commencement of the High Court of Australia Act 1979 (Cth) in 1980.

69 Section 6A was then inserted into the FOI Act two years later by the Public Service Reform Act 1984 (Cth) (102). Its insertion was

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(101) Australia, Senate, Parliamentary Debates (Hansard), 7 May 1981, p 1768.

(102) Section 154 of the Public Service Reform Act 1984 (Cth).

contemporaneous with, and consequential upon, the amendment by the *Public Service Reform Act 1984* (Cth) of the *Governor-General Act 1974* (Cth) which created the statutory office of Official Secretary (103). Immediately before those amendments in 1984, the Official Secretary had been an officer of the Australian Public Service seconded to the Governor-General's staff from the Department of the Prime Minister and Cabinet (104).

70 The identity of the language used in s 6A of the FOI Act and the language used in ss 5 and 6 of the FOI Act suggests that the same distinction was being drawn in 1984 to govern inclusion within the scope of the FOI Act of documents in the possession of the Official Secretary as had earlier been drawn to govern inclusion within the scope of the FOI Act of documents in the possession of a court or industrial body.

Construction

71 The Full Court of the Federal Court, in the decision under appeal, held the distinction drawn by s 6A of the FOI Act to be between “substantive powers and functions” and the “apparatus” supporting the exercise or performance of those substantive powers and functions (105).

72 The legislative history compels the conclusion that that is not only a correct distillation of the distinction drawn by s 6A of the FOI Act, but also a correct distillation of the distinction drawn by ss 5 and 6 of the FOI Act. *Bienstein v Family Court of Australia* (106), which reached a different conclusion in relation to s 5 of the FOI Act, was wrongly decided.

73 Sections 5, 6 and 6A of the FOI Act draw a dichotomy between documents which relate to “administrative matters” and those which do not. The word “administrative” is used in each of those sections in the primary sense of “[p]ertaining to, or dealing with, the conduct or management of affairs” (107).

74 The relevant affairs, or “matters”, to which each of ss 5, 6 and 6A of the FOI Act refers, are distinct from, but incidental to, the exercise or performance of substantive powers or functions in the sense of providing logistical support (or infrastructure or physical necessities or

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(103) Section 141 of the *Public Service Reform Act 1984* (Cth), inserting s 6 of the *Governor-General Act 1974* (Cth).

(104) Australia, Senate, *Public Service Reform Bill 1984*, Explanatory Memorandum, p 47.

(105) *Kline v Official Secretary to the Governor-General* (2012) 208 FCR 89 at 95 [21].

(106) (2008) 170 FCR 382.

(107) *Oxford English Dictionary*, 2nd ed (1989), vol 1, p 163.

resources or platform) for the exercise or performance of those substantive powers or functions to be able to occur.

75 The distinction sought to be drawn by the appellant between documents which ªrelate to administrative tasks ¼ to support or assist the exercise of ¼ powers or the [performance] of ¼ functionsº, on the one hand, and documents which answer that description but which would ªdisclose the decision-making process involved in the exercise of those powers or performance of those functions in a particular matter or contextº, on the other, is too fine to be sustained. The true distinction is more robust and more practical.

76 Matters which do not relate to the provision of logistical support do not become ªadministrativeº merely because they are in some way preparatory to an exercise of a substantive power or to the performance of a substantive function.

77 The Governor-General has many functions, some of which are ceremonial. Were, for example, the Governor-General to travel to a remote location to attend a ceremony in her official capacity, documents relating to travel by and accommodation for the Governor-General and her entourage would relate to matters of an administrative nature within the meaning of s 6A and would therefore fall within the scope of the FOI Act. Documents relating to the Governor-General's participation in the ceremony, whether generic or specific and whether prepared or received by the Governor-General or by the Official Secretary before or after the Governor-General's participation in the particular ceremony, would not relate to matters of an administrative nature within the meaning of s 6A and would therefore fall outside the scope of the FOI Act.

Application

78 To the extent that they remain material to this appeal, the categories of documents in the possession of the Official Secretary to which the appellant sought access comprised: correspondence held by the Official Secretary in relation to the appellant's nominations of a named person for an Order of Australia; working manuals, policy guidelines and criteria related to the administration of the Order of Australia; documents relating to review processes; and ªfile notes from the Secretariatº (being in fact the Office of Official Secretary) concerning the nominations.

79 All of those categories on their face relate to the exercise of the substantive function which the Governor-General performs as Chancellor of the Order of Australia pursuant to Letters Patent issued by the Queen (108). All relate to the ªadministrationº of the Order of

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(108) Constitution of the Order of Australia.

Australia within the meaning of the Letters Patent (109), but none relates to matters of an “administrative nature” within the meaning of s 6A of the FOI Act. None, therefore, falls within the scope of the FOI Act.

80 The Full Court of the Federal Court rightly held that the Administrative Appeals Tribunal was correct in law in so finding.

Conclusion

81 For these reasons, the appeal should be dismissed.

Appeal dismissed with costs

Solicitors for the appellant, Bartley Cohen.

Solicitor for the first respondent, Australian Government Solicitor.

JDM

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(109) Section 3 of the Constitution of the Order of Australia.