IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

NO B47 OF 2013

BETWEEN:

KAREN KLINE
Appellant

OFFICIAL SECRETARY TO THE GOVERNOR GENERAL
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

APPELLANT'S SUBMISSIONS

APPELLANT'S SUBMISSIONS
Filed on behalf of the Appellant
Form 27A
Dated: 20 September 2013
Ref: Mr Paul Burgess

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PART I PUBLISHABLE ON THE INTERNET

1. These submissions are in a form suitable for publication on the internet.

PART II STATEMENT OF THE ISSUES

2. The appellant made a request to the respondent (**the Official Secretary**) for access to certain categories of documents under the *Freedom of Information Act 1982* (Cth) (**the FOI Act**), including:

   (a) all correspondence held by the Official Secretary in relation to the appellant's 2009 nomination of a person for an Order of Australia;

   (b) working manuals, policy guidelines and criteria related to the administration of awards within the Order of Australia;

   (c) documents relating to review processes, i.e., right of appeal in cases of maladministration;

   (d) all file notes from the Secretariat contained in the appellant's 2007 and 2009 nominations of her nominee for an Order of Australia.

3. The issue on the appeal is whether the documents, or categories of documents, the subject of the appellant's request were capable of being characterised as documents that "relate to matters of an administrative nature" for the purposes of s 6A of the FOI Act.

4. In summary, the appellant contends that the documents or categories of documents the subject of the request were capable of being characterised as documents that relate to matters of an administrative nature because the documents or categories on their face:

   (a) relate to administrative tasks performed within the Office of the Official Secretary; and

   (b) are capable of covering documents that do not disclose or involve the deliberative or decision-making process engaged in by the Council of the Order of Australia, or by the Governor-General, in respect of the appellant's 2007 and 2009 nominations.

PART III SECTION 78B NOTICES

5. The appellant has considered whether any notice should be given under s 78B of the *Judiciary Act 1903* (Cth), and has concluded that no such notice should be given.

PART IV JUDGMENT OF COURT BELOW

6. The reasons for judgment of the Full Court of the Federal Court have been reported as *Kline v Official Secretary to the Governor-General and Another* (2012) 208 FCR 89.

PART V RELEVANT FACTS

10 ***The Order of Australia, and the Official Secretary's functions***

7. The Order of Australia is constituted and administered pursuant to the Constitution of the Order of Australia originally made under Letters Patent dated 14 February 1975 and since amended. Under the Constitution:

   (a) the Governor-General is the Chancellor of the Order, and is thereby charged with the administration of the Order (cll 2(1) and 3);

   (b) the Governor-General makes awards under the Order (cl 9);

   (c) there is established a Council of the Order (cl 4);

   (d) the Council's functions include: (i) to consider nominations of Australian citizens for appointment to the order; (ii) to make
20 recommendations to the Governor-General in relation to those nominations; and (iii) to advise the Governor-General on such other matters concerning the Order as the Governor-General may refer to the Council for consideration (cl 5);

   (e) there is a Secretary of the Order, who is appointed by the Governor-General (cl 6(1));

   (f) the Secretary's functions include: (i) to maintain the records of the Order and of the Council; and (ii) to perform such other functions in respect of the Order as the Governor-General directs (cl 6(2)); and

(g) nominations of Australian citizens for appointment to the Order as a member in the General Division are made to the Secretary for consideration by the Council (cl 19(1)).

8. The procedure in respect of a nomination was summarised by the Full Court as follows:[1]

> [W]hen a nomination for the making of an appointment and award in the Order of Australia is received by the Australian Honours and Awards Secretariat (part of the Honours and Awards Branch of the Office of the Official Secretary to the Governor-General), the nomination is registered, an acknowledgement sent to the nominator, and then Secretariat staff conduct further research and contact relevant referees, both those suggested by the nominator and those sourced directly by the Secretariat. The purpose of the research is to confirm and verify information supplied by the nominator and to provide additional information that may be relevant to the Council, for its consideration. Once research is completed, nominations are presented to the Council for consideration. Papers are sent to the Council before the meetings which are held twice a year. The outcome of a nomination can either be an appointment or award recommended, no appointment or award recommended or deferral of the nomination for consideration at a later meeting. The Council makes recommendations for appointments and awards to the Governor-General as Chancellor of the Order of Australia. Once the Governor-General has considered and decided those to be appointed or awarded in the Order, congratulatory letters are sent to the successful recipients. Each Australia Day and on the Queen's Birthday an honours list is gazetted in the Commonwealth of Australia Gazette and the awards are publicly announced. There was evidence that the Secretariat staff used a manual to assist them in their work.

9. The sole statutory function of the Official Secretary is to assist the Governor-General.[2] The Official Secretary is an "agency" for the purposes of the FOI Act.[3]

The appellant's request for documents

10. In 2007, and then again in 2009, the appellant nominated the same person for appointment to the Order. Each nomination was unsuccessful.

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1 At [11] of the reasons.
2 Section 6(3) of the *Governor-General Act 1974* (Cth).
3 See the definition of "agency" and paragraph (c) of the definition of "prescribed authority" in s 4(1) of the FOI Act.

11. On 26 January 2011, the applicant made a request to the Official Secretary under s 15 of the FOI Act for access to certain categories of documents, as set out below (emphasis added):[4]

> 1. My nomination dated 31 March 2007 of [the nominee] for an Order of Australia. This includes the nomination form and all accompanying material i.e. testimonial, newspaper articles, and referee details. A list of which of my nomination documents were presented to Council [in] August 2008.
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> 2. My 2009 nomination of [the nominee] for an Order of Australia. This includes nomination forms and accompanying material sent in 2009 and 2010 i.e. journal articles, referee reports, submissions and updates. All correspondence held by the Official Secretary in relation to this nomination. A list of which of my nomination documents were presented to Council [in] August 2010.
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> 3. Working manuals, policy guidelines and criteria related to the administration of the awards with The Order of Australia.
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> 4. Documents relating to review processes i.e. right of appeal in cases of maladministration.

On 30 January 2011, the appellant enlarged her request to include the following additional category of documents:

> 5. All file notes from the Secretariat contained in my nominations of 2007 and 2009.

12. On 25 February 2011, the Deputy Official Secretary refused the appellant's requests, without examining the relevant documents. In relation to the "lists" described in categories 1 and 2 of the appellant's requests, the Deputy Official Secretary indicated that no such documents existed. In relation to the other categories of documents, the Deputy Official Secretary indicated that "no documents of an administrative nature" existed.[5]

13. The Information Commissioner affirmed the decision of the Deputy Official Secretary without examining the relevant documents. The appellant sought review by the Administrative Appeals Tribunal (**the Tribunal**). The Tribunal conducted a hearing on the preliminary question "whether the terms of the [appellant's] request for access to documents are capable of covering documents that relate to the matters of an administrative nature within the

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4 The underlining has been added to identify the relevant documents still subject to the appellant's request for access under the FOI Act.

5 The Deputy Secretary did provide the appellant with the nomination forms and accompanying material described in categories 1 and 2 of her request, but expressly on the basis that he did so "outside" the Act.

meaning of s 6A of the **[FOI Act]**". The Tribunal ruled that they were not so capable, and accordingly affirmed the decision of the Information Commissioner, without scrutinising the documents in detail.[6] The Tribunal accepted that if the documents did relate to matters of an administrative nature, then it would be necessary at a further hearing to consider the applicability of the exemptions in Pt IV of the FOI Act. The Tribunal member stated:[7]

> [D]ocuments generated in connection with the conferral of honours do not ordinarily relate to matters of an administrative nature. They relate to substantive functions of the Governor-General. While it is possible to conceive of exceptions to this general proposition (correspondence with the supplier of medals and insignia, or with a caterer providing refreshments at the awards ceremony come to mind), the documents in question do not relate to this sort of matter. If the Act was intended to apply to documents generated in connection with a wider view of the Governor-General's functions, it would have done so using clear words.
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> ...
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> I indicated at the outset of these reasons that a small number of documents held by the Official Secretary fall within the categories identified by Ms Kline and at issue in this case. The documents in question squarely relate to the operation of the system of honours. I do not accept those documents, or any part of them, answer the description of a "document [that] relates to matters of an administrative nature" within the meaning of s 6A. I would then affirm the decision under review.

14. The appellant appealed from the Tribunal's decision under s 44(1) of the *Administrative Appeals Tribunal Act 1975* (Cth) (the **AAT Act**), and applied to have the appeal determined by a Full Court, on the basis that it raised issues of wide public importance. Subsequently, the Chief Justice of the Federal Court made a decision under s 44(3) of the AAT Act for the appeal to be heard by a Full Court.

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6 *Kline v Official Secretary to the Governor-General* (2012) 127 ALD 639.
7 At 643 [18] and 644 [24].

The Full Court's judgment

15. On 19 December 2012, the Full Court dismissed the appeal. The critical part of its reasoning is set out in [21] and [22] of its judgment:[8]

> [21] In our view the relevant distinction being drawn by s 6A is between the substantive powers and functions of the Governor-General, on the one hand, and the apparatus for the exercise of that power or function, matters merely supportive of that power or function, on the other. The first respondent accepted, and we agree, that documents dealing with staffing arrangements within the Office, the costs of running the Office, or statistics about the activities undertaken by the Office, could all be the subject of a request for access to which the *FOI Act* would apply.
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> [22] The terms of the present requests by the applicant show that the substantive power or function in question was the administration of the Order of Australia, in particular nominations for appointment and the consideration of those nominations culminating in the decision to appoint or not appoint a particular person. The applicant's requests were for access to documents of the Official Secretary which related to that substantive power or function (including the working manuals, policy guidelines and criteria, review processes and file notes concerning nominations), and not to documents relating to matters of an administrative nature. We therefore reject the applicant's submission that any document which contains information bearing upon the Office of the Official Secretary's conduct of the work antecedent to the consideration by the Council of its recommendation to the Governor-General contains information about matters of an administrative nature.

16. The Full Court held that a document may be characterised as "relating to matters of an administrative nature" within the meaning of s 6A if it relates to the "apparatus" that is supportive of the exercise of the Governor-General's "substantive powers and functions", but that it loses that characterisation if it relates to a substantive power or function of the Governor-General.

17. In arriving at that conclusion the Full Court saw only a "faint analogy"[9] with the Federal Court's decision in *Bienstein v Family Court of Australia*[10], which

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8 (2012) 208 FCR 89 at 95 [20]-[21].

concerned the interpretation of s 5 of the Act. The Full Court considered that "the exception in s 6A is referable to a different and distinct public interest" to the same exception in ss 5 and 6, without identifying the "different and distinct" public interest.[11]

PART VI ARGUMENT

Summary

18. The Full Court's construction is not supported by the text or context of s 6A, or by the legislative history of ss 5, 6 and 6A, and does not "best achieve the purpose or object" of s 6A (cf. s 15AA of the *Acts Interpretation Act 1901* (Cth).

19. The appellant contends that, in the context of a request under the FOI Act that relates to a matter involving a decision-making or deliberative process the phrase "documents relating to matters of an administrative nature" was intended to have a cognate meaning in ss 5, 6 and 6A, which provided an exception to the FOI Act in order to protect the same public interest. That public interest was that the FOI Act was not to intrude upon or interfere with the independence of the deliberative or decision-making process in the relevant courts and tribunals and of the Governor-General.[12]

20. The documents excluded under ss 5, 6 and 6A are documents that do not relate to matters of an administrative nature. The legislative history set out below establishes that the exclusion was to prevent disclosure of documents under the FOI Act that intrude upon or interfere with the independence of the decision-making or deliberative process in the institutions covered by ss 5, 6 and 6A. Accordingly, documents brought into existence to assist or support that process, but which do not disclose the process followed by the decision-maker in a particular case, are able to be characterised as documents that relate to matters of an administrative nature, and are therefore subject to the Act, including its exemptions from disclosure.

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9 (2012) 208 FCR 89 at 96 [24].

10 (2008) 170 FCR 382.

11 (2012) 208 FCR 89 at 96 [26]. However, in course of the Special Leave application, counsel for the Official Secretary articulated the public interest underlying s 6A as "maintaining the confidentiality of the functions and the councils of the Crown": [2013] HCA Trans 180 at 9-10.

12 The present context involves a decision-making or deliberative process in respect of the Order of Australia. Although the issue does not arise in the appeal, in so far as a request under the FOI Act relates to a non-deliberative function of the Governor-General an analogous approach may be taken.

The proper construction of s 6A

21. Section 6A of the Act distinguishes between two categories of documents based on their character.[13] Two questions of construction arise. First, what is meant by "matters of an administrative nature"? And second, what degree of connection is required for a document to "relate to" such matters?

22. An understanding of the object underlying s 6A gives content to the degree of the connection required for a document to be characterised as a document that "relates to" matters of an administrative nature. That expression gathers meaning from its context,[14] and therefore has a "chameleon-like quality".[15] What degree of connection must be shown between the document and "matters of an administrative nature" is determined having regard to the subject matter of the inquiry, the legislative history, and the facts of the case.[16]

23. The relevant ordinary meaning of the word 'administrative' in the Shorter Oxford English dictionary is "pertaining to management of affairs".[17] The phrase "matters of an administrative nature" in ss 5, 6 and 6A is not used by way of contradistinction with matters of a "legislative" or "judicial" nature.[18]

24. It is accepted that a boundary needs to be drawn between documents that do relate, and documents that do not relate to matters of an administrative nature. The boundary is to be identified by an interpretation that best gives effect to and promotes the legislative purpose of s 6A. That purpose can be discerned by considering the legislative history of the section.

25. The history starts with the 1979 Report by the Senate Standing Committee on Constitutional and Legal Affairs in relation to the *Freedom of Information Bill* 1978.[19] That report considered cl 4 of the Bill, which proposed to exclude federal courts and certain tribunals and industrial bodies from the operation of

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13 *Kline* at 96 [23].
14 *Workers' Compensation Board of Queensland v Technical Products Pty Ltd* (1988) 165 CLR 642 at 653.
15 *Technical Products Pty Ltd v State Government Insurance Office* (1989) 167 CLR 45 at 47.
16 *Travelex Ltd v FCT* (2010) 241 CLR 510 at 519-20 [25] (French CJ and Hayne J) and 533 [90] (Crennan and Bell JJ, in dissent).
17 Oxford University Press, *Shorter Oxford English Dictionary* (6th edn, 2007) at 29.
18 *Kline* at 8 [19].
19 *Freedom of Information*, 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, pp 158-160.

the Bill. After expressing concern that the Bill should not "interfere with the independence of the judiciary and the proper administration of justice", the Committee proposed that the exemption should be limited to the non-administrative functions of the Courts.[20] Similarly, in respect of the specified federal industrial tribunals and bodies the Committee concluded "[as] with the courts, we see no reason why the administrative functions of these conciliatory bodies should be exempt" and recommended that the exemption be in respect of the bodies "non-administrative functions only".[21]

26. In *Bienstein*, which concerned a request under s 5 of the FOI Act for access to documents relating to the case management of matters in which the applicant was involved in the Family Court of Australia, Gray J considered the relevant legislative history concerning ss 5 and 6 of the Act,[22] which evolved from cl 4 of the Bill that had been considered by the Senate Committee.

27. The passages from the Senate debate set out at [46] and [48] of *Bienstein* demonstrate that the purpose of the amendments to cl 4 (now ss 5 and 6) was to enable the FOI Act to apply to the administration of the courts and industrial bodies and to their administrative procedures, properly so-called. In moving the amendment that resulted in what is now ss 5 and 6, Senator Evans, relevantly, said:

> [W]hilst there are obviously good reasons for excluding the operation of this kind of legislation where it might intrude on the independence of the judiciary ... there was a clearly definable area of court and tribunal activity which was legitimately the subject of public interest so far as efficient administration was concerned. The Bill ought to be amended to make this clear.
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> We decided, as I indicated, that it was important to maintain, absolutely unsullied and unfettered, the principle of judicial independence so far as judicial powers, properly so-called, were concerned. But when it came to the administration of any of the courts in the Federal system and even more so when it came to the administration of [certain tribunals] ... the public had an overwhelming interest and indeed a right to know how they were being administered...

28. The appellant contends that the boundary in ss 5 and 6 can be understood as being between documents relating to the management of the affairs of courts

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20 See the Report at [12-29] – [12-30] at 159.
21 See the Report at [12.33] – [12.34] at 159-160.
22 At 396 [44] – 400 [54].

and specified tribunals (which are subject to the Act) and documents that do not so relate because their disclosure would intrude upon or interfere with the independent discharge of the functions of those institutions.[23]

29. The Full Court explained the enactment of s 6A:[24]

> [6] The *Public Service Reform Act 1984* (Cth), added, by Part VI, the relevant provisions to the *Governor-General Act* and, by s 154, s 6A of the *FOI Act*. The explanatory memorandum said that the *Governor-General Act* was to be amended to provide a legislative basis for the office of Official Secretary, to provide for the employment of staff of the Governor-General, and for related purposes. It said that at present the Official Secretary and other staff were Australian Public Service officers and employees who were seconded to the Governor-General's staff from the Department of the Prime Minister and Cabinet. It was said that the amendments were broadly similar to those that were proposed for Ministerial and electorate staff under the *Members of Parliament (Staff) Bill*. These were said to be technical provisions and provisions providing for separate employment arrangements for staff of the Governor-General.
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> [7] Before that legislation was enacted the position under the FOI Act for documents such as the present was that the Act did not apply to the Governor-General as such as that office did not fall within the definition of a prescribed agency. After that legislation the present position applied, the change being that documents in the possession of the Official Secretary to the Governor-General relating to matters of an administrative nature no longer stood outside the *FOI Act*. It is unnecessary to resolve the question whether, before 1984, access could have been obtained under the *FOI Act* to any documents of the Governor-General if they had been in the possession of a Department or a prescribed authority.

30. In the context of the legislative history set out above, the conclusion is compelling that Parliament has sought in ss 5, 6 and 6A to pursue the objects of the Act identified in s 3 while protecting a common public interest affecting certain documents of the relevant bodies. The common public interest is the independent discharge of the substantive functions and powers of the relevant bodies – be they judicial (in the case of courts) or administrative (in the case of specified tribunals and the Official Secretary) in nature.[25]

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23 Cf *Bienstein* at 406 [78] -408 [81].

24 At [6] – [7] of the reasons.

25 The specified tribunals prescribed under s 6 are the Australian Industrial Relations Commission, Australian Fair Pay Commission and the Industrial Registrar and Deputy Industrial Registars.

31. There is no reason to be found in the text, context or legislative history to the Act to displace the ordinary presumption that the same words in ss 5, 6 and 6A ("documents that relate to matters of an administrative nature") should be accorded a cognate meaning and operation.[26] That the nature of the Governor-General's functions are distinct from those of courts and industrial tribunals is of no consequence once it is recognised that the public interest sought to be protected is the independent discharge of those various government functions while otherwise promoting the declared objects of the FOI Act in s 3.

10 32. The nature of the boundary drawn in ss 5, 6 and 6A can also be assisted by the consideration by Gaudron J of the principles that govern the judicial immunity from discovery, which likewise rests on the legal value of judicial independence in the sense that the judges must "be free in thought and judgment".[27] It is clear from her Honour's reasoning in both cases that the judicial immunity from compulsory disclosure (e.g., by discovery) is that while in an appropriate case judges may be compelled to disclose the record on which they have acted, they are immune from a requirement to disclose any aspect of their decision-making process:see *Herijanto v Refugee Review Tribunal (No 1)*[28] at [16], [23]; *Herijanto v Refugee Review Tribunal (No 2)*[29] at
20 [10]; *MacKeigan v Hickman*[30] at 809, 844 and 846; and *Hennessy v Broken Hill Proprietary Company Ltd*[31] at 348-9.

33. The same principles of judicial and executive independence underpin ss 5, 6 and 6A, so that the FOI Act does not apply to documents that disclose any aspect of the relevant judicial or executive officer's decision-making process.

34. The structure of the Act reinforces the appellant's construction of s 6A. Sections 5, 6 and 6A apply at the threshold: a finding that a document "relates to matters of an administrative nature" simply places such a document within the reach of Pt III of the Act, on the same footing as any other "document of

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26 See, e.g., *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611 at 618 (Mason J, Barwick CJ and Jacobs J agreeing); *McGraw-Hinds (Aust) Pty Ltd v Smith* (1978) 144 CLR 633 at 643 (Gibbs J); *Clyne v Deputy Federal Commissioner of Taxation* (1981) 150 CLR 1 at 10 (Gibbs CJ) and 15 (Mason J, Aickin and Wilson JJ agreeing).

27 *Herijanto v Refugee Review Tribunal* (2000) 170 ALR 379 at 382 [13] – 384 [23] and *Herijanto v Refugee Review Tribunal (No 2)* (2000) 170 ALR 575 at 577 [10].

28 (2000) 170 ALR 379.

29 (2000) 170 ALR 575.

30 [1989] 2 SCR 796.

31 (1926) 38 CLR 342.

an agency" or official document of a Minister, and is not sufficient of itself to create a right of access. Section 11 only confers a legally enforceable right to obtain access to the document if it is not exempt. Section 11A only requires access be granted if the document is not an exempt document (s 11A(4)) or a document that is conditionally exempt and access to the document would not, on balance, be contrary to the public interest (s 11A(5)). The exemptions are contained in Pt IV Div 2, and the "public interest conditional exemptions" are contained in Pt IV Div 3, of the Act. The categories of exempt document include, for example, those documents containing material obtained in confidence (s 45). And the categories of conditionally exempt documents include, for example, documents the disclosure of which could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of the agency (s 47E).

35. The Act therefore contains a finely calibrated scheme to balance the general public interest favouring access to information against specific countervailing public interests. These provisions carefully map out the specific matters of public interest that Parliament intended to countervail the public interest in favour of disclosure, identified in s 3 of the Act. Section 22 provides further subtlety to the balancing of those interests, by enabling an agency to provide access to a document, but with exempt material deleted. Sections 5, 6 and 6A deal with a threshold issue having regard to the particular public interest affecting documents of those agencies. The presence of the detailed scheme in Pts III and IV weighs against any interpretation of ss 5, 6 or 6A as reflecting a choice by Parliament to protect documents from disclosure by reference to some suggested public interest (such as confidentiality) that would afford the agencies covered by those sections a wider protection than that which is necessary to protect their independence.

The Full Court's construction of s 6A

36. If the submissions outlined above are accepted, it is apparent that the Full Court erred in its construction and application of s 6A.

37. The Full Court's consideration of s 6A, particularly at [21] and [22], failed to identify or consider the purpose of, or the public interest served by, the section. That omission might have arisen from the Full Court's reliance on the

observations of Gleeson CJ in *Carr v Western Australia,*[32] which related to a submission that sought to consider the relevant provision by reference to the purpose of the Act, rather than of the particular provision under consideration. As outlined above, the appellant's submissions seek to apply s 15AA of the Acts Interpretation Act to the proper construction of the text in s 6A, in the context of ss 5 and 6 and of the purpose of the three provisions by reference to the text and structure of the FOI Act and a consideration of the relevant extrinsic material. That was the approach of the plurality in *Carr*[33], with whose reasons Gleeson CJ agreed on that issue.[34]

10 38. The Full Court's reasoning at [21] – [22] appears to proceed in two steps, which do not accord with the orthodox approach outlined in *Carr* above. It first drew a distinction between the substantive powers and functions of the Governor-General and the apparatus that is supportive of the exercise of those powers and functions. On that distinction documents such as working manuals and review processes may properly be characterised as relating to the apparatus, and therefore to matters of an administrative nature.[35] However, documents relating to the apparatus were excluded by the second step if they also related to a substantive power or function. The Court appeared to arrive at the result without articulating the public interest served
20 by its approach and without considering the context and legislative history relevant to the proper construction of s 6A.[36]

39. Having drawn the distinction between the "substantive powers and functions" of the Governor-General and the "apparatus for the exercise of those powers and functions" the Full Court should then have asked whether the documents sought by the appellant could be characterised as relating to the "apparatus". But it did not. Rather, it inverted the characterisation process by asking whether the documents requested related (in an apparently *expansive* sense)

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32 (2007) 232 CLR 138 at 142-3 [5] – [6].

33 See Gunmow, Heydon and Crennan JJ at 155-156 [51] – [55]

34 See *Carr* at 141 [1].

35 One particular contextual indicator supporting this approach is s 8, which requires agencies to publish the agency's "operational information". The term "operational information" is defined in s 8A as including "information held by the agency to assist the agency to perform or exercise the agency's functions or powers in making decisions or recommendations affecting members of the public", and gives as an example "the agency's rules, guidelines, practices and precedents relating to those decisions and recommendations".

36 See, for example, at [24] where the Full Court saw only a 'faint analogy' in the decision of *Bienstein* and found it unnecessary to consider whether the proper exercise of the substantive powers or functions would be hampered or compromised by disclosure.

to the "substantive powers and functions" of the Governor-General. By adopting this approach, the Full Court eroded the supposed distinction between substantive powers and functions, on the one hand, and the apparatus for their exercise, on the other. That is because the apparatus that is supportive of the exercise of substantive powers and functions will almost always relate to some degree to those powers and functions. Furthermore, given that the sole statutory function of the Official Secretary under s 6 of the *Governor-General Act 1974* (Cth) is to "assist the Governor-General", almost all documents of the Official Secretary will relate to some degree to those powers and functions.

40. The Full Court provided no analysis of how remote the connection between a document and a "substantive power or function" of the Governor-General need be in order to be characterised as a document relating to "matters of an administrative nature". Yet it can be inferred from the Court's conclusion about documents described as "working manuals", "policy guidelines", "files notes" and "documents relating to review processes" that the connection must be remote indeed.

41. Thus, while the Full Court provided no clear criteria for distinguishing what is caught by s 6A of the FOI Act, it is clear that all documents containing meaningful information regarding the general processes adopted in the Office with respect to its function of supporting the Governor-General are inaccessible to the public under the FOI Act. Such an interpretation effectively defeats Parliament's evident purpose of bringing the Official Secretary within the purview of the Act.

Application of s 6A to the appellant's requests

42. The Full Court had before it the following evidence about the case officer manual. Before a nomination is put forward to the Council, a case officer within the Honours and Awards Branch of the office of the Official Secretary conducts research and makes inquiries in order to ensure that the nominee meets relevant criteria, and to provide further information to the Council (Fraser affidavit; Full Court at [11]; TS13.24ff). An application ordinarily takes between 18 months and two years to go through the process (TS 13.25). That process would include identifying and approaching suitable referees (TS 13.36), conducting other forms of research (TS 13.38), sending out various

letters (TS 13.38), feeding information into databases (TS 13.40; TS 14.11-16), checking citizenship status (TS 20.35-6) and a range of other things (TS 13.41). A case officer manual contains information about such matters as the types of referees to be contacted, the number of referees, the timeframes for contacting them, and the way to extract relevant information from them (TS 13.46 – 14.4). It also contains template letters, containing draft language of how referees should respond, what information is being sought and how the process is to play out (TS 14.6-9). It includes case studies, advice, tips and information to assist case officers in fulfilling their role (TS 14.1-14.3). It appears that a central purpose of the manual is to ensure that the Council obtains the right kind of information, in the right manner (TS 14.19-21). This process of research and inquiry, guided by the manual, culminates in the provision of the relevant information to the Council for its consideration (TS 21.34 – 22.10).

43. The Deputy Official Secretary, the Information Commissioner, the AAT and the Full Court each decided that the documents the subject of the appellant's request fell outside the scope of s 6A without having to consider the documents. However, it appears from the evidence before the Full Court that the case officer manual contained procedural guidance on the preparation of information for Council. The process to which it related was therefore necessarily anterior to the commencement of any deliberative or decision-making process of the Council. Nor is there any evidence or basis to infer that the manual contained anything bearing on any specific nomination, or what the Council should recommend in a particular case. The appellant submits that, on the proper construction of s 6A, such a document is plainly capable of being a document that relates to matters of an administrative nature. The same observations may be made about the request for access to documents relating to review processes etc.

44. Plainly, each category of document the subject of the appellant's request is capable of covering documents of being characterised as documents that relate to the management of a particular area of administration, being the administration of the Order of Australia, but which do not disclose any aspect of the decision-making processes of the Council or the Governor-General in respect of a particular nomination.

45. The appellant submits that the appropriate course is to remit the matter to the AAT so that it can review the documents in order to properly characterise them for the purpose of s 6A having regard to the proper construction of the FOI Act determined by this Court and, if they "relate to matters of an administrative nature", go on to determine whether the documents are exempt under Pt IV of the Act.

46. There is a further reason why the matter should be remitted to the AAT to consider the application of s 6A by reference to the documents themselves. "Document" is defined in s 5 of the FOI Act to include any, *or any part of*, records variously described. It may be that, upon inspection, it is possible to say that one or more parts of the manuals and policy guidelines in issue do not, properly characterised, "relate to matters of an administrative nature". In that case, the request could be understood as a request for one or more documents (being component parts of the categories referred to in paragraphs 3 and 4 of the appellant's request) that do not relate to matters of an administrative nature, and one or more documents (being the remainder) that do. In that case, the FOI Act would apply to the request only insofar as it relates to the component "documents" falling within the scope of s 6A, in respect of which the AAT would then consider the application of s 11A. The FOI Act would have no further application to the request for the component "documents" in the former class.

PART VII APPLICABLE LEGISLATION

47. Section 6A(1) of the *Freedom of Information Act 1982* (Cth), as it existed at the relevant time, provided as follows:

> (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.

48. Section 6 of the *Governor-General Act 1974* (Cth), as it existed at the relevant time, provided as follows:

> (1) There shall be an Official Secretary, who shall be appointed by the Governor-General.
>
> (2) The Official Secretary, together with the staff employed under section 13, constitute the Office of the Official Secretary to the Governor-General.
>
> (3) The function of the Office is to assist the Governor-General.

49. Those provisions are still in force, in that form, at the date of making this submission.

PART VIII RELIEF

50. The appellant seeks the following relief:

(a) an order that the judgment of the Full Court of the Federal Court given on 19 December 2012 be set aside;

(b) an order that the appeal to the Full Court from the decision of the Administrative Appeals Tribunal on 30 April 2012 be allowed;

(c) an order that the applicant's requests for access to documents be remitted to the Administrative Appeals Tribunal to be determined according to law;

(d) an order that the first respondent pay the appellant's costs of the appeal, and of the appeal to the Full Court below;

(e) any further or other order that the Court thinks fit.

PART IX ESTIMATE OF TIME FOR ORAL ARGUMENT

51. The appellant estimates that presentation of her oral argument will take approximately 2 hours.

Dated: 20 September 2013

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