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 REPLY

APPELLANT'S SUBMISSIONS
Filed on behalf of the Appellant
Form 27E
Dated: 25 October 2013
Ref: Mr Paul Burgess

Bartley Cohen
Solicitors
Level 22, 123 Eagle Street
BRISBANE QLD 4000
Telephone: (07) 3831 9400
Fax: (07) 3831 9500

PART I PUBLISHABLE ON THE INTERNET

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

PART II ARGUMENT IN REPLY

2. 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 *Freedom of Information Act 1982* (Cth) (**FOI Act**) as meaning documents that:

   (a) 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

   (b) do not relate to their functions of assisting the relevant court or tribunal or the Governor-General.[1]

3. The appellant construes the same words as meaning documents that:

   (a) 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 or tribunal or the Governor-General; and

   (b) do *not* disclose the decision-making process involved in the exercise of those powers or the discharge of those functions by the court, tribunal or the Governor-General in a particular matter or context.[2]

4. The appellant's and the first respondent's respective constructions seek to answer the following question:[3]

   > How far does s 6A go in pursuit of the purpose or object set out in s 3 of the FOI Act?

5. The appellant's answer to that question 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).[4] 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. This is evident in the admitted "overreach" of the first respondent's construction.[5]

6. The first respondent bases his narrow construction of s 6A on two related premises, both of which are flawed.

---

1 Submissions of the First Respondent (**SOFR**) at [9], [10], [45], [62], [63], [66].
2 See Appellant's Submissions (**AS**) at [4], [19] and [20].
3 *Carr* v *Western Australia* (2007) 232 CLR 138 at 142-143 [5]-[7] per Gleeson CJ and *Construction, Forestry and Mining and Energy Union V Mammoet* (2013) 87 ALJR 1009 at [40]-[41].
4 The s 6 exemption is described in Sch 1 of the FOI Act as an exemption in respect of 'non-administrative matters.' See s 13(1), *Acts Interpretation Act* 1901 (Cth).
5 SOFR at [28], [44] and [64].

7. The first premise is that the construction is necessary to give effect to an 'absolute' and 'wholesale' immunity, which judges of the courts and members of tribunals covered by ss 5 and 6 of the FOI Act, and the Governor-General, are alleged to have from the operation of the FOI Act.[6]

8. The judges of the courts and tribunals, and the Governor-General, are not immune from the operation of the FOI Act. Rather, they are not an agency (or a prescribed authority) subject to the legally enforceable right of a person to obtain access to non-exempt documents under s 11 of the FOI Act.[7] Significantly, neither the judges, the tribunal members nor the Governor-General are granted what is, in effect, an immunity from the operation of the FOI Act under ss 7(2A) and (2C), which provide for an agency to be exempt from the operation of the FOI Act in respect of the relevant classes of documents and information (eg intelligence and defence). Likewise, they are not granted any special status under the FOI Act in relation to exempt documents under Pt IV. Thus, if a document of a judge, tribunal member or the Governor-General is in the possession of an agency the document will be subject to the right of access conferred by s 11 unless it is an exempt document.

9. The second and related premise, which is said to explain the alleged immunity,[8] is the public interest of 'preserving confidentiality in the discharge of the Governor-General's functions'.[9] The submission appears to rely on the possibility that some functions of the Governor-General are unreviewable, and the notion that "the counsels of the Crown are secret".[10] In *Australian Communist Party v The Commonwealth*, Dixon J said:[11]

> The prerogative writs do not lie to the Governor-General. The good faith of any of his acts as representative of the Crown cannot be questioned in a court of law ... An order, proclamation or declaration of the Governor-General in Council is the formal legal act which gives effect to the advice tendered to the Crown by the Ministers of the Crown. The counsels of the Crown are secret and an inquiry into the grounds upon which the advice tendered proceeds may not be made for the purpose of invalidating the act formally done in the name of the Crown by the Governor-General in Council.

10. This second premise cannot be reconciled with the decisions of this Court in *The Queen v Toohey; Ex parte Northern Land Council*[12] and *FAI Insurances Ltd v Winneke*,[13] which accepted that decisions of the Administrator of the Northern Territory, and of the Governor, representing the Crown can be subject to judicial review,[14] depending on the nature and subject matter of the

---

6 SOFR at [40] and [48].

7 They do not fall within the definition of a prescribed authority under s 4, and ss 5(1)(b) and 6(1)(b) appear to have been enacted to ensure that ss 5 and 6 do not give rise to a contrary intention for the purposes of s 4.

8 SOFR at [19].

9 SOFR [20], [21].

10 First Respondent's Submissions at [19].

11 (1951) 83 CLR 1 at 179.

12 (1981) 151 CLR 170.

13 (1982) 151 CLR 342. See also *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 89-90 [235].

14 See also *Council of Civil Service Unions v Minister for the Civil Service* (1985) 1 AC 374 subjecting a Minister acting under a prerogative power to judicial review. The recent trend is towards extending, rather than limiting, judicial reviewability of the royal prerogative, including in respect of honors: *R (Bancoult) v Foreign Secretary (No 2) (CA)* [2008] QB 365 at 397-399;

decision. The decision of the High Court in each case forms part of the context in which s 6A was enacted in 1984.[15]

11. Secondly, Pt IV of the FOI Act sets out the specific circumstances in which Parliament considered that the public interest in maintaining the secrecy and confidentiality of government documents outweighs the public interest embodied in s 3, making it unlikely that s 6A was intended to replace or extend that protection by implication.[16]

12. Thirdly, confidentiality is a means by which the public interest of independence and impartiality is given effect to in ss 5, 6 and 6A, but is not an end in itself.[17] Although the first respondent asserts that the public interests served by each of ss 5, 6 and 6A are 'quite different',[18] he appears elsewhere to accept the "independent", "impartial" and "apolitical" nature of the Governor-General's office.[19]

13. Fourthly, the confidentiality argued for is not reconcilable with the Official Secretary being an agency for the purposes of the FOI Act and, for example, subject to ss 8 and 8A.

14. Finally, the substantially identical structure for access to documents provided for in ss 5, 6 and 6A is an indication that the same distinct public interest is being sought to be protected. That public interest - independence and impartiality - is an incident of the constitutional roles of the judiciary and the Governor-General.[20] It is also an inherent incident in the constitutional and statutory roles of arbitration and conciliation of the industrial tribunals specified in Sch 1 for the purposes of s 6.[21] At the least, that is the view of Parliament in enacting ss 5, 6 and 6A.

15. Independence and impartiality are associated public interests in relation to the entities protected by ss 5, 6 and 6A. Decisional independence 'is a necessary condition of impartiality'.[22] Or, put another way, judicial independence is 'the underlying condition of judicial impartiality in the particular case.'[23] The same observations may be made in respect of the industrial tribunals specified in Sch 1 and the Governor-General.

16. Judicial independence and impartiality require complete autonomy in relation to the process of making a decision in a particular matter or context. Thus, the independence and impartiality of courts is impaired if the legislature purports to

---

Kerr & Ors v Blair [2009] CSIH 61; cf *Osland v Secretary, Dept of Justice* (2008) 234 CLR 275 at 297 [47].

15 By s 154 of the *Public Service Reform Act* 1984 (No 63 of 1984).

16 See, for example, ss 33, 34, 37, 38, 42, 45, 47 of the FOI Act.

17 See AS [30]-[33] and *Bienstein v Family Court of Australia* (2008) 170 FCR 382 at 399-400.

18 SOFR at [44], [62].

19 SOFR [22], [23], [42]. Cf *FAI Insurances Ltd v Winneke* (1982) 151 CRL 342 at 401 per Wilson J (the Governor's responsibility is to administer the executive government with 'integrity, discretion and a complete absence of political partiality').

20 The oaths of office of judges and the Governor- General both include 'I will do right to all manner of people according to law without fear or favour, affection or ill-will: see Letters Patent of the Governor-General (V b) and s 11 of the *High Court of Australian Act* 1979 (Cth).

21 Section 51(xxxv) and for example, *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Angliss Group* (1969) 122 CLR 546 at 552-554, in respect of the constitutional duty to comply with the rules of natural justice. See also *Ocean Port Hotel v British Columbia* [2001] 2 RCS 781 at 792-4.

22 *South Australia v Totani* (2010) 242 CLR 1 at 43 [62] French CJ.

23 *Mackeigan v Hickman* [1989] 2 SCR 796 at 826 g-h.

direct them "as to the manner and outcome of the exercise of their jurisdiction".[24] This precludes any external influence over courts in the exercise of judicial functions in a particular case. In *MacKeigan v Hickman*,[25] McLachlin J noted that judicial independence precluded any direction as to matters directly affecting adjudication, including assignment of judges, sittings of the court and court lists.[26] For this reason, a Royal Commission was not empowered to compel the provision of information about the composition of a particular bench in a particular case.[27] By contrast, her Honour noted that legislatures had long enacted legislation establishing courts and setting general guidelines as to how they function.[28] For example, Australian legislation governing civil procedure has not been said to impair the institutional integrity of courts.[29]

17. A similar approach can be discerned from the publication of information, required by ss 8 and 8A of the FOI Act, by an 'agency', which includes the courts and tribunals in ss 5 and 6 and the Official Secretary. If the court, tribunal or Official Secretary has 'operational information' as defined in s 8A (which includes rules, guidelines, practices and precedents), the information *must* be published. That is a strong contextual indication that such information (cf. the working manuals, policy guidelines and criteria, review procedures in cases of maladministration sought in this case) does not relate to the 'non-administrative matters' protected under ss 5, 6 and 6A.

18. The first respondent acknowledges that his construction may 'overreach' that which is necessary to protect the alleged competing public interest of confidentiality he claims is provided for in s 6A (and ss 5 and 6). Thus, he acknowledges his construction will lead to documents, the contents of which may be 'mundane' and the disclosure of which will not damage the public interest, being protected from disclosure.[30] The construction necessarily leads to non-confidential documents being protected on the basis of the alleged public interest of protecting confidentiality. That acknowledgement reveals that the construction goes further that is necessary in pursuit of the interest, purpose or object s 6A is seeking to protect. The same cannot be said of the appellant's construction.

19. The first respondent's submission at [70] misunderstands the question for this Court. On 2 December 2011, the Tribunal made directions for the parties to file evidence and submissions "in relation to the preliminary question of whether the terms of the applicant's request for access to documents are capable of covering documents that 'relate to matters of an administrative nature' within the meaning of s6A of the [FOI Act]".[31] As the first respondent

---

24 *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 560 [39] (Gummow, Hayne, Heydon and Kiefel JJ).

25 [1989] 2 SCR 796, referred to with approval by Gaudron J in *Herijanto v Refugee Review Tribunal* (2000) 170 ALR 379 at 382 [14] and [15].

26 [1989] 2 SCR 796 at 832, by reference to the decision of Le Dain J in *Valente v The Queen* [1985] 2 SCR 673. See also *MIMA v Wang* (2003) 215 CLR 518 at 524 [12] (Gleeson CJ) and *Fingleton v The Queen* (2005) 227 CLR 166 at 190-191 [52] (Gleeson CJ).

27 At 833. Cf *Fingleton v The Queen* (2005) 227 CLR 166 at 190-191.

28 At 832f.

29 For example, the *Criminal Procedure Act 2009* (Vic) and *Civil Procedure Act 2010* (Vic) contain detailed procedural powers and requirements, governing civil procedure in courts. In the federal context, see the changes made to the *Federal Court of Australia Act 1976* (Cth) by the *Federal Court of Australia Amendment (Criminal Jurisdiction) Act 2009* and the *Access to Justice (Civil Litigation Reforms) Amendment Act 2009* (Cth).

30 SOFR at [28], [44] and [64].

31 A copy of this order will be handed up by the Appellant at the hearing.

said in asking the Tribunal to adopt this course,[32] the preliminary question did not require consideration of any documents; it was only if the preliminary question was answered in favour of the applicant that the Tribunal would need to consider the application of s 6A to the actual documents responding to the request.

20. On the appeal under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth), the Full Court should have held that on the proper construction of s 6A the documents underlined in [4] of the AS were capable of covering documents that relate to matters of an administrative nature, and remitted the matter to the Tribunal to consider the application of s 6A to the appellant's requests in respect of those documents. On appeal, this court should so order.

Dated: 25 October 2013

Ron Merkel QC
Melbourne Chambers
T: (03) 9640 3173
F: (02) 9640 3108
ronmerkel@vicbar.com.au

Emrys Nekvapil
Melbourne Chambers
T: (03) 9225 6831
F: (03) 9225 8395
emrys.nekvapil@vicbar.com.au

Nick Wood
Melbourne Chambers
T: (03) 9640 3137
F: (03) 9225 8395
nick.wood@vicbar.com.au

[32] By letter from the Australian Government Solicitor to the Administrative Appeals Tribunal, dated 28 October 2011. A copy of this letter will be handed up by the Appellant at the hearing.