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

(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

(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

(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

programs having an Australian provenance over programs having a corresponding New Zealand provenance. Thus the Australian Content Standard appears not to be consistent with Australia's obligations under Arts 4 and 5(1) of the Protocol.

5 In the Federal Court, Davies J made a declaration that the Australian Content Standard "is invalid to the extent to which it fails to be consistent with the Protocol". The consequential order that his Honour made was in these terms:

> "2. THE COURT ORDERS THAT unless the Standard is revoked or varied in accordance with law by the Respondent on or before 31 December 1996, the Standard is set aside with effect from 31 December 1996."

On appeal to the Full Court of the Federal Court a majority (Wilcox and Finn JJ, Northrop J dissenting) upheld the validity of the ABA's Standard. The Full Court allowed the appeal and dismissed Blue Sky's application (11). Pursuant to a grant of special leave, Blue Sky appeals against the Full Court's orders and seeks in lieu thereof a declaration that the Australian Content Standard is invalid.

The issues

6 The power of the ABA to determine standards is conferred by s 122 which reads:

> "(1) The ABA must, by notice in writing:
>
> (a) determine standards that are to be observed by commercial television broadcasting licensees; and
>
> (b) determine standards that are to be observed by community television broadcasting licensees.
>
> (2) Standards under subsection (1) for commercial television broadcasting licensees are to relate to:
>
> (a) programs for children; and
>
> (b) the Australian content of programs.
>
> (3) Standards under subsection (1) for community television broadcasting licensees are to relate to programs for children.
>
> (4) Standards must not be inconsistent with this Act or the regulations."

The standards which may be determined in exercise of the power conferred by s 122 are limited to standards relating to the matters specified in pars (a) and (b) of sub-s (2) — relevantly, "the Australian content of programs".

7 The majority of the Full Court pointed out (12) that the term "Australian content" is not defined by s 122 or by any other provision

(11) *Australian Broadcasting Authority v Project Blue Sky Inc* (1996) 71 FCR 465 at 484.

(12) *Australian Broadcasting Authority* (1996) 71 FCR 465 at 482.

in the Act. The connotation which their Honours attributed to "Australian" was "something particular to this country". Then, noting that "a New Zealand program is not an Australian program", their Honours reasoned that (13) —

> "If the ABA specified the 'Australian content' of television programs in such a way as to allow any of that required content to be satisfied by New Zealand programs, however they might be defined, it would fail to carry out its statutory task ... The only standard the ABA could set, consistent with the Protocol, would be one that allowed for there to be no Australian content programs at all, provided that New Zealand programs were broadcast in lieu of programs having Australian content. While one may be able to describe this as determining a standard, it is not one that puts into effect the statutory obligation to determine a standard that relates to the Australian content of programs."

8 Herein lies a difficulty. The proposition that a New Zealand program does not, or cannot, satisfy the "Australian content" requirement of a standard to be determined under s 122 is not self-evident. No doubt the proposition depends on the meaning to be attributed to "Australian content" in s 122, a question to which I shall return. The proposition led their Honours to the conclusion (14) that, in enacting ss 122 and 160 —

> "Parliament has given the ABA two mutually inconsistent instructions. It has said, first, that the ABA is to provide for preferential treatment of Australian programs, but, second, that it is to do so even-handedly as between Australia and New Zealand."

Holding that there was an irreconcilable conflict between s 122(2)(b) and s 160(d), the majority regarded s 122(2)(b) as a special provision overriding the general provision in s 160(d) (15). Accordingly, the validity of the Australian Content Standard was upheld.

9 In argument, Blue Sky attacked the reasoning of the majority but chiefly upon grounds which appear to assume that a standard prescribing a transmission quota for "Australian programs" as defined by cl 7 of the Australian Content Standard is a standard relating to the "Australian content" of programs within the meaning of that term in s 122(2)(b). On that assumption and on the further assumption that "Australian content" excluded non-Australian content, New Zealand programs could not satisfy either the Australian Content Standard or any other standard determined under s 122(1). Allowing that to be so, the argument relied on the wide import of the words "relate to" in s 122(2). The width of that phrase was said to permit the prescription

(13) *Australian Broadcasting Authority* (1996) 71 FCR 465 at 482.
(14) *Australian Broadcasting Authority* (1996) 71 FCR 465 at 483.
(15) *Australian Broadcasting Authority* (1996) 71 FCR 465 at 484.

of transmission quotas for Australian programs in terms which, in obedience to s 160(d), would also provide equal transmission quotas for New Zealand programs (16). It was also submitted that a standard would "relate to" Australian content and would be valid if it prescribed Australian content without excluding non-Australian content.

10 Before any inconsistency can be found between s 122(2)(b) and s 160(d), it is necessary to ascertain the meaning of the terms used in the former provision. What is a "standard" and what is "Australian content"? The parties and the interveners made their submissions principally on the basis that Australian content could be seen or heard only in a program having an Australian provenance. The adoption of that common basis is understandable.

11 First, it is in the interveners' interests to assert that Australian content is to be found only in programs having an Australian provenance. If that be correct, s 122(2) authorises the determination of a standard that, by safeguarding Australian content, safeguards programs having an Australian provenance.

12 Secondly, the commercial interests represented by Blue Sky presumably recognise that the content of programs made in New Zealand or by New Zealanders will not be recognisably Australian or will be less likely to be recognisably Australian than programs having an Australian provenance. Blue Sky did not seek to have the Australian Content Standard set aside on the ground that the power to determine standards could be used only to prescribe the content of programs, whatever the provenance of those programs might be. However, Mr Ellicott, senior counsel for Blue Sky, accepted that to confine "Australian content" to what could be seen and heard in a program and to deny that the term includes the provenance of a program removes any possibility of inconsistency between s 122(2)(b) and s 160(d). In the course of argument, counsel submitted:

> "Obviously, if a standard could be devised which had no reference to — I have called them trade-related matters — then it may be that there was no need to be concerned about the international obligation.
>
> ... May I say this ... *if a standard was confined to content in the sense of subject matter, then anybody in the world could make or produce with whatever actors or writers, et cetera, they wanted to such films.* Therefore, it could be argued everybody would be on a

(16) An example was proffered of a standard which prescribed 10 per cent or more solely for Australian programs, an equal percentage solely for New Zealand programs but a minimum 50 per cent for Australian and New Zealand programs combined. The ABA submitted that such a standard would be an invalid prescription of New Zealand content and would diminish the minimum Australian content which the ABA had found to be appropriate.

level playing field in relation to such a standard and there may not be any specific requirements for the application of section 160(d).

In other words, all I am positing is that it is quite possible, fully consistent with our argument, that you may have a case where a standard satisfies section 122 and is consistent with section 160(d), even though it does not have to mention New Zealand films or other films if they have a most favoured nation situation." (Emphasis added.)

But Blue Sky was not willing to advance that as the true construction of "Australian content", perhaps because it was thought that success on that ground might yield little commercial benefit. This seems to have been recognised by counsel who observed that "my clients might in another matter want to say otherwise".

13 However, the interests of persons concerned in the litigation and the assumptions made in the rival submissions cannot divert the Court from its duty to construe the statute. "Judges are more than mere selectors between rival views", said Lord Wilberforce in *Saif Ali v Sydney Mitchell & Co* (17), "they are entitled to and do think for themselves".

14 Thirdly, the ABA relied on the legislative history relating to program standards in an attempt to show that "Australian content" in s 122(2)(b) requires the involvement of Australians in the making of the program and that cl 7 of the Australian Content Standard conforms with the historical understanding.

15 The issues for determination can now be stated:

1. Is a transmission quota for programs of a particular description a "standard"?
2. What is the meaning of "the Australian content of programs"?
3. Is the Australian Content Standard consistent with s 160(d)?
4. If not, is the Australian Content Standard valid?

1. *Is a transmission quota a standard?*

16 A standard in the context of something "to be observed by commercial television broadcasting licensees" is a measure of performance to which licensees must attain. As the standard must relate to "the Australian content of programs", a standard to be observed by broadcasting licensees is a standard which is calculated to ensure that they broadcast programs of Australian content. A transmission quota for programs is a standard of that kind.

2. *"The Australian content of programs"*

(a) Legislative history

17 The *Broadcasting Act* 1942 (Cth) (the 1942 Act) which was

(17) [1980] AC 198 at 212.

repealed by the Act defined (s 4(1)) "program standard" as "a standard or condition determined by the Tribunal in the performance of its function under paragraph 16(1)(d)". Section 16(1)(d) of the 1942 Act (18) defined one of the functions of the Australian Broadcasting Tribunal constituted under that Act to be the determination of "standards to be observed by licensees in respect of the broadcasting of programs and in respect of programs to be broadcast". The definition did not provide a description of the kind of programs which might be selected in determining a standard. A standard was determined by the Tribunal under the 1942 Act known as (TPS)14 which contained a transmission quota for Australian programs and other provisions designed to ensure the broadcasting of programs in the making of which Australians played a substantial part or which featured Australians (19) or the accomplishments of Australians. When the Act — that is, the 1992 Act — was introduced, transitional provisions were introduced by the *Broadcasting Services (Transitional Provisions and Consequential Amendments) Act* 1992 (Cth) (the Transitional Act). Section 21 of the Transitional Act affected the continuance of (TPS)14, the relevant provisions of the section reading as follows:

> "(1) In subsection (2), a reference to a program standard is a reference to a program standard that was in force immediately before the commencement of this Act under paragraph 16(1)(d) of the Broadcasting Act.
>
> (2) A program standard or a part of a program standard that related to programs for children or the level of Australian content of programs is taken, after that commencement, to be a standard determined by the ABA under paragraph 122(1)(a) of the new Act.
>
> (3) For the purposes of subsection (2), the provisions of section 114 of the Broadcasting Act are taken to be program standards in force under the Broadcasting Act relating to the level of Australian content of programs.
>
> ...
>
> (8) A program standard relating to a matter referred to in subsection (2) ceases to be in force upon the determination by the ABA under paragraph 122(1)(a) of the new Act of a program standard relating to that matter.
>
> ..."

18 The ABA submits that the Parliament must have understood that the continuance of (TPS)14 and the continued operation of s 114 of the

(18) See s 99(2) of the 1942 Act and ss 123(2) and 125 as well as s 122 of the 1992 Act.

(19) Section 114 of the 1942 Act required the Australian Broadcasting Corporation and commercial broadcasting licensees under that Act to use the services of Australians, as far as possible, "in the production and presentation of radio and television programs".

1942 Act meant that the standard which the ABA was to determine under s 122(2)(b) was a standard governing the minimum use or the preferential use of Australian programs. Thus, so the argument ran, the Australian Content Standard was within the power conferred on the ABA by s 122.

19 The argument fails to take account of the text of s 21(2) of the Transitional Act and s 122(2) of the 1992 Act. Section 21 of the Transitional Act does not continue the entirety of a standard determined under the 1942 Act. Sub-section (2) provides that only a program standard or only that part of a program standard under the 1942 Act which related to "programs for children or the level of Australian content of programs" should be taken to be a standard determined under s 122(1)(a) of the 1992 Act. Section 21 of the Transitional Act textually follows the terms of s 122(2) of the 1992 Act. To ascertain what part of (TPS)14 was continued in operation when the 1992 Act commenced operation, it is necessary to construe the text of s 122(2) which accords with s 21 of the Transitional Act. To assume that (TPS)14 continued in undiminished force in order to illuminate the meaning of the words which governed whether and to what extent it was continued in force is a fallacy: it assumes the operation of a statute in order to discover its meaning.

20 However, the scope of s 21(2) of the Transitional Act is fictionally extended by sub-s (3) which requires the provisions of s 114 of the 1942 Act be taken to be a program standard in force under the 1942 Act "relating to the level of Australian content of programs". That deeming provision, which expired pursuant to sub-s (8), cannot illuminate the meaning of "Australian content" except in one respect. It indicates that preferential provisions such as those contained in s 114 of the 1942 Act would not fall within the concept of "a standard relating to the Australian content of programs" if there were no deeming provision.

21 Thus the legislative history of the relevant provisions of the 1992 Act sheds no light on the meaning of s 122(2)(b). It remains for this Court to ascertain the meaning of "Australian content" in s 122(2)(b) from the statutory context and to determine whether the Australian Content Standard, so far as it prescribes a transmission quota for programs having an Australian provenance, relates to the Australian content of programs.

(b) The meaning derived from the statutory context

22 The term "program" in relation to a broadcasting service is defined by the Act (s 6) to mean:

> "(a) matter the primary purpose of which is to entertain, to educate or to inform an audience; or
> (b) advertising or sponsorship matter, whether or not of a commercial kind."

The "content" of a "program" is what a program contains. The Act

calls that content "matter": it is what the broadcast audience sees or hears. "Australian" is the adjective describing the matter contained in the program; but the matter contained in a program is not its provenance. The content of a program for broadcast may be difficult to define in a statute, for it has to do with the communication of sights and sounds that convey ideas and the classification of an idea as "Australian" is a rather elusive concept. But that is not to deny the reality of Australian ideas; they are identifiable by reference to the sights and sounds that depict or evoke a particular connection with Australia, its land, sea and sky, its people, its fauna and its flora. They include our national or regional symbols, our topography and environment, our history and culture, the achievements and failures of our people, our relations with other nations, peoples and cultures and the contemporary issues of particular relevance or interest to Australians. The conferring of power on the ABA to determine a standard relating to the Australian content of programs accords with one of the objects prescribed by the Act, namely, "to promote the role of broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity" (s 3(e)).

23 The "Australian content of a program" is the matter in a program in which Australian ideas find expression. The ABA is empowered by s 122(1)(a) to determine a transmission quota for programs in which Australian ideas find expression and the manner in which and the extent to which such programs must contain Australian ideas.

24 Also, s 125 empowers the ABA to determine standards in relation to a matter referred to in s 123(2) if a code of practice governing such a matter has not been registered or is not operating to provide appropriate community safeguards. The "matters" referred to in s 123(2) are all concerned with the content of programs to be broadcast, the last of which is expressed (s 123(2)(l)) as "such other matters relating to program content as are of concern to the community". That "content" is a term which connotes what is to be seen and heard in a program is confirmed by the provisions of s 129. That section ensures that the ABA's power to determine standards does not empower the ABA to require the approval by it of programs before broadcasting except in relation to children's programs. The purpose of the provision seems to be to deny the ABA general power to require a program, other than children's programs, to be seen and heard by the ABA before broadcasting.

25 A distinct regime applies in respect of "Australian drama programs" which might be broadcast by subscription television broadcasting licensees. The definition of "Australian drama program" in s 6 draws a distinction between the provenance of a drama program and its content. That definition selects Australian provenance and Australian content as alternative criteria of Australian drama programs. These are the programs for which a minimum expenditure requirement is imposed on subscription television broadcasting licensees by s 102. Although s 215 includes a minimum expenditure requirement as an

item to be reviewed by the Minister when the Minister reviews "the operation of the condition relating to Australian content on subscription television broadcasting licensees", the circumstance that either criterion will identify a program as an Australian drama program does not mean that "Australian content" includes Australian provenance. The "condition" relating to Australian content is prescribed (20) by pars (b), (e), (f) and (g) of cl 10(1) in Sch 2 to the Act. All of these paragraphs relate to the matter to be broadcast, not the provenance of the programs broadcast.

26 The provisions of the Act uniformly point to one meaning of "the Australian content of programs", namely, the Australian matter contained in a program. There is neither historical nor textual foundation for the proposition that the term can be used to classify programs by reference to their provenance. The determination of the Australian Content Standard adopts an impermissible basis for classifying programs as the subject of a standard under s 122. It follows that I would hold the Australian Content Standard to be invalid, but for a reason other than the reason advanced by Blue Sky and debated by the ABA and the interveners.

3. *Is the Australian Content Standard consistent with s 160(d)?*

27 If, contrary to my view, s 122(2)(b) empowered the ABA to determine and prescribe a transmission quota for programs having an Australian provenance, is it consistent with s 160(d)?

28 Section 160 defines four categories of constraint on the ABA's performance of its functions. The "objects of this Act" in par (a) are to be collected from the terms of the Act. As the particular terms of the Act would prevail over the general requirements of s 160 in any event, the "objects of this Act" requirement in par (a) — but not "regulatory policy" — must prevail over the other requirements in s 160. The "objects of this Act" in par (a) and "Australia's obligations" in par (d) prescribe existing constraints on the ABA's performance of its functions; the constraints imposed by pars (b) and (c) await the notification of general policies or the giving of directions and the constraint of "regulatory policy" awaits the formulation of that policy. As there is nothing which suggests that Parliament contemplated that the four categories of constraints might be inconsistent or incompatible one with another, the policies which may be formulated under par (a) or notified under par (b) and the directions which may be given under par (c) must be consistent with the objects of the Act and with par (d). So construed, there could be no conflict between the constraint created by the objects of the Act or by par (d) and any of the other constraints imposed by s 160. If there were any conflict between "the objects of this Act" and s 160(d) the former would prevail but no such conflict appears in the present case.

(20) By virtue of s 99.

Section 160(d) therefore prescribes a manner in which the ABA must perform its statutory functions. It has effect according to its tenor.

29 Of course, the ascertainment of Australia's obligations under "any convention to which Australia is a party or any agreement between Australia and a foreign country" may be difficult to ascertain, especially if those obligations are mutually inconsistent. Counsel for the interveners pointed to a number of international instruments which indicate that the conventions and international agreements to which Australia is a party create obligations which, if not mutually inconsistent, at least throw doubt on the proposition that Arts 4 and 5(1) of the Protocol entitle Australian and New Zealand makers of programs to share the market between them and equally. Clearly Parliament did not contemplate that the constraints imposed by s 160(d) could be mutually inconsistent for the entirety of Australia's obligations had to be observed by the ABA in the performance of its functions.

30 Here, Arts 4 and 5(1) express unequivocally Australia's obligations under an agreement "between Australia and a foreign country". Whether or not Australia's obligations under other agreements or conventions restrict the proportion of a market available to Australian and New Zealand service providers, Arts 4 and 5(1) of the Protocol impose an obligation on Australia to extend to New Zealand service providers market access and treatment no less favourable to New Zealand service providers than the market access and treatment available to Australian service providers. As there is nothing to show that Arts 4 and 5(1) do not truly impose obligations on Australia, s 160(d) has the effect of requiring the ABA to perform its functions in a manner consistent with Arts 4 and 5(1).

31 On the hypothesis that the prescription of a transmission quota for programs having an Australian provenance could be supported by an exercise of power conferred by s 122, s 160(d) directs the ABA not to exercise its power so as to breach Australia's international obligations. On that hypothesis, a majority of this Court, reading s 122 with s 160, holds that (21):

> "the legal meaning of s 122 is that the ABA must determine standards relating to the Australian content of programs but only to the extent that those standards are consistent with the directions in s 160."

Given the hypothesis, I would respectfully agree. And, as Australian program makers are given an advantage over the New Zealand program makers by cll 7 and 9 of the Australian Content Standard, I would hold those clauses to be inconsistent with s 160(d).

(21) *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 385.

4. *Is the Australian Content Standard valid?*

32 Although I apprehend that, on the hypothesis stated, the majority and I would hold cll 7 and 9 to be inconsistent with s 160(d) of the Act, my analysis of the consequences is radically different. I must explain the basis on which I proceed.

33 The supposed conflict between s 122 and s 160(d) which a majority of the Federal Court held to exist was not textual; it was operational. There is no textual inconsistency between s 122 and s 160. And an operational conflict could arise only if s 122 conferred a power which required the ABA to determine a standard inconsistent with Australia's obligations under an agreement with another country. Were that the situation, s 122 would prevail because, on that construction of s 122, it would express the Parliament's direction to the ABA to exercise the power it confers in a particular way while s 160 expresses a direction as to the way in which the ABA's functions generally were to be exercised. One of the "objects of this Act" would be expressed by s 122. The special direction contained in s 122 would prevail over the general direction contained in s 160(d) (22). However, as it is not possible to construe s 122 as containing a direction to the ABA to determine a standard inconsistent with Australia's obligations under an agreement with another country, there is no textual inconsistency between the two provisions. Nor is there any operational inconsistency as it is open to the ABA so to formulate a determination as to afford the same protection to the makers of New Zealand programs as that afforded to the makers of Australian programs. Therefore this question arises: what is the effect of an obligation owed by Australia under an agreement with a foreign country on the ambit of the power conferred on the ABA by s 122?

34 A provision conferring a general power and a provision prescribing the manner in which the repository of that power must exercise it have to be read together. In *Colquhoun v Brooks* (23), Lord Herschell said:

> "It is beyond dispute, too, that we are entitled and indeed bound when construing the terms of any provision found in a statute to consider any other parts of the Act which throw light upon the intention of the legislature and which may serve to shew that the particular provision ought not to be construed as it would be if considered alone and apart from the rest of the Act."

When the Parliament confers a power and statutorily directs the manner of its exercise, "[t]he ambit of the power must be ascertained by the character of the statute and the nature of the provisions it

(22) *Smith v The Queen* (1994) 181 CLR 338 at 348; *Refrigerated Express Lines (Australasia) Pty Ltd v Australian Meat and Live-stock Corporation (No 2)* (1980) 44 FLR 455 at 468-469; 29 ALR 333 at 347.

(23) (1889) 14 App Cas 493 at 506.

contains'' (24). Therefore a provision conferring the power must be so construed as to conform with a provision governing the manner of its exercise. The authority conferred on the repository of a general power cannot be exercised in conflict with a provision which governs the manner of its exercise (25); the constraint on the exercise of the power defines the ambit of the power granted. A purported exercise of a power in breach of the provision which governs the manner of its exercise is invalid, since there is no power to support it.

35 If a statutory instrument is invalid by reason of conflict between the terms of the instrument and a statutory direction as to the manner in which the power to make the instrument may be exercised, the source of the invalidity is the restricted ambit of the power, not the absence of some act or occurrence extrinsic to the statute. A statutory direction as to the manner in which a power may be exercised is not a condition upon the existence of the power or a mere direction as to the doing of some preliminary or collateral act. It is a delimitation of the power itself.

36 If the power exercised by a repository is within the ambit of the power reposed, there can be no unlawfulness on the part of the repository in exercising it. Either there is power available for exercise in the manner in which the repository has exercised it and the exercise is lawful or there is no power available for exercise in the manner in which the repository has purported to exercise it and the purported exercise is invalid.

37 A provision which directs the manner of the exercise of a power is quite different from a provision which prescribes an act or the occurrence of an event as a condition on the power — that is, a provision which denies the availability of the power unless the prescribed act is done or the prescribed event occurs. In one case, power is available for exercise by the repository but the power available is no wider than the direction as to the manner of its exercise permits; in the other case, no power is available for exercise by the repository unless the condition is satisfied (26). A provision which prescribes such a condition has traditionally been described as mandatory because non-compliance is attended with invalidity. A purported exercise of a power when a condition has not been satisfied is not a valid exercise of the power.

38 A third kind of provision must be distinguished from provisions which restrict the ambit of the power and provisions which prescribe

(24) *Morton v Union Steamship Co of New Zealand Ltd* (1951) 83 CLR 402 at 410.

(25) *Shanahan v Scott* (1957) 96 CLR 245 at 250; *Clyne v Deputy Commissioner of Taxation* (1984) 154 CLR 589 at 597-598; *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)* (1995) 183 CLR 552 at 561; *Harrington v Lowe* (1996) 190 CLR 311 at 324-325; *Utah Construction & Engineering Pty Ltd v Pataky* [1966] AC 629 at 640; *Willocks v Anderson* (1971) 124 CLR 293 at 298-299.

(26) See, eg, *Spicer v Holt* [1977] AC 987.

conditions on its availability for exercise. A provision may require the repository or some other person to do or to refrain from doing something (sometimes within a period prescribed by the statute) before the power is exercised but non-compliance with the provision does not invalidate a purported exercise of the power (27): the provision does not condition the existence of the power (28). Such a provision has often been called directory, in contradistinction to mandatory, because it simply directs the doing of a particular act (sometimes within a prescribed period) without invalidating an exercise of power when the act is not done or not done within the prescribed period. The description of provisions as either mandatory or directory provides no test by which the consequences of non-compliance can be determined; rather, the consequences must be determined before a provision can be described as either mandatory or directory.

39 The terms of the statute show whether a provision governs the manner of exercise of a general power, or is a condition on a power, or merely directs the doing or refraining from doing an act before a power is exercised. The distinction between conditions on a power and provisions which are not conditions on a power is sometimes difficult to draw, especially if the provision makes substantial compliance with its terms a condition (29). Then an insubstantial non-compliance with the same provision seems to give the provision a directory quality, although in truth such a provision would have a dual application: substantial non-compliance is a condition; insubstantial non-compliance is not (30).

40 The question whether a breach of a provision prescribing the doing of some act before a power is exercised invalidates a purported exercise of the power (31) is not, in my respectful opinion, relevant to the present case. We are here concerned not with the availability of a power or the classification of a provision as mandatory or directory but with a provision which determines the ambit of a power which was available for exercise by the ABA.

41 The purpose of construing the text of a statute is to ascertain

(27) *Osborne v The Commonwealth* (1911) 12 CLR 321 at 336-337; *Buchanan v The Commonwealth* (1913) 16 CLR 315 at 329.

(28) See, eg, *Clayton v Heffron* (1960) 105 CLR 214 at 246-248; *Simpson v Attorney-General (NZ)* [1955] NZLR 271; *Wang v Commissioner of Inland Revenue* [1994] 1 WLR 1286; [1995] 1 All ER 367.

(29) *Scurr v Brisbane City Council [No 5]* (1973) 133 CLR 242 at 255-256; *Grunwick Processing Laboratories Ltd v Advisory, Conciliation and Arbitration Service* [1978] AC 655 at 691-692; cf *R v Inner London Betting Licensing Committee; Ex parte Pearcy* [1972] 1 WLR 421; [1972] 1 All ER 932.

(30) Wade and Forsyth, *Administrative Law*, 7th ed (1994), p 253.

(31) *Montreal Street Railway Co v Normandin* [1917] AC 170 at 175; *Victoria v The Commonwealth and Connor* (1975) 134 CLR 81 at 161-162, 178-179; *Tasker v Fullwood* [1978] 1 NSWLR 20 at 23-24; *London & Clydeside Estates Ltd v Aberdeen District Council* [1980] 1 WLR 182 at 201-202; [1979] 3 All ER 876 at 892-893; *TVW Enterprises Ltd v Duffy [No 3]* (1985) 8 FCR 93 at 102.

therefrom the intention of the enacting Parliament. When the validity of a purported exercise of a statutory power is in question, the intention of the Parliament determines the scope of a power as well as the consequences of non-compliance with a provision prescribing what must be done or what must occur before a power may be exercised. If the purported exercise of the power is outside the ambit of the power or if the power has been purportedly exercised without compliance with a condition on which the power depends, the purported exercise is invalid. If there has been non-compliance with a provision which does not affect the ambit or existence of the power, the purported exercise of the power is valid. To say that a purported exercise of a power is valid is to say that it has the legal effect which the Parliament intended an exercise of the power to have.

42 Here, s 160(d) is a provision which directs the manner of the exercise of the powers conferred on the ABA under the Act, including (so far as is relevant) the power conferred by s 122(1)(a). If the ABA purports to exercise its powers in breach of the injunction contained in s 122(4) and s 160(d), to that extent the purported exercise of the power is invalid and the purported standard (or the non-conforming provisions thereof) is invalid and of no effect. The standard cannot be saved by some notion that s 160(d) is "directory". The Act empowers the ABA to determine a program standard that relates to the Australian content of programs only to the extent that the standard is consistent with Australia's obligations under Arts 4 and 5(1) of the Protocol. On the hypothesis that the Australian Content Standard authorises the determination of a standard prescribing a transmission quota for programs having an Australian provenance, cl 9 does not conform with Arts 4 and 5(1). It is therefore invalid.

43 On either view of the meaning of "Australian content" I would allow the appeal. Allowing the appeal, I would set aside the order of the Full Court of the Federal Court and in lieu thereof order that the appeal to that Court be dismissed. The respondent must pay the costs.

44 McHUGH, GUMMOW, KIRBY AND HAYNE JJ. The question in this appeal is whether a program standard (32), known as the Australian Content Standard, made by the respondent, the Australian Broadcasting Authority (ABA), is invalid. The appellants contend that it is invalid because it gives preference to Australian television programs contrary to Australia's obligations under the Australia New Zealand Closer Economic Relations Trade Agreement (the Trade Agreement) and the Trade in Services Protocol to the Trade Agreement (the Protocol).

45 The appeal is brought against an order of the Full Court of the

(32) "Program standards" are defined by s 6 of the *Broadcasting Services Act* 1992 (Cth) to mean "standards determined by the ABA relating to the content or delivery of programs".

Federal Court of Australia (Wilcox and Finn JJ, Northrop J dissenting) (33) which set aside an order made by Davies J in the Federal Court (34). The order made by Davies J declared that the Australian Content Standard was invalid to the extent that it was inconsistent with the Trade Agreement and the Protocol.

46 The appellants are companies involved in the New Zealand film industry. The ABA was established by the *Broadcasting Services Act* 1992 (Cth) (the Act) (s 154) to supervise and control television and radio broadcasting in Australia. Section 158 sets out its primary functions. They include:

> "(j) to develop program standards relating to broadcasting in Australia; and
> (k) to monitor compliance with those standards."

The legislation

47 Section 4(1) of the Act declares that Parliament "intends that different levels of regulatory control be applied across the range of broadcasting services according to the degree of influence that different types of broadcasting services are able to exert in shaping community views in Australia".

48 Three of the objects of the Act are (s 3):

> "(d) to ensure that Australians have effective control of the more influential broadcasting services; and
> (e) to promote the role of broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity; and
> ...
> (g) to encourage providers of commercial and community broadcasting services to be responsive to the need for a fair and accurate coverage of matters of public interest and for an appropriate coverage of matters of local significance."

49 Section 160 declares that:

> "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

(33) *Australian Broadcasting Authority v Project Blue Sky Inc* (1996) 71 FCR 465 at 484.

(34) The order of Davies J was made in *Project Blue Sky Inc v Australian Broadcasting Authority* (unreported; Federal Court of Australia; 26 August 1996). The reasons for judgment but not the order are reported in *Project Blue Sky Inc v Australian Broadcasting Authority* (1996) 68 FCR 455.

(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." (35)

50 The appellants contend that par (d) of s 160 required the ABA in determining program standards to comply with the Trade Agreement and the Protocol. They contend that, because the Protocol requires equality of treatment and access to markets, the Australian Content Standard is invalid because it gives television programs made by Australians preferential treatment over programs made by New Zealand nationals.

51 The Act imposes a specific obligation on the ABA to determine program standards to be observed by commercial television broadcasting licensees in respect of the Australian content of television programs. Section 122 states:

"(1) The ABA must, by notice in writing:

(a) determine standards that are to be observed by commercial television broadcasting licensees; and

(b) determine standards that are to be observed by community television broadcasting licensees.

(2) Standards under subsection (1) for commercial television broadcasting licensees are to relate to:

(a) programs for children; and

(b) the Australian content of programs.

(3) Standards under subsection (1) for community television broadcasting licensees are to relate to programs for children.

(4) Standards must not be inconsistent with this Act or the regulations."

52 Section 6 defines "program" in relation to a broadcasting service to mean:

"(a) matter the primary purpose of which is to entertain, to educate or to inform an audience; or

(b) advertising or sponsorship matter, whether or not of a commercial kind."

(35) A number of federal statutes and regulations have provisions similar to s 160(d). See *Air Services Act* 1995 (Cth), s 9(3); *Australian Postal Corporation Act* 1989 (Cth), s 28(c); *Chemical Weapons (Prohibition) Act* 1994 (Cth), ss 22, 95; *Civil Aviation Act* 1988 (Cth), s 11; *Customs Act* 1901 (Cth), s 269SK; Customs (Prohibited Exports) Regulations 1956 (Cth), reg 13CA(2); *Endangered Species Protection Act* 1992 (Cth), s 171; Extradition (Ships and Fixed Platforms) Regulations, regs 6(2), 7(2); Hazardous Waste (Regulation of Exports and Imports) Regulations, reg 7(2); *Navigation Act* 1912 (Cth), s 422; *Nuclear Non-Proliferation (Safeguards) Act* 1987 (Cth), s 70(1); *Ozone Protection Act* 1989 (Cth), s 45(5); *Sea Installations Act* 1987 (Cth), s 13; *Telecommunications Act* 1997 (Cth), s 366.

53 Before determining, varying or revoking a standard, the ABA must "seek public comment on the proposed standard or the variation or revocation" (s 126). Decisions by the ABA with respect to standards are not decisions under the Act which may be reviewed under s 204 by the Administrative Appeals Tribunal. Instead, the Act gives the Houses of Parliament authority to alter a standard. Section 128(1) provides that, upon either of the Houses of Parliament agreeing to an amendment of a standard which has been determined, the standard has effect as amended from the twenty-eighth day after the date on which the other House agrees to the amendment.

54 The Act also provides for the allocation of commercial television broadcasting licences and the conditions of such licences (36) include (37) a requirement that the licensee comply with program standards determined by the ABA. Breaches of licence conditions are offences (s 139(1)) and may lead to cancellation of a licence by the ABA (s 143).

55 Pursuant to the power conferred by s 122, the ABA determined the Australian Content Standard on 15 December 1995. It was to become operative from 1 January 1996. Clause 3 declares:

> "The object of this Standard is to promote the role of commercial television in developing and reflecting a sense of Australian identity, character and cultural diversity by supporting the community's continued access to television programs produced under Australian creative control."

56 Clause 4 declares:

> "This Standard:
>
> (a) sets minimum levels of Australian programming to be broadcast on commercial television; and
>
> (b) requires minimum amounts of first release Australian drama, documentary and children's programs ... to be broadcast on commercial television; and
>
> (c) requires preschool programs broadcast on commercial television to be Australian programs."

57 Clause 5 defines "Australian" to mean "a citizen or permanent resident of Australia". Clauses 5 and 7 define "an Australian program" as one that was "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 which was made without financial assistance from a fund administered by the Australian Film Commission. A program complies with sub-cl (2) if the Minister for Communications and the Arts has issued a final certificate under s 124ZAC of the *Income Tax*

(36) Set out in Sch 2 of the Act.
(37) cl 7(1)(b) of Sch 2.

Assessment Act 1936 (Cth). Such a certificate can only be given with respect to a film which has a significant Australian content (38). A program complies with sub-cl (3) if it was made pursuant to an agreement between the Australian government or an Australian government authority and the government or a government authority of another country. A program complies with sub-cl (4) if it meets certain criteria ensuring that Australians are primarily responsible for the making of the program and that Australia is the country where the program is produced or post-produced unless that production "would be impractical".

58 Clause 9, which is the critical clause for the purposes of this appeal, declares:

> "(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."

59 Clauses 10 and 11 deal with Australian drama program requirements, an Australian drama program being defined in cl 5 as an Australian program that meets certain criteria. Clauses 12, 13, 14 and 15 deal with the Australian content of children's programs. Clause 16 requires that at least ten hours of first release Australian documentary programs be broadcast each year by a licensee.

60 The objects specified in s 3 of the Act make it clear that a primary purpose of the Act is to ensure that Australian television is controlled by Australians for the benefit of Australians. The objects require that the Act should be administered so that broadcastings reflect a sense of Australian identity, character and cultural diversity, that Australians will effectively control important broadcasting services and that those services will provide an appropriate coverage of matters of local significance. However, the direction in s 160(d) contains the potential for conflict with the objects of the Act because it requires the ABA to perform its functions in a manner consistent with Australia's obligations under any convention to which Australia is a party or under any agreement between Australia and a foreign country. It is not

(38) See the definition of "Australian film" in s 124ZAA of the *Income Tax Assessment Act* 1936 (Cth).

difficult to imagine treaties entered into between Australia and a foreign country which may be utterly inconsistent with those objects.

61 Furthermore, s 160(b) and s 160(c) respectively require the ABA to perform its functions in accordance with "any general policies of the Government notified by the Minister under s 161" and with "any directions given by the Minister in accordance with this Act". These provisions also contain the potential for conflicts with the objects of the Act. However, arguably, the Minister cannot notify policies or give directions which attempt "to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary the plan which the legislature has adopted to attain its ends" (39).

62 It is not necessary in this case, however, to decide which of the directions in s 160 is to prevail if, in a particular case, two or more applicable directions are inconsistent with each other. Nothing in the objects of the Act requires the ABA to give preferential treatment to Australian over New Zealand nationals in determining "standards that are to be observed by commercial television broadcasting licensees" (s 122(1)(a)). Nor were we referred to any notified policy or ministerial direction to that effect.

The Trade Agreement and the Protocol

63 The Trade Agreement came into force on 1 January 1983. Its object was the expansion of free trade between Australia and New Zealand. In August 1988, the Protocol was signed. It came into effect on 1 January 1989.

64 Article 4 of the Protocol states:

> "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."

65 Article 5 states:

> "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."

66 It was common ground between the parties that the provisions of cl 9 of the Australian Content Standard are in conflict with the provisions of Arts 4 and 5 of the Protocol. That being so, two questions arise: (1) is cl 9 of the Australian Content Standard in breach of s 160(d) of the Act; (2) if it is, is cl 9 invalid?

(39) *Shanahan v Scott* (1957) 96 CLR 245 at 250; *Peppers Self Service Stores Pty Ltd v Scott* (1958) 98 CLR 606 at 610. See also *Morton v Union Steamship Co of New Zealand Ltd* (1951) 83 CLR 402 at 410; *Banks v Transport Regulation Board (Vict)* (1968) 119 CLR 222 at 235; *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 369, 380-381.

The Federal Court

67 At first instance in the Federal Court, Davies J made a declaration that the Australian Content Standard was invalid to the extent to which it failed to be consistent with the Protocol (40). His Honour also ordered (41) that "unless the Standard is revoked or varied in accordance with law by [the ABA] on or before 31 December 1996, the Standard is set aside with effect from 31 December 1996".

68 On appeal, the Full Court set aside the orders of Davies J (42). In a joint judgment Wilcox and Finn JJ held (43) that there was "an irreconcilable conflict between the special provision constituted by s 122(2)(b) of the Act and the general provision of s 160(d), as applied to the [Trade Agreement]" and that s 122(2)(b) must prevail. Northrop J dissented. His Honour was of the opinion that there was no irreconcilable conflict between the two sections. He held (44) that the ABA had failed to comply with the obligations imposed upon it by ss 160(d) and 122(4) of the Act and that the Australian Content Standard was invalid.

Conflicting statutory provisions should be reconciled so far as is possible

69 The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute (45). The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole" (46). In *Commissioner for Railways (NSW) v Agalianos* (47), Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed (48).

70 A legislative instrument must be construed on the prima facie basis

(40) *Project Blue Sky Inc v Australian Broadcasting Authority* (unreported; Federal Court of Australia; 26 August 1996).
(41) *Project Blue Sky* (unreported; Federal Court of Australia; 26 August 1996).
(42) *Australian Broadcasting Authority v Project Blue Sky Inc* (1996) 71 FCR 465 at 484.
(43) *Australian Broadcasting Authority* (1996) 71 FCR 465 at 484.
(44) *Australian Broadcasting Authority* (1996) 71 FCR 465 at 475.
(45) See *Taylor v Public Service Board (NSW)* (1976) 137 CLR 208 at 213, per Barwick CJ.
(46) *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 320, per Mason and Wilson JJ. See also *South West Water Authority v Rumble's* [1985] AC 609 at 617, per Lord Scarman, "in the context of the legislation read as a whole".
(47) (1955) 92 CLR 390 at 397.
(48) *Toronto Suburban Railway Co v Toronto Corporation* [1915] AC 590 at 597; *Minister for Lands (NSW) v Jeremias* (1917) 23 CLR 322 at 332; *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 312, per Gibbs CJ; at 315, per Mason J; at 321, per Deane J.

that its provisions are intended to give effect to harmonious goals (49). Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions (50). Reconciling conflicting provisions will often require the court "to determine which is the leading provision and which the subordinate provision, and which must give way to the other" (51). Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme.

71 Furthermore, a court construing a statutory provision must strive to give meaning to every word of the provision (52). In *The Commonwealth v Baume* (53) Griffith CJ cited *R v Berchet* (54) to support the proposition that it was "a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent".

The Australian Content Standard was authorised by the literal meaning of s 122

72 The Australian Content Standard made on 15 December 1995 is plainly a standard that relates to "the Australian content of programs" within the literal and grammatical meaning of s 122(2)(b) of the Act. The term "Australian content" is not defined by s 122 or by the Act. But, given the history of the term, there can be no doubt that the standard made on 15 December 1995 relates to the "Australian content of programs" within the literal meaning of s 122(2)(b) of the Act.

73 Immediately prior to the commencement of the Act "TPS 14 (Australian Content of Television Programs)" (55) was in force. Section 21 of the *Broadcasting Services (Transitional Provisions and Consequential Amendments) Act* 1992 (Cth) (the Transitional Provisions Act) deemed TPS 14 to be a standard determined by the ABA

(49) *Ross v The Queen* (1979) 141 CLR 432 at 440, per Gibbs J.

(50) See *Australian Alliance Assurance Co Ltd v Attorney-General (Q)* [1916] St R Qd 135 at 161, per Cooper CJ; *Minister for Resources v Dover Fisheries Pty Ltd* (1993) 43 FCR 565 at 574, per Gummow J.

(51) *Institute of Patent Agents v Lockwood* [1894] AC 347 at 360, per Lord Herschell LC.

(52) *The Commonwealth v Baume* (1905) 2 CLR 405 at 414, per Griffith CJ; at 419, per O'Connor J; *Chu Kheng Lim v Minister for Immigration Local Government & Ethnic Affairs* (1992) 176 CLR 1 at 12-13, per Mason CJ.

(53) (1905) 2 CLR 405 at 414.

(54) (1688) 1 Show KB 106 [89 ER 480].

(55) "TPS": Television Program Standard.

under s 122(1)(a) of the Act. It also provided that the provisions of s 114 of the *Broadcasting Act* 1942 (Cth) were to be taken to be program standards in force under that Act relating to the level of Australian content of programs and were continued in force.

74 Clause 1 of TPS 14 declared that the objective of that standard was:

> "to encourage programs which:
> (a) are identifiably Australian;
> (b) recognise the diversity of cultural backgrounds represented in the Australian community;
> (c) are developed for an Australian audience; and
> (d) are produced with Australian creative control."

75 Clause 21 provided that:

> "Not less that 35% of the time occupied by programs broadcast by a licensee between the hours of 6.00am and midnight, averaged over the calendar year commencing 1 January 1990, shall be devoted to the broadcasting of Australian programs, including repeats. The percentage requirement shall increase to:
> (a) 40% for the calendar year commencing 1 January 1991;
> (b) 45% for the calendar year commencing 1 January 1992;
> (c) 50% for the calendar year commencing 1 January 1993 and for each calendar year thereafter."

76 Other clauses in TPS 14 spelt out the criteria for determining whether programs qualified for the transmission quota referred to in cl 21. Thus, cl 23 relevantly provided:

> "(a) Programs other than drama will qualify in full for the transmission quota if they are:
> (i) designed for and relevant to Australian society;
> (ii) under Australian creative control; and
> (iii)(A) are shot in Australia and all elements of the program have been designed and produced by Australians for an Australian audience; or
> (B) are produced in Australia for an Australian audience but some elements of the program have been made by non-Australians (eg news, current affairs and today programs); or
> (C) are shot overseas but with substantial Australian production involvement (eg Australian travel documentaries and sporting events covered on site by Australian interviewers and commentators)."

It is unnecessary to set out the criteria for other programs to qualify as Australian programs for the purpose of cl 21 of TPS 14. It is enough to say that to qualify they had to be identifiably Australian either in their content or in their creation or production.

77 Against the background of TPS 14 and its continuation into force by

the Transitional Provisions Act, it is clear that the Australian Content Standard was authorised by the literal meaning of s 122(2)(b).

The legal meaning of s 122

78 However, the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction (56) may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning. In *Statutory Interpretation* (57), Mr Francis Bennion points out:

> "The distinction between literal and legal meaning lies at the heart of the problem of statutory interpretation. An enactment consists of a verbal formula. Unless defectively worded, this has a grammatical meaning in itself. The unwary reader of this formula (particularly if not a lawyer) may mistakenly conclude that the grammatical meaning is all that is of concern. If that were right, there would be little need for books on statutory interpretation. Indeed, so far as concerns law embodied in statute, there would scarcely be a need for law books of any kind. Unhappily this state of being able to rely on grammatical meaning does not prevail in the realm of statute law; nor is it likely to. In some cases the grammatical meaning, when applied to the facts of the instant case, is ambiguous. Furthermore there needs to be brought to the grammatical meaning of an enactment due consideration of the relevant matters drawn from the context (using that term in its widest sense). Consideration of the enactment in its context may raise factors that pull in different ways. For example the desirability of applying the clear literal meaning may conflict with the fact that this does not remedy the mischief that Parliament intended to deal with." (footnotes omitted)

79 The express words of s 160 require the ABA to carry out its functions in accordance with the directions given by that section. Section 160 therefore provides the conceptual framework in which the functions conferred by s 158 are to be carried out. The function specified in s 158(j) encompasses the direction in s 122 to "determine standards" to be observed by commercial and community television broadcasting licensees. The carrying out of the directions in s 122 is therefore one of the functions of the ABA.

(56) For example, the presumption that, in the absence of unmistakable and unambiguous language, the legislature has not intended to interfere with basic rights, freedoms or immunities: *Coco v The Queen* (1994) 179 CLR 427 at 437.

(57) 3rd ed (1997), pp 343-344.

80 If s 122(1) and (2) were given their grammatical meaning, without regard to the provisions of s 160, they would authorise the making of standards which were inconsistent with Australia's obligations under international conventions or under its agreements with foreign countries. However, the express words of s 122(4) and the mandatory direction in s 160 show that the grammatical meaning of s 122(1) and (2) is not the legal meaning of those sub-sections. When s 122 is read with s 160, the legal meaning of s 122 is that the ABA must determine standards relating to the Australian content of programs but only to the extent that those standards are consistent with the directions in s 160. If, by reason of an obligation under a convention or agreement with a foreign country, it is impossible to make an Australian content standard that is consistent with that obligation, the ABA is precluded by s 160 from making the standard, notwithstanding the literal command of s 122(1) and (2). Accordingly, in making the Australian Content Standard in December 1995, the ABA was under an obligation to ensure that the Standard was not inconsistent with the Trade Agreement or the Protocol.

81 The majority judges in the Full Court in the present case were therefore in error in holding that the relationship of s 160 and s 122 is that of a general and a special provision. They are interlocking provisions, with s 160 — the dominant provision — directing how the function conferred by s 122 is to be carried out. The power conferred by s 122 must therefore be exercised within the framework imposed by s 160.

An Australian content standard must be consistent with the Trade Agreement and the Protocol

82 The Trade Agreement and the Protocol are agreements "between Australia and a foreign country" within the meaning of s 160(d). They fall within the ordinary grammatical meaning of that paragraph. Moreover, the Explanatory Memorandum that accompanied the Bill that became the Act stated that cl 160 (58):

> "Requires the ABA to perform its functions in a manner consistent with various matters, including Australia's international obligations or agreements such as Closer Economic Relations with New Zealand."

Accordingly, s 122 prohibits the ABA from making a standard that is inconsistent with the Trade Agreement or the Protocol.

83 No doubt it is a curious feature of the 1992 legislation that, despite the enactment of s 160(d) of the Act, s 21 of the Transitional Provisions Act maintained TPS 14 in force notwithstanding that its provisions were inconsistent with the Protocol and that, for present

(58) *Australian Broadcasting Authority v Project Blue Sky Inc* (1996) 71 FCR 465 at 483.

purposes, its provisions are substantially the same as the Australian Content Standard. However, the continuation in force of TPS 14 provides no ground for holding that s 122 authorises standards that are in conflict with Australia's obligations under the Trade Agreement or the Protocol. The continuation of TPS 14 was probably a stop-gap measure, designed to protect Australian interests, until the ABA promulgated a new standard that was consistent with Australia's international obligations including those under the Trade Agreement and the Protocol. Certainly, the Minister for Transport and Communications was aware that the provisions of TPS 14 might be in conflict with Australia's obligations under the Protocol. In a letter dated 2 December 1992 to the Chairperson of the ABA, the Minister, after referring to s 160 and the Trade Agreement, said:

> "Having consulted with the Minister for Trade and Overseas Development, I am aware that Australia's present treatment of New Zealand produced programming in Australian content Standard TPS14 may be in breach of Australia's Services Protocol obligations. I would hope that the ABA can quickly reconsider the Australian content standard."

84 Clause 9 of the Australian Content Standard published in December 1995 is plainly in breach of Australia's obligations under Arts 4 and 5 of the Protocol. That is because cl 9 requires Australian programs to constitute 50 per cent (rising to 55 per cent) of programming broadcasts made between 6 am and midnight. Consequently, Australian programs have an assured market of at least 50 per cent of broadcasting time while New Zealand programs have to compete with all other programs including Australian programs for the balance of broadcasting time. New Zealand programs therefore have less favourable access rights to the market for television programs than Australian programs have. As a result, cl 9 of the Australian Content Standard is in breach of Art 4 (access rights of persons and services to a market to be no less favourable) and Art 5 (treatment of persons and services to be no less favourable) of the Protocol and was therefore made in contravention of s 122(4).

85 It would seem to follow from the conclusion that cl 9 is in breach of the Act that other provisions of the Standard such as cll 10-16, which have a similar effect to cl 9, were also made in breach of s 122(4). However, the Court heard no detailed submissions on the validity of cll 10-16. For the purpose of the present case, it is unnecessary to come to any fixed view about the validity of these clauses. It is sufficient to hold that cl 9 was made in breach of the Act.

86 However, it does not follow that cl 9 of the Standard is void and of no force or effect. A group of Australian companies and persons who were given leave to appear in the proceedings as amici curiae, submitted to the Court that, on its proper construction, s 160(d) did not impose any duty on the ABA that would result in the invalidity of any act done in breach of that paragraph. Before turning to this submission,

however, it is necessary to discuss the conclusion of the majority judges in the Full Court that, because of the Trade Agreement and the Protocol, in enacting ss 122 and 160 (59):

> "Parliament has given the ABA two mutually inconsistent instructions. It has said, first, that the ABA is to provide for preferential treatment of Australian programs, but, second, that it is to do so even-handedly as between Australia and New Zealand."

87 With great respect to their Honours, the Parliament has done no such thing. The Parliament has not said that the ABA must give preferential treatment to Australian programs. It has said that the ABA must determine standards that "relate to ... the Australian content of programs" (s 122(2)(b)). The words "relate to" are "extremely wide" (60). They require the existence of a connection or association (61) between the content of the Standard and the Australian content of programs. What constitutes a sufficient connection or association to form the required relationship is a matter for judgment depending on the facts of the case. No doubt the association or connection must be a relevant one in the sense that it cannot be accidental or so remote that the Standard has no real effect or bearing on the Australian content of programs. But, without attempting to provide an exhaustive definition, once the Standard appears to prohibit, regulate, promote or protect the Australian content of television broadcasts the required relationship will exist. Furthermore, the fact that the Standard also deals with matters other than the Australian content of programs will not necessarily negate the existence of a relevant relationship. A standard can relate to the Australian content of programs although it also regulates other matters (62). Section 158(j) gives the ABA power to develop program standards relating to broadcasting including those standards referred to in s 122. There is nothing in the Act to prevent the ABA from utilising the power conferred by s 158(j) to determine program standards in a general way and at the same time carry out its obligation to determine the Australian content of programs.

88 Nor is there anything in the Act — including the combined effect of s 160 and the Trade Agreement — which prevents the ABA from

(59) *Australian Broadcasting Authority v Project Blue Sky Inc* (1996) 71 FCR 465 at 483.

(60) *Tooheys Ltd v Commissioner of Stamp Duties (NSW)* (1961) 105 CLR 602 at 620, per Taylor J.

(61) *Perlman v Perlman* (1984) 155 CLR 474 at 484. See also *R v Ross-Jones; Ex parte Beaumont* (1979) 141 CLR 504 at 510; *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185 at 196-197; *O'Grady v Northern Queensland Co Ltd* (1990) 169 CLR 356 at 367, 376.

(62) cf *Herald and Weekly Times Ltd v The Commonwealth* (1966) 115 CLR 418 at 434; *Murphyores Inc Pty Ltd v The Commonwealth* (1976) 136 CLR 1 at 11, 19-20; *The Commonwealth v Tasmania* (the *Tasmanian Dam Case*) (1983) 158 CLR 1 at 151.

determining a standard relating to the Australian content of programs in cases where preferential treatment cannot be given to Australian programs. The phrase "the Australian content of programs" in s 122 is a flexible expression that includes, inter alia, matter that reflects Australian identity, character and culture. A program will contain Australian content if it shows aspects of life in Australia or the life, work, art, leisure or sporting activities of Australians or if its scenes are or appear to be set in Australia or if it focuses on social, economic or political issues concerning Australia or Australians. Given the history of the concept of Australian content as demonstrated by the provisions of TPS 14, a program must also be taken to contain Australian content if the participants, creators or producers of a program are Australian. Nothing in the notion of the Australian content of programs requires, however, that a standard made pursuant to s 122 must give preference to Australian programs. Nor does the phrase "the Australian content of programs" in s 122 require that such programs should be under Australian creative control.

89 Absent s 160(d), a standard containing cl 9 and similar clauses of the Australian Content Standard would plainly be valid. But it is a fallacy to suppose that a standard that does not provide preference for Australian programs is not a standard that relates to the Australian content of programs. The ABA has complete authority to make a standard that relates to the Australian content of programs as long as the standard does not discriminate against persons of New Zealand nationality or origin or the services that they provide or against the members of any other nationality protected by agreements similar to those contained in the Protocol. Subject to s 160, the form that standard takes is a matter for the ABA.

90 It is of course true that one of the objects of the Act is "to promote the role of broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity" (s 3(e)). But this object can be fulfilled without requiring preference to be given to Australian programs over New Zealand programs. Thus, the ABA could determine a standard that required that a fixed percentage of programs broadcast during specified hours should be either Australian or New Zealand programs or that Australian and New Zealand programs should each be given a fixed percentage of viewing time. Such a standard would relate to the Australian content of programs even though it also dealt with the New Zealand content of programs. In any event, the existence of the object referred to in s 3(e) cannot control the dominating effect of s 160(d). That paragraph and s 122(4) insist that any program made under s 122 must be consistent with Australia's agreements with foreign countries. The Trade Agreement and the Protocol constitute such an agreement.

Does the failure to comply with s 160 *mean that cl* 9 *of the Australian Content Standard is invalid?*

91 An act done in breach of a condition regulating the exercise of a

statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition. Unfortunately, a finding of purpose or no purpose in this context often reflects a contestable judgment. The cases show various factors that have proved decisive in various contexts, but they do no more than provide guidance in analogous circumstances. There is no decisive rule that can be applied (63); there is not even a ranking of relevant factors or categories to give guidance on the issue.

92 Traditionally, the courts have distinguished between acts done in breach of an essential preliminary to the exercise of a statutory power or authority and acts done in breach of a procedural condition for the exercise of a statutory power or authority. Cases falling within the first category are regarded as going to the jurisdiction of the person or body exercising the power or authority (64). Compliance with the condition is regarded as mandatory, and failure to comply with the condition will result in the invalidity of an act done in breach of the condition (65). Cases falling within the second category are traditionally classified as directory rather than mandatory. In *Pearse v Morrice* (66), Taunton J said "a clause is directory where the provisions contain mere matter of direction and nothing more". In *R v Loxdale* (67), Lord Mansfield CJ said "[t]here is a known distinction between circumstances which are of the essence of a thing required to be done by an Act of Parliament, and clauses merely directory". As a result, if the statutory condition is regarded as directory, an act done in breach of it does not result in invalidity (68). However, statements can be found in the cases to

(63) *Howard v Bodington* (1877) 2 PD 203 at 211, per Lord Penzance.

(64) See, eg, *R v Loxdale* (1758) 1 Burr 445 [97 ER 394]; *Bowman v Blyth* (1856) 7 El & Bl 26 [119 ER 1158]; *Thwaites v Wilding* (1883) 12 QBD 4; *Edwards v Roberts* [1891] 1 QB 302; *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369; *R v Murray; Ex parte Proctor* (1949) 77 CLR 387; *Sutherland Shire Council v Finch* (1970) 123 CLR 657; *Victoria v The Commonwealth and Connor* (1975) 134 CLR 81; *Mark v Australian Broadcasting Tribunal* (1991) 32 FCR 476.

(65) *Townsend's Case* (1554) 1 Plowden 111 [75 ER 173]; *Stradling v Morgan* (1560) 1 Plowden 199 [75 ER 305]; *Maloney v McEacharn* (1904) 1 CLR 77; *SS Constructions Pty Ltd v Ventura Motors Pty Ltd* [1964] VR 229; *Public Prosecutor v Oie Hee Koi* [1968] AC 829; *Cullimore v Lyme Regis Corporation* [1962] 1 QB 718; *Sandvik Australia Pty Ltd v The Commonwealth* (1989) 89 ALR 213.

(66) (1834) 2 Ad & E 84 at 96 [111 ER 32 at 37].

(67) (1758) 1 Burr 445 at 447 [97 ER 394 at 395].

(68) *Stallwood v Tredger* (1815) 2 Phill Ecc 287 [161 ER 1147]; *R v Justices of Leicester* (1827) 7 B & C 6 [108 ER 627]; *Catterall v Sweetman* (1845) 9(1) Jur 951; *R v Lofthouse* (1866) LR 1 QB 433; *Montreal Street Railway Co v Normandin* [1917] AC 170 at 174-175; *Clayton v Heffron* (1960) 105 CLR 214

support the proposition that, even if the condition is classified as directory, invalidity will result from non-compliance unless there has been "substantial compliance" with the provisions governing the exercise of the power (69). But it is impossible to reconcile these statements with the many cases which have held an act valid where there has been no substantial compliance with the provision authorising the act in question. Indeed in many of these cases, substantial compliance was not an issue simply because, as Dawson J pointed out in *Hunter Resources Ltd v Melville* (70) when discussing the statutory provision in that case: "substantial compliance with the relevant statutory requirement was not possible. Either there was compliance or there was not."

93 In our opinion, the Court of Appeal of New South Wales was correct in *Tasker v Fullwood* (71) in criticising the continued use of the "elusive distinction between directory and mandatory requirements" (72) and the division of directory acts into those which have substantially complied with a statutory command and those which have not. They are classifications that have outlived their usefulness because they deflect attention from the real issue which is whether an act done in breach of the legislative provision is invalid. The classification of a statutory provision as mandatory or directory records a result which has been reached on other grounds. The classification is the end of the inquiry, not the beginning (73). That being so, a court, determining the validity of an act done in breach of a statutory provision, may easily focus on the wrong factors if it asks itself whether compliance with the provision is mandatory or directory and, if directory, whether there has been substantial compliance with the provision. A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. This has been the preferred approach of courts in this country in recent years, particularly in New South Wales (74). In determining the question of purpose, regard must

(68) *cont*
at 247; *Australian Broadcasting Corporation v Redmore Pty Ltd* (1989) 166 CLR 454.

(69) *Woodward v Sarsons* (1875) LR 10 CP 733 at 746-747; *Caldow v Pixell* (1877) 2 CPD 562 at 566-567; *Scurr v Brisbane City Council (No 5)* (1973) 133 CLR 242 at 255-256.

(70) (1988) 164 CLR 234 at 249.

(71) [1978] 1 NSWLR 20 at 23-24. See also *Victoria v The Commonwealth and Connor* (1975) 134 CLR 81 at 161-162, per Gibbs J.

(72) *Australian Capital Television Pty Ltd v Minister for Transport and Communications* (1989) 86 ALR 119 at 146, per Gummow J.

(73) *McRae v Coulton* (1986) 7 NSWLR 644 at 661; *Australian Capital Television* (1989) 86 ALR 119 at 147.

(74) *Hatton v Beaumont* [1977] 2 NSWLR 211 at 213, 226; *Attorney-General (NSW); Ex rel Franklins Stores Pty Ltd v Lizelle Pty Ltd* [1977] 2 NSWLR 955 at 965; *Tasker v Fullwood* [1978] 1 NSWLR 20 at 24; *National Mutual Fire Insurance*

be had to "the language of the relevant provision and the scope and object of the whole statute" (75).

An act done in breach of s 160 *is not invalid*

94 Section 160 proceeds on the hypothesis that the ABA has power to perform certain functions and directs that it "is to perform" those functions "in a manner consistent with" the four matters set out in the section. In the present case, for example, s 158(j) as well as s 122 authorised the making of a standard relating to the Australian content of television programs. Thus, the making of an Australian content standard was not outside the powers granted to the ABA (76) even though, as we have concluded, cl 9 of the Standard was made in breach of the Act. The fact that s 160 regulates the exercise of functions already conferred on the ABA rather than imposes essential preliminaries to the exercise of its functions strongly indicates that it was not a purpose of the Act that a breach of s 160 was intended to invalidate any act done in breach of that section.

95 That indication is reinforced by the nature of the obligations imposed by s 160. Not every obligation imposed by the section has a rule-like quality which can be easily identified and applied. Thus, s 160 requires the functions of the ABA to be performed in a manner consistent with: the objects of the Act and the regulatory policy described in s 4; any general policies of the Government notified by the Minister under s 161; any directions (77) given by the Minister in accordance with the Act. In particular situations, it is almost certain that there will be room for widely differing opinions as to whether or not a particular function has been carried out in accordance with these policies or general directions. When a legislative provision directs that a power or function be carried out in accordance with matters of policy, ordinarily the better conclusion is that the direction goes to the administration of a power or function rather than to its validity (78).

96 Furthermore, while the obligations of Australia under some international conventions and agreements are relatively clear, many

(74) *cont*
Co Ltd v The Commonwealth [1981] 1 NSWLR 400 at 408; *TVW Enterprises Ltd v Duffy [No 3]* (1985) 8 FCR 93 at 102; *McRae v Coulton* (1986) 7 NSWLR 644 at 661 and see *Australian Broadcasting Corporation v Redmore Pty Ltd* (1989) 166 CLR 454 at 457-460; *Yates Security Services Pty Ltd v Keating* (1990) 25 FCR 1 at 24-26. See also two recent decisions of the Court of Appeal of the Supreme Court of the Northern Territory: *Johnston v Paspaley Pearls Pty Ltd* (1996) 110 NTR 1 at 5; *Collins Radio Constructions Inc v Day* (1997) 116 NTR 14 at 17; and *Wang v Commissioner of Inland Revenue* [1994] 1 WLR 1286 at 1294, 1296; [1995] 1 All ER 367 at 375, 377.

(75) *Tasker v Fullwood* [1978] 1 NSWLR 20 at 24.

(76) cf *Mark v Australian Broadcasting Tribunal* (1991) 32 FCR 476.

(77) Except as otherwise specified in the Act, the directions are to be only of a general nature (s 162).

(78) cf *Broadbridge v Stammers* (1987) 16 FCR 296 at 300.

international conventions and agreements are expressed in indeterminate language (79) as the result of compromises made between the contracting State parties (80). Often their provisions are more aptly described as goals to be achieved rather than rules to be obeyed. The problems that might arise if the performance of any function of the ABA carried out in breach of Australia's international obligations was invalid are compounded by Australia being a party to about 900 treaties (81).

97 Courts have always accepted that it is unlikely that it was a purpose of the legislation that an act done in breach of a statutory provision should be invalid if public inconvenience would be a result of the invalidity of the act (82). Having regard to the obligations imposed on the ABA by s 160, the likelihood of that body breaching its obligations under s 160 is far from fanciful, and, if acts done in breach of s 160 are invalid, it is likely to result in much inconvenience to those members of the public who have acted in reliance on the conduct of the ABA.

98 Among the functions of the ABA, for example, are the allocation and renewal of licences (s 158(c)) and the design and administration of price-based systems for the allocation of commercial television and radio broadcasting licences (s 158(e)). It is hardly to be supposed that it was a purpose of the legislature that the validity of a licence allocated by the ABA should depend on whether or not a court ultimately ruled that the allocation of the licence was consistent with a general direction, policy or treaty obligation falling within the terms of s 160. This is particularly so, given that the "general policies of the Government notified by the Minister under section 161" unlike the "directions given by the Minister in accordance with this Act" (83) are not required to be publicly recorded and that even those with experience in public international law sometimes find it difficult to ascertain the extent of Australia's obligations under agreements with other countries. In many cases, licensees would have great difficulty in ascertaining whether the ABA was acting consistently with the obligations imposed by s 160. Expense, inconvenience and loss of investor confidence must be regarded as real possibilities if acts done in breach of s 160 are invalid.

99 Because that is so, the best interpretation of s 160 is that, while it

(79) Bennion, *Statutory Interpretation*, 2nd ed (1992), p 461.

(80) *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 255-256.

(81) *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 316.

(82) *Montreal Street Railway Co v Normandin* [1917] AC 170 at 175; *Clayton v Heffron* (1960) 105 CLR 214 at 247; *TVW Enterprises Ltd v Duffy [No 3]* (1985) 8 FCR 93 at 104-105.

(83) See s 162(2) which required the Minister to "cause a copy of each direction given to the ABA to be published in the *Gazette* as soon as practicable after giving the direction".

imposes a legal duty on the ABA, an act done in breach of its provisions is not invalid.

100 In a case like the present, however, the difference between holding an act done in breach of s 160 is invalid and holding it is valid is likely to be of significance only in respect of actions already carried out by, or done in reliance on the conduct of, the ABA. Although an act done in contravention of s 160 is not invalid, it is a breach of the Act and therefore unlawful. Failure to comply with a directory provision "may in particular cases be punishable" (84). That being so, a person with sufficient interest is entitled to sue for a declaration that the ABA has acted in breach of the Act and, in an appropriate case, obtain an injunction restraining that body from taking any further action based on its unlawful action.

Order

101 The appeal to this Court from the Full Court of the Federal Court should be allowed with costs. However, that Court was correct in allowing the appeal from the orders of Davies J because his Honour had held that the Australian Content Standard was invalid to the extent that it was inconsistent with the Trade Agreement and the Protocol. Order 1 of the Full Court's orders should therefore stand. In lieu of the orders made by the Full Court, however, there should be substituted the following orders:

1. The appeal be allowed and the orders made by Davies J set aside.
2. THE COURT DECLARES THAT cl 9 of the Australian Content Standard (the Standard) determined by the Appellant on 15 December 1995 was unlawfully made.
3. THE APPELLANT pay the costs of the appeal and of the proceedings before Davies J.
4. Each party has liberty to apply further, as it may be advised.
5. Without limiting the generality of Order 4, the respondents have liberty to apply for such further or other orders as they may be entitled to arising from the alleged failure of a clause of the Standard to comply with Australia's obligations under the Australia New Zealand Closer Economic Relations Trade Agreement and the Trade in Services Protocol to that agreement.
6. There be no order in relation to the costs of the interveners.

1. *Appeal allowed.*
2. *The respondent pay the appellants' costs of this appeal.*
3. *In lieu of the orders of the Full Court of the Federal Court of* 12 *December* 1996, *substitute the following orders:*

(84) *Simpson v Attorney-General (NZ)* [1955] NZLR 271 at 281; *Montreal Street Railway Co v Normandin* [1917] AC 170 at 175.

1. *The appeal be allowed and the orders made by Davies J set aside.*
2. *THE COURT DECLARES THAT cl 9 of the Australian Content Standard (the Standard) determined by the appellant on* 15 *December* 1995 *was unlawfully made.*
3. *THE APPELLANT pay the costs of the appeal and of the proceedings before Davies J.*
4. *Each party has liberty to apply further, as it may be advised.*
5. *Without limiting the generality of O* 4, *the respondents have liberty to apply for such further or other orders as they may be entitled to arising from the alleged failure of a clause of the Standard to comply with Australia's obligations under the Australia New Zealand Closer Economic Relations Trade Agreement and the Trade in Services Protocol to that agreement.*
6. *There be no order in relation to the costs of the interveners.*

Solicitors for the appellants, *Minter Ellison.*

Solicitor for the respondent, *Australian Government Solicitor.*

Solicitors for the interveners, *Fisher Grogan.*

GSC

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) — Freedom of information — Documents held by Official Secretary to Governor-General — Exception from disclosure unless relating to matters of an administrative nature — Documents relating to nomination for award in Order of Australia — Governor-General Act 1974 (Cth), s 6(1) — Freedom of Information Act 1982 (Cth), ss 4(1) "agency", "prescribed authority", 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 "prescribed authority" for the purposes of the Act the person holding, or performing the duties of, an office established by an enactment. That Act applied to "agencies", 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 "matters of an administrative nature"; 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

(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.

(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

(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.

(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:

> "That 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."

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: "it 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." Accordingly, the Letters Patent established "a society of honour to be known as the 'Order of Australia'". 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

(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 "is charged with the administration of the Order" (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 "strictly confidential". Appointments to the Order and awards of the Medal of the Order are made "with the approval of The Sovereign, by Instrument signed by the Governor-General and sealed with the Seal of the Order" (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.

(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 "unless the document relates to matters of an administrative nature" 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:

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

(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, "The Evolving Role of the Australian Governor-General", 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."

13 Section 13 provides that the Official Secretary may employ a person as "a member of the Governor-General's staff". 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 "promoting better-informed decision-making" and permitting "increasing scrutiny" of the Government's activities (40). Those objects are to be achieved by requiring "agencies" which are subject to the operation of the FOI Act (41) to "publish … information" and to "provid[e] … access to documents" (42). The powers and functions given by the FOI Act to achieve its objects are to

(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

(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

(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

(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

(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

(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.

(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

(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

(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.

(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

(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).

(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 "operational information", being information held by the agency to assist the agency in "making decisions or recommendations affecting members of the public" (90). The appellant drew comfort from the circumstance that an agency's "guidelines" and "practices and precedents relating to [the agency's] decisions and recommendations" are cited as examples of the kinds of documents covered by the expression "operational information". 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 "agencies" as well as official documents in the possession of Ministers of State of the Commonwealth. Departments of State of the Commonwealth and "prescribed authorities" 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.

(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 "unless the document relates to matters of an administrative nature".

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

Legislative history

62 In answering that question, "a page of history is worth a volume of logic" (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 "to documents of a non-administrative character" (94) and in respect of industrial bodies to "their non-administrative functions only" (95). Explaining the reasons for its recommendation to limit the exemption in respect of courts, the Senate Standing Committee said (96):

> "There 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

(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

(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.

"administer its own affairs" (s 17(1)) and for that purpose the High Court was given power "to do all things … necessary or convenient to be done for or in connection with the administration of its affairs" 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):

> "The 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."

68 The word "administrative" 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 "administrative" and "non-administrative" 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

(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

(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 "relate to administrative tasks … to support or assist the exercise of … powers or the [performance] of … functions", on the one hand, and documents which answer that description but which would "disclose the decision-making process involved in the exercise of those powers or performance of those functions in a particular matter or context", 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 "administrative" 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 "file notes from the Secretariat" (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 "administration" of the Order of

(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

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