IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

No. S262 of 2019

BETWEEN:

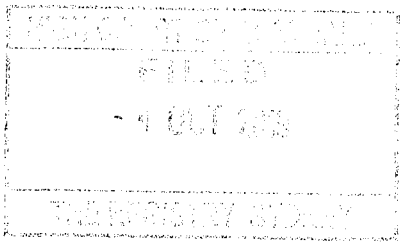
**JENNIFER HOCKING**

Appellant

and

**DIRECTOR-GENERAL OF THE NATIONAL ARCHIVES OF AUSTRALIA**

10 Respondent



**APPELLANT'S SUBMISSIONS**

3456-2617-8829v4

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**Part I: Certification**

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

**Part II: Issues**

2. Are originals of correspondence received by and contemporaneously made copies of correspondence sent by the Governor-General to and from the Queen in the performance of the office of Governor-General the property of the Commonwealth or the personal property of the person who is Governor-General?

3. Was correspondence between Sir John Kerr and the Queen which arose from the representative character of the relationship between the Queen and the Governor-General, addressed topics relating to the official duties and responsibilities of the Governor-General and took the form of reports to the Queen about the events of the day in Australia thereby shown to be created in the performance of the office of Governor-General; or was the evidence in any event sufficient to show that records in issue were created or received by the Governor-General in the performance of his office?

4. Does the *Archives Act 1983* (Cth) (**Act**) properly construed not include within the defined term "Commonwealth records" records which, while being the property of the Commonwealth at law, are the private or personal records of the Governor-General?

**Part III: Section 78B of the *Judiciary Act 1903***

5. Notice pursuant to sec 78B of the *Judiciary Act 1903* (Cth) has been given.

**Part IV: Citations**

6. This is an appeal from the whole of the judgment of the Full Court of the Federal Court of Australia in *Hocking v Director General of the National Archives of Australia* (2019) 264 FCR 1; [2019] FCAFC 12 (**FC**). The decision of the Full Court was on appeal from the decision at trial in *Hocking v Director General of National Archives of Australia* (2018) 255 FCR 1; [2018] FCA 340 (**TJ**).

**Part V: Facts**

7. Record AA1984/609 (**Records**) in the National Archives of Australia (**Archives**) consists of originals of correspondence received by, and contemporaneously made copies of correspondence sent by, the former Governor-General Sir John Kerr or his Official Secretary to and from the Queen by means of her Private Secretary. The Records arose from the representative character of the relationship between the Queen and the Governor-General {FC [96]; CAB 90}. The Records comprised letters and telegrams and certain attachments for the period 15th August 1974 to 5th December 1977 {FC [2] CAB 67}. The majority of those letters

addressed topics relating to the official duties and responsibilities of the Governor-General. Some of the letters take the form of reports to the Queen about the events of the day in Australia. Certain of the letters included attachments which expanded upon or corroborated the information communicated by the Governor-General in relation to contemporary political happenings in Australia {FC [46] CAB 78}. The Records include correspondence relating to Sir John Kerr's dismissal of Prime Minister Whitlam {(TJ) [1] CAB 9}.

8. The Records were lodged with the Archives on 26th August 1978 by Mr David Smith in his capacity as Official Secretary to the Governor-General {FC [42] and [43] CAB 77}. By covering letter Mr Smith instructed that the Records were to remain closed until after 8th December 2037 and thereafter were not to be released without prior consultation with the Sovereign's Private Secretary of the day and the Governor-General's Official Secretary of the day. On 23rd July 1991, the then Official Secretary of the then Governor-General instructed the Archives that on the instructions of the Queen the date of release of the Records had been amended to 8th December 2027, subject to the approval of the Sovereign's Private Secretary and the Official Secretary of the Governor-General at the time of release {FC [42] CAB 77}.

9. The Appellant's request for access to the Records was refused by letter of 10th May 2016 for the reason that the Records were not "Commonwealth records" within the meaning of the Act {FC [4] CAB 67}. The Records form part of the archival resources of the Commonwealth within the meaning of the Act {FC [14] CAB 70}.

**Part VI: Argument**

10. The Appellant sought access pursuant to the open access provisions of the Act to the Records.

11. If the Records, or any of them, were "Commonwealth records" within the meaning of the Act, ss.31 and 40 operated to impose upon the Respondent an obligation pursuant to s.40(3) to decide whether access would be provided and to notify the Appellant of that. The Respondent did not make a decision pursuant to s.40(3).

12. The open access period for the Records if they be "Commonwealth records" commenced on 1 January, 31 years after their creation {s.3(7); FC [20] CAB 72}, that is by no later than 1 January 2008. Application of the open access provisions of the Act to the Records depended upon whether they were "Commonwealth records" within the meaning of paragraph (a) of the definition in s. 3(1) – that is a record that is *the property of the Commonwealth or of a Commonwealth institution.*

13. It followed that if the Records, or any of them, were a "Commonwealth record", the Appellant was entitled to the mandamus she sought –requiring the Respondent to make a decision pursuant to s.40(3).

**A. GROUND 1 – PROPERTY OF THE COMMONWEALTH**

14. The Records are, or include, Commonwealth records being "the property of the Commonwealth" within the meaning of the definition of "Commonwealth record" in s.3 of the Act, and the Court below erred in concluding otherwise, and in its reasoning to that conclusion.

15. The argument to that conclusion proceeds as follows:

(a) the text and structure of the Act supports giving to the words "property of the Commonwealth" their natural meaning (**Part VI A1**);

(b) that meaning includes within the defined term "Commonwealth records" all records in which the body politic established by covering clause 3 of the Constitution holds property (**Part VI A2**);

(c) "property" refers to property in a chattel as understood at law: that is the entitlement or a right to immediate possession exigible against all persons other than those claiming through the Commonwealth (**Part VI A3**);

(d) documents created or received by the Governor-General in the performance of the constitutional office of Governor-General are the property of the Commonwealth because:

(i) their creation or receipt is by the Commonwealth as a body politic acting, by or through the office of Governor-General, which is a part of and emanation of the Commonwealth; and

(ii) the office of Governor-General is, or is in the nature of, a public office and the incidents of the relationship governing the consequences of performance of that office between the office holder and the body politic are, or are relevantly analogous to, those of a public officer and the Crown (**Part VI A4**);

(e) legislative history supports the operation of the Act as so construed (**Part VI A5**);

(f) the findings at trial and in the Full Court, and in any event the evidence, was sufficient to show that the Records were created or received by Sir John Kerr in the performance of the office of Governor-General (**Part VI A6**);

(g) contrary to TJ [117] CAB 43 and FC [103] CAB 91, evidence did not show that any person who dealt with the Records or similar correspondence between a Governor-

General and the Queen perceived that the Australian copy of those Records was the personal property of the person who was Governor-General (**Part VI A7**).

16. In **Part VI A8** we identify the error which caused the Full Court's erroneous conclusion.

17. **Part VI A1. The Act – text and structure:** The starting point is the objects of the Act {s.2A}. They are to provide for a National Archives of Australia (Archives) which has three relevant functions: first to identify, secondly to preserve and thirdly to make publicly available the archival resources of the Commonwealth. As will be seen, the outcome below gives no weight to the first and second of those functions.

18. *Archival resources of the Commonwealth* are defined in s.3(2) and consist of such Commonwealth records and other material as are of national significance or public interest and relate to, among other things the history or government of Australia.

19. The definition of "Commonwealth record" in s. 3 of the Act is general in terms extending to every record which is the property of the Commonwealth. There is no textual support to exclude any record which is, apart from the Act, the property of the Commonwealth.

20. The definition in its reference to "a Commonwealth institution" does not operate to limit those records which are Commonwealth records because they are the property of the Commonwealth. Rather the definition extends the class of records which are "Commonwealth records" to those records which are not the property of the Commonwealth but are the property of a Commonwealth institution. For example, records which are the property of the Australian Broadcasting Corporation are *Commonwealth records* because they are the property of an *authority of the Commonwealth* and therefore of a *Commonwealth institution* even though they are not the property of the *Commonwealth* (contra FC [94] and [98]). That the reference to *Commonwealth institution* expands the class of records which are Commonwealth records is confirmed by the definition of "*Commonwealth institution*" which includes in paragraphs (a) to (c) institutions which are incapable of holding property other than as an emanation of the Commonwealth. Records *of* those institutions are *Commonwealth records* only if they are the property of the Commonwealth; and it is the records of those institutions – encompassing the executive and legislative branches of the government of the Commonwealth which are the repositories of the core of the *archival resources of the Commonwealth.* It is an improbable construction to exclude from the core provisions of the Act records at the heart of the nation's history on the basis that the official establishment of the Governor-General or a House of Parliament (for example) is not itself capable of holding property other than as an emanation of the Commonwealth.

21. **Part VI A2. "Commonwealth":** "Commonwealth" means the Commonwealth of Australia being the body politic by which the people of the various States are united.[1] The *Commonwealth* incorporates, but is not limited to, the government of the Commonwealth under the Constitution including its legislative, executive and judicial branches.[2] That the Act's reference to the "Commonwealth" extends to all three branches of the Constitutional government of the body politic is confirmed by the definition of *"Commonwealth institution"* in s.3 which extends to the institutions of the executive government, the Houses of Parliament and the Courts and by ss.18 to 20 which limit the operation of Divisions 2 and 3 of Part V in respect of the records of the Houses of Parliament, Parliamentary Departments and the Courts. Divisions 2 and 3 of Part V apply only to "Commonwealth records" and ss.18 to 20 only have work to do if included within "Commonwealth records" are the documents of the Parliament and the Courts.

22. **Part VI A3. "Property":** The term "property" is not further defined in the Act but the context of the Act, and secondary materials each point to it having the general law meaning of property in a chattel: that is the entitlement or the right to possess the thing in question; the *legal* possession of the thing.[3] Context supporting that construction is ss.24 and 26 of the Act which are concerned with the Act's object of preservation of the nation's historical record. Those provisions create offences which may be committed by any person who deals with a Commonwealth record by its destruction or other disposal, transfer of its custody or ownership, or damage to or alteration of it otherwise than in accordance with what might be described generally as the internal processes of government {s.24(2) and 26(2)}. Offences of that breadth operate harmoniously with the general law if, but only if, they apply to chattels in which the Commonwealth has a right to possession enforceable against anyone who may commit the offence. The explanatory memorandum to Clause 5(2)(f) of the *Archives Bill 1983* explained that it was open to the Commonwealth by legal action to seek to recover custody of any *Commonwealth record* out of official custody. Any such action would be in detinue (aided by equity) and the right to support such a claim is the right to immediate possession.[4]

23. Consistent with that meaning of "property" ss.27 to 29, which are concerned to secure the functions of Archives in the identification and preservation of the historical record, operate

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[1] *Acts Interpretation Act 1901* s.3, Constitution covering clauses 3 and 6.
[2] *Bank Nationalisation Case* (1948) 76 CLR 1 at 363; *Sue v Hill* (1999) 199 CLR 462 at 501 [90] and [91]; Quick and Garran at 366.
[3] Pollock and Wright: Possession in the Common Law (Law Press, 1990) pages 17 and 27: Tarrant: Legal and Equitable Property Rights (Federation Press, 2019) pages 42,43, 99-101
[4] Flemings Law of Torts 10th Ed (Lawbook, 2011) page 66 [4.50]; Meagher Gummow and Lehane's Equity Doctrine and Remedies 5th Ed (Lexis Nexis, 2015) Chapter 22.

to require *Commonwealth institutions* which have *custody*, that is *physical control*[5] of certain *Commonwealth records* to transfer that custody to Archives, which is itself part of the Commonwealth. Obligations are imposed on Commonwealth institutions which have *custody* of Commonwealth records, including Commonwealth institutions which are incapable of holding property themselves: the official establishment of the Governor-General, the Executive Council, the Senate, the House of Representatives, a Federal Court (including those, unlike this Court, which have no corporate existence separate from the Commonwealth) and a Department. Importantly, and consistent with it operating by reference to the Commonwealth's *legal* possession, apart from the proscriptions in ss. 24 and 26 on destroying, altering or parting with possession of a Commonwealth record, the Act does not regulate the custody or other *factual* control of a Commonwealth record by any entity other than Commonwealth institutions and the Archives. By that mechanism the Act limits the records which must be placed with Archives to those forming part of the Archival resources of the Commonwealth which are both in the Commonwealth's or a Commonwealth institution's *legal* possession and in a Commonwealth institution's *custody*.[6]

24. That dual requirement of *legal* possession of the Commonwealth or a Commonwealth institution and *custody* or *factual control* of a Commonwealth institution is part of the Act's scheme to deal with records *of* constitutional office holders including the Governor-General, Ministers, Parliamentarians and Judges. The office holders, while in office and in retirement, are not Commonwealth institutions and the Act imposes no duties on them other than those not to destroy, alter or part with custody of Commonwealth records imposed by ss.24 and 26. Nor does the Act impose any duty on the Commonwealth institutions to which particular office holders relate (the Governor-General to the Official Establishment and to the Executive Council, Ministers to the Executive Council and their departments, Parliamentarians to their House and Judges to the Courts) to get in or otherwise procure custody of the records of office holders. Consequently, an office holder is not obliged to have any of the records of the performance of the office placed with a Commonwealth institution or the Archives.

25. Rather, the scheme of the Act is to facilitate but not to require the lodgement of records of national significance by constitutional office holders – and to provide for public access in accordance with the Act to those which are Commonwealth records.[7] Section 57 underlines that scheme, by protecting the Commonwealth and any person who places a record into the custody

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[5] See Pollock and Wright at pages 26-27.
[6] See also Senate Standing Committee on Education and the Arts Hansard (**Committee Hansard**) 5 December 1978 page 45.
[7] Committee Hansard pages 44 – 45.

of a Commonwealth institution from an action for breach of confidence or copyright resulting from the resultant provision of public access.

26. That scheme of dealing with office holders is reinforced by ss.6(2) and (3) which operate so that persons who are not Commonwealth institutions, including current and retired Governors-General, Ministers, Parliamentarians and Judges, can make private arrangements concerning the deposit of records (whether Commonwealth records or otherwise) in their factual possession. If any such records are "Commonwealth records" the provisions of Part V, and not those private arrangements, will govern access to them. The purpose of s. 6(3) is to ensure that normal government controls apply to any Commonwealth records placed with the National Archives including those deposited with personal papers {TJ[36] CAB 24}. Section 70(3) operated to apply those provisions to deposits made with the Archives prior to commencement of the Act.

27. That scheme is further reinforced by ss.18 to 20 which provide for special rules to be made by regulation concerning any records in the possession of the Senate, the House of Representatives, a Parliamentary Department or a Court. Those special rules recognise the special constitutional sensitivities that arise between the executive on the one hand and the Houses of Parliament and Parliamentarians or Courts and Judges on the other.[8] No such special provision is made for the records of the Governor-General (either as part of the legislative or executive branch or as representative of the Queen) and there is nothing in the text or structure of the Act, the Explanatory Memorandum or Second Reading Speech to indicate an intention that there be any such special provision.

28. **Part VI A4. The office of Governor-General:** The first function of the Governor-General is conferred by s. 2 of the Constitution and supported by the Preamble and clause 3 of the covering Act: to be the Queen's representative in the Commonwealth. Those provisions constitute the relationship between the Queen and the Governor-General which is central to the formation and functioning of the Commonwealth as a polity.[9]

29. The office of Governor-General is created by s. 2 of the Constitution read with covering clause 2. The Governor-General is appointed by the Queen, represents the Queen and exercises the powers and functions of the Queen. Those references to "Queen" are by force of covering clause 2 to the official Queen of Australia.[10]

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[8] Explanatory Memorandum to the Archives Bill 1983 page 2.
[9] Quick and Garran: Annotated Constitution of the Commonwealth of Australia (Legal Books, 1901) page 294.
[10] *Pochi v Minister for Immigration and Ethnic Affairs* (1982) 151 CLR 101 at 109; *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 184 and 186; *Sue v Hill* (1999) 199 CLR 462 at 489 [57], 501 [93] and 503 [96].

30. From no later than the appointment of Sir Isaac Isaacs in 1931, in making the appointment of a Governor-General, the Queen acts on the advice of the Australian Prime Minister.[11]

31. Section 3 of the Constitution provides that the occupant of the office of Governor-General must be paid for performance of the office by the Commonwealth, the payment must be by way of salary and the salary must be fixed by legislation enacted prior to a Governor-General's appointment. The Convention Debates show that the purpose of s. 3 is to reduce the risk that a Governor-General would fear, or hope for reward, from doing his or her duty.[12] The Constitution does not permit of a Governor-General deriving, by performance of the office of Governor-General, a proprietary interest in anything other than the salary for which s. 3 provides.

32. The functions of the office of Governor-General are performed under and subject to the Constitution. Their performance constitutes a central part of the functioning of the government of the Commonwealth as a body politic. In performing his or her office the Governor-General is an emanation of the Commonwealth.[13] Acts of the Governor-General in performance of his or her office are acts of, by or in intimate relationship with, the Commonwealth as a body politic. Pre-eminent among offices the performance of which is an emanation of the Commonwealth is the Governor-General.

33. The majority below were therefore correct at FC [91] CAB 89 to accept that some of the records written by the Governor-General are the property of the Commonwealth: the example given was records of the exercise by the Governor-General of the executive power of the Commonwealth within the meaning of s.61 of the Constitution. The majority identified no basis to distinguish between records created in the exercise by the Governor-General of a constitutional power, such as under s.61, and records created or received by the Governor-General in the performance of a constitutional function (for example as a constituent of the Parliament making law by assent to Bills pursuant to ss.1 and 57; and as the representative of the Queen pursuant to s.2) or a statutory function or power of the office of Governor-General.

34. A public office is a position or post which continues without regard to the identity of the holder from time to time and in which the public is interested:[14]

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[11] *Sue v Hill* (1999) 199 CLR 462 per Gleeson CJ, Gummow and Hayne JJ at 495 [74].
[12] Australasian Federal Conference 14 April 1897, page 633.
[13] *Bank Nationalisation Case* (1948) 76 CLR 1 at 363.
[14] *Sykes v Cleary* (1999) 176 CLR 77 at 96.8 and 117.6.

> *"A public officer is an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public. If taxes go to supply his payment and the public have an interest in the duties he discharges, he is a public officer."*[15]

35. State judges and members of Parliament are public officers.[16] There is no reason why Commonwealth constitutional office holders are not also public officers.

36. All profits or advantages gained by a public officer's use of his or her office are held for the benefit of the body politic and not for the officer personally.[17] In *R v Boston*[18] the majority of the Court reasoned that a public office is to be performed solely in the interests of the community. Isaacs and Rich JJ referred to the fundamental obligation of a public officer as:

> *"The duty to serve and, in serving, to act with fidelity and a single-mindedness for the welfare of the community.*[19] ...
>
> *A member of parliament is, therefore, in the highest sense a servant of the state; his duties are those appertaining to the position he fills, a position of no transient or temporary existence, a position forming a recognised place in the constitutional machinery of government ... clearly a member of parliament is a "public officer" in a very real sense, for he has ... duties to perform which would constitute in law an office."*[20]

37. The Court reasoned by analogy in identifying the duties of a Commonwealth constitutional office in *Re Day (No 2)*.[21] The application of the common law of property in the product of the performance of a public office in *Nixon v Sampson*[22] was persuasive. The central importance of the relationship between the Governor-General and the Queen (which is constitutional in all its respects) underlined the relevance of that law {contra FC [104] CAB 91}.

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[15] *R v Whitaker* [1914] 3 KB 1283 at 1296.8.
[16] *Second Fringe Benefits Tax Case* (1987) 163 CLR 329 at 351 – 352.
[17] *Reading v Attorney-General* [1951] AC 507; *Earl of Devonshire's Case* (1607) 11 Co Rep 89a; 77 ER 1266; *Selway* at 203 – 205.
[18] (1923) 33 CLR 386 **(Boston).**
[19] Boston at 400, emphasis in original; approved and applied in *Re Day (No. 2)* [2017] HCA 14 per Kiefel CJ, Bell and Edelman JJ at [49], Keane J at [179] and Nettle and Gordon JJ at [269].
[20] Per Isaacs and Rich JJ in Boston at 402. See also *Horne v Barber* (1920) 27 CLR 494 per Isaacs J at 500 – 501 and Rich J at 502.
[21] (2017) 263 CLR 201; [2017] HCA 14 per Kiefel CJ, Bell and Edelman JJ at 221 [49], Keane J at 251 [179] and Nettle and Gordon JJ at 272 [269].
[22] 389 F. Supp. 107 (1975) at 133.

38. It is as fundamental to the operation of the system of representative and responsible government for which the Constitution provides that a Governor-General not derive a pecuniary interest in the outcome of the performance of any aspect of his or her office as that a Parliamentarian not have an interest in an agreement with the Commonwealth.[23] The Constitution operates conformably with the law of public office so that a Governor-General is not caused to have such an interest: the product of the performance of the office is the property of the body politic. The conclusion of the majority below ignores that fundamental consideration. The majority reasoned that the Governor-General derives personal property in his correspondence with the Queen. If that be correct, the Constitution operates to require a Governor-General who corresponds with the Queen whom he or she represents, to acquire interests potentially in conflict with his or her Constitutional duties. Furthermore, the more controversial his or her tenure the more valuable may become his or her property in the records thereby generated.

39. **Part VI A5. Legislative History:** With the following exceptions the majority's discussion of legislative history at FC [24] to [40] CAB 73 to 77 is accurate:

(a) ***first***, the history of the National Archives (formerly the Commonwealth Archives Office) is not as straightforward as suggested at FC [25] CAB 73. While Prime Minister Curtin had authorised CEW Bean to chair a Committee on the Collection and Preservation of Historical Records in 1942 the Commonwealth's archival efforts were focused upon war archives until the early to mid-1960's at the earliest. To the extent the archiving of civil records was addressed in that time it was to insist that "the primary object of archives is efficiency in the executive arm of government." As a result until sometime in the 1960's or 1970's the need to document history carried less weight than the money saved through efficient disposal of records.[24] The results appear to include *first* correspondence with the Monarch by Governors-General before Sir William McKell usually ended up in the National Library, *secondly* there is no official record of such correspondence in the post-war period until Lord Casey's correspondence, some of which was deposited with the Archives. Those records of Lord Casey were not deposited with the Archives until after his death and that of his widow {TJ [23] CAB 20 – 21}, and *thirdly* at least in the post war period up to the enactment of the Act it was commonplace for former Ministers and officials to

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[23] See *Re Day (No 2)* at 226 [72].
[24] ABFM 144; 149-150.

maintain custody of official papers as if they were personal records;[25]

(b) ***secondly***, at FC [29] CAB 74 the majority understate the authority and significance of the enquiry conducted by the Senate Committee on Education and the Arts. The *Archives Bill 1978* had been referred to the Standing Committee on Constitutional and Legal Affairs for enquiry and report insofar as the Bill related to issues common to or related to that Committee's enquiry into the *Freedom of Information Bill 1978*. The whole of the *Archives Bill 1978* was otherwise referred to the Standing Committee on Education and the Arts;[26]

(c) ***thirdly***, at FC [30] the reasoning that the Standing Committee on Education and the Arts sought to allay concerns that the Bill extended to personal papers does not capture the issues addressed by that Committee both in its consideration of the definition of "archival resources of the Commonwealth" at paragraphs 2.9 to 2.25 and in Chapter 3 of its report dealing with personal papers. The concerns were of library institutions, including the National Library, and of the States, concerning the risk that the National Archives would collect papers which had, traditionally, been the preserve of libraries and/or which were primarily connected with the government of the States with "only an inconsequential association with the Commonwealth or a Commonwealth institution."[27] The Committee accepted Archives' submission that one of the reasons for the National Archives acquiring personal papers "was the difficulty in determining whether particular records, which were not in the custody of a Commonwealth institution, were Commonwealth records or not"[28] because "in many of the collections of personal papers of former Ministers and officials there were records which might be the property of the Commonwealth, but the only competent authority to determine this would be a Court of law."[29]

40. The conclusions to be drawn from that legislative history are as follows:

(a) ***first***, while each of the drafts of the *Archives Bill* prior to 1983 wholly excluded the documents of the Governor-General, the 1983 Bill contained a provision restricting its application to the documents of the Parliament and the Courts but no provision restricting, much less excluding, its application to the documents of the Governor-General;

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[25] Committee Hansard pages 42 – 43.
[26] Report of the Senate Standing Committee on Education and the Arts: Enquiry into the Archives Bill 1978 paragraph [1.2].
[27] Paragraph 2.11.
[28] Paragraph 3.7.
[29] At paragraph 3.9. See also Committee Hansard at pages 42 – 43.

(b) ***secondly***, while the Senate Standing Committee on Constitutional and Legal Affairs had acknowledged that there may be a suggestion for the need for special treatment to be given to correspondence with the Monarch it had recommended that there be no such special treatment and that no category of records be excluded from the open access provisions of the Bill. It was those open access provisions which were the matters within that Committee's terms of reference; and

(c) ***thirdly***, the Second Reading Speech quoted at FC [39] CAB 76 did no more than accurately record the effect of the provisions of the Bill as introduced. The paragraph quoted is in part of the speech concerned with the scope of documents to be identified and preserved by being deposited with Archives. "The records of the Official Establishment of the Governor-General" to which the Minister made reference were those records which were in the "custody" of the Official Establishment. The "private or personal" records of the Governor-General to which reference was made were to the Governor-General's records not placed into the custody of the Official Establishment.[30]

41. That history shows the Parliament, with its eyes open to the special status of correspondence between the Governor-General and Queen amending, by law, the public access regime to apply to any such correspondence placed into the custody of the Official Establishment and therefore with the Archives. That change was made by the amendment which inserted s.6(3) as referred to at FC [38] CAB 76. Nothing in the history supports restriction of the scope of records which are "Commonwealth records." To the contrary, "Commonwealth records" in the Bill as passed had the same meaning as in the Bill immediately before insertion of clause 6(3). The insertion of clause 6(3) showed an intention that all such records were to be subject to the open access provisions.

42. **Part VI A6. Records created or received in the performance of office:** The findings below, to which reference is made in paragraphs 7 and 8 above are sufficient to establish that the Records were created or received by the Governor-General in the performance of his office and more particularly in the performance of the constitutional function of being the Queen's representative in the Commonwealth.

43. The trial judge accepted that the result was that the Records arose from the performance of the duties and functions of the office of Governor-General {TJ [132] CAB 48}. The majority

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[30] The evidence referred to at paragraph 50 below showed that Sir John Kerr ran his office by distinguishing between his personal papers and official papers. Official papers were "passed out" to the Official Secretary.

of the Full Court found that they arose from the representative character of the relationship between the Governor-General and Queen and appear to accept that creation and receipt of the Records constituted actions referrable to the office of Governor-General {FC [97] CAB 90}.

44. Those findings show that *first*, this was not a case based upon the subject matter of the Records simply relating to the performance of the Governor-General's role and function. Contrary to the reasoning at FC [86] to [89] CAB 88, the Appellant did not run a case to that effect at trial or on appeal below. *Secondly* this is not a case which depends upon a proposition that everything that a person who holds an office does is done by that person officially even though but for holding that office the person holding the office would not be so acting. While the majority below rejected that approach at FC [97] CAB 90, it was not an approach for which the Appellant contended.

45. There were further findings of fact available to be made on the evidence which show that the records comprise or include correspondence which is the property of the Commonwealth because it was created or received by the Governor-General in the performance of his office. Those findings are as follows.

46. Sir John Kerr understood that his creation and receipt of the Records was pursuant to his duties as Governor-General.[31] Buckingham Palace understood such correspondence would occur as part of the Governor-General's representation of the Queen.[32]

47. The Records include correspondence from the Queen's Private Secretary dealing with how the Queen would respond to advice from the Prime Minister, if it were tendered, that Sir John Kerr be recalled and correspondence from Sir John Kerr that the Prime Minister had discussed tendering of such advice to the Queen.[33] The advice from the Palace resulted in Sir John Kerr's decision to play his "cards close to [his] chest" in his dealings with his Prime Minister.[34]

48. The Records also include a report of the conversation between the Governor-General and Prime Minister immediately preceding the withdrawal of the Prime Minister's commission on 11 November 1975.[35] Other extracts from the Records are reproduced at ABFM 48 to 56. Reports in those terms could only have been made in the performance of the Governor-General's representational function.

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[31] ABFM [illegible], 67, 69.
[32] ABFM 40-44; Twomey: The Chameleon Crown: The Queen and her Australian Governors (Federation Press 2006) page 95.
[33] ABFM 48 – 56; 72-73.
[34] ABFM 72.
[35] ABFM 74; 55.

49. The Records were marked "Personal and Confidential". At the time the Records were created and received by Sir John Kerr, State Governors were instructed on a convention that regular reports were to be provided and of marking their reports "Personal and Confidential" notwithstanding that they were reports to the Queen through the Secretary of State for the Foreign and Commonwealth Office of the British government.[36] Sir Paul Hasluck, as Governor General, corresponded with the Queen's Private Secretary with that marking on correspondence which was not personal and which Sir Paul identified as properly disclosed under the open access provisions of the Act.[37] The marking was a public sector convention implemented by Buckingham Palace.

50. Sir John Kerr ran his office at Government House by distinguishing between his "personal papers" which were kept in his Administrative Secretary's office and upon cessation of his office were sent to him in London, and non-personal papers which were "passed out" to the Official Secretary's office.[38] The Records were not treated as Sir John's "personal papers". They must have been "passed out" to the Official Secretary's office because the Official Secretary had custody of them, copied them and lodged them with Archives. Some of the Records were drafted with the Official Secretary's input.[39]

51. **Part VI A7. Perception of property in the Records:** Contrary to the finding at TJ [117] CAB 43 and FC [103] CAB 91, the evidence did not show that relevant actors perceived that the Records, or documents of their kind, were the property of Sir John Kerr. Rather that evidence showed that up until the last months of Sir John Kerr's tenure as Governor-General there had been a practice of Governors-General taking their correspondence with the Queen with them upon leaving office; that that practice changed as a result of advice from Prime Minister Fraser to Sir John Kerr on 18 October 1977, and that there was an understanding at least on the part of Buckingham Palace that the Queen was entitled to determine the timing and conditions of access to any of the correspondence that a Governor-General had had with her or her predecessors.

52. ***First***, a letter from Sir John Kerr to Sir Martin Charteris { TJ [12] CAB 15} is not concerned with property in the Records but with custody and control of the Records. The letter records that Sir John, an experienced jurist, had recently remade his Will. The letter shows that Sir John, accurately, understood that to that time each Governor-General took his

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[36] ABFM 30-31, 34, 36 and 37.
[37] ABFM 8-13 and 17-26.
[38] ABFM 62.
[39] ABFM 61.

correspondence with the Queen with him upon leaving office. The letter expressly addressed who was to have *custody* (not property) in the event of Sir John's death. The letter also indicates that Sir John was, in September 1976, not aware of the emergence of the Archives as an institution separate from the National Library.

53. ***Secondly***, the response from Sir Martin Charteris {TJ [13] CAB 15 to 16} is only consistent with a perception that the Queen was entitled to specify an embargo period in respect of the Records and had in fact stipulated to the National Library such an embargo period with respect to Lord Stonehaven's correspondence with the King. The Queen having such an entitlement was inconsistent with Sir John Kerr's personal ownership of the Records. Sir Martin Charteris' reference to Lord Stonehaven's son and successor indicates no more than Lord Stonehaven had maintained custody of his copies of correspondence with the King and contrary to TJ [110] CAB 42 that letter did not indicate that the son had "succeeded to ownership". At most it may have indicated the passing of a possessory title.

54. ***Thirdly***, the letter from Prime Minister Fraser to Sir John Kerr of 18 October 1977 referred to at TJ [14] CAB 16 appears to be the occasion upon which Sir John Kerr learnt of the Australian Archives. The letter shows an expectation within the Australian ministerial government that the Queen's correspondence with Governors-General would be protected under official archives processes. The reference to protection was in particular, or in any event extended, to the preservation of those records. The Prime Minister's expression of hope that arrangements would be made between the Australian Archives and the Governor-General's Office marks the end of the practice of Governors-General taking correspondence of the kind in question with them upon leaving office. The consequence was that Mr Smith as Official Secretary proceeded to lodge with Archives the counterpart documents of Sir John Kerr, Sir Zelman Cowan and Sir Ninian Stephen {TJ [22] CAB 19}.

55. ***Fourthly***, the letter from the Director-General of Australian Archives to Mr Smith of 18 November 1977 shows clearly a perception that Sir John Kerr had no role in determining conditions of access to the Records. Those conditions were to be determined in accordance with the official policy governing such papers in London. That was inconsistent with Sir John Kerr's personal ownership. Professor Neale's reference to provision for the disposition of the sensitive papers was expressly to the copy which was to be, and ultimately was, made by Mr Smith for Sir John's personal use following his retirement. It was common ground at trial that that set of documents was Sir John Kerr's personal property. Even in that context Professor Neale's expressed concern is with the custody of the Records rather than property in them.

56. ***Fifthly***, Sir John Kerr's record of his discussion with Sir Phillip Moore in 1980 shows a perception that the Records were not the personal property of Sir John Kerr but were expressed to be the property of the Queen {TJ [19] CAB 18}.

57. ***Sixthly***, the letter of 23 July 1991 from the Official Secretary at TJ [22] CAB 20 shows a perception that the Queen was entitled to, and did, amend the conditions of deposit of the Records. That letter, which post-dated Sir John Kerr's death, was inconsistent with anyone perceiving that Sir John Kerr's widow then held property in the Records.

58. ***Seventhly***, contrary to the finding at TJ [129] CAB 48, the evidence showed that Sir John Kerr had deposited eleven cartons of papers with Archives in May 1984 including at least some of his copies of the Records.[40] Upon being advised of the application of the recently proclaimed Archives Act to Commonwealth records among his papers Sir John and his personal secretary proceeded to withdraw all eleven cartons from Archives. They were not to return to Archives until after the death of Sir John's widow. Sir John did not however seek to disturb the deposit of the Records. The inference to be drawn was that Sir John did not perceive himself entitled to disturb that deposit because he did not perceive himself to have property in the Records.

59. **Part VI A8. The error below:** The dispositive reasoning of the majority is at FC [95] to [97] CAB 90 and is to the effect that the Act is to be construed as excluding from "property of the Commonwealth" records of the Governor-General which are created or received by the Governor-General "personally and not officially" in circumstances where that creation or receipt is referrable to the Governor-General's office; and that creation and receipt arises from the representative character of the relationship between the Monarch and the Governor-General.

60. The unstated major premise of the reasoning at FC [97] is that if something be done "personally" it is thereby not done "officially." That premise finds no support in the text of the Act and conflicts with the terms of the Constitution and the common experience of the performance of constitutional offices. Of necessity, aspects of any Governor-General's representation of the Queen in the Commonwealth will be performed personally – a common example is attendance as Head of State at national memorial services. The fact that the performance of the constitutional function is personal does not take any part of it outside the scope of the constitutional functions of the office. The subject matter of the Records includes the dismissal (in contemplation and as effected) of Mr Whitlam as Prime Minister {TJ [1]}. That involved the exercise by Sir John Kerr of the constitutional power conferred on him as

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[40] ABFM 88 and 93-95.

Governor-General by s. 64. That the exercise of the power was personal, and most likely lonely, made it no less official.

61. The majority erred at FC [97] by substituting for the test of property at law a test in the nature of characterisation of an act as either personal or official, when the Governor-General's acts were relevantly in performance of office and both personal and official.

**B. GROUND 2 - ERROR OF STATUTORY CONSTRUCTION**

62. At FC [95] and [102] CAB 90 and 91 the majority contemplate that the Act operates so as not to include as property of the Commonwealth private or personal records of the Governor-General even when they were created or received by the Governor-General in the performance of his or her office. That reasoning is said to proceed by analogy with the reasoning of this Court in *Kline v Official Secretary to the Governor-General* [2013] HCA 52; 249 CLR 645.

63. *Kline* concerned the *Freedom of Information Act 1982* (Cth) (**FOI Act**). The objects of the FOI Act include the promotion of better informed decision making and increasing scrutiny of government activities {*Kline* at 654 [14]}. The Act is concerned with the preservation and (much) later public access to the nation's historical record.

64. The only analogue was between the FOI Act's references to documents "in the possession" of "an agency" and the Archive Act's records "in the custody of" "Commonwealth institutions." That was beside the point because in *Kline* the documents were in the possession of the agency: the Official Secretary; and in this case the records were in the custody of the Commonwealth institution (when placed with Archives): the Official Establishment. Nothing could turn on that analogy.

65. The provision upon which *Kline* turned was the exclusion from the obligation otherwise imposed upon the Official Secretary to give access to documents in his possession "*unless the document relates to matters of an administrative nature*" {*Kline* at 656 [18]}. That phrase was construed so that the processes and activities of government, which are open 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 {*Kline* at 662 [41]}.

66. The purposive construction of the phrase "*unless the document relates to matters of an administrative nature*" in *Kline* was adopted for two reasons: *first*, because the FOI Act operated by reference to documents in possession of an agency and the Governor-General was not an "agency" indicating an intention that documents of the Governor-General were not covered, and *secondly* because, on construing the FOI Act as a whole, the substantive powers and functions of the Governor-General were not to be the subject of the "increased scrutiny of government activities" to which the FOI Act was directed {*Kline* at 660 [34]}. As to the first

of those reasons, the Archives Act applies to Commonwealth records which are the property of the Commonwealth, without any delineation by reference to particular parts of the government of the Commonwealth. Nothing indicates an intention not to include the records of the Governor-General. As to the second of the reasons in *Kline,* the powers and functions of the Governor-General, and their centrality to the operation of the Commonwealth as a polity, indicate that the Archive Act's objects of identification and preservation of historical records is likely to extend to precisely that class of documents to which the FOI Act was found in *Kline* not to extend. The open access provisions, which provide for public access many years after the events to which any document may refer, provide no indication to the contrary. A striking feature of the reasoning and outcome of the majority below, is that the provisions of the Act directed to the identification and preservation of the nation's historical record can have no application to the Records which "*relate to one of the most controversial and tumultuous events in the modern history of the nation.*" {TJ[1]} That is at odds with the statutory objects, indicating that the majority's construction ought not be preferred.

67. The Archives Act includes a reference to the phrase in issue in *Kline* in s. 19: so that decisions on public access in the open access period to records of Courts *other than records of an administrative nature* are excluded from the provisions for merits review by the Administrative Appeals Tribunal. That reference, and the absence of any such reference to the records of the Governor-General, speaks powerfully against *Kline* providing any analogue of assistance to the issues of construction in this case.

68. The majority below erred at FC [95] CAB 90 in proceeding on the basis that *Kline* was concerned with private or personal records of the Governor-General when it was concerned with the opposite: documents associated with the exercise of the Governor-General's substantive powers and functions.

69. In FC [100] and the first sentence of [102] CAB 91 the majority below deal with the case which was run by the Appellant below and in effect reject it as a matter of assertion rather than reasoning. To the extent that reasoning supporting that rejection is provided in the second sentence of FC [102], it ascribes to the statutory text a meaning unsupported by that text and drawn from a loose and inaccurate reading of the Second Reading Speech. In so

construing the Act, the majority below gave no consideration to the distinctions drawn, at law, between property in a chattel, possession or custody of the chattel and the possessory title of a person with possession or custody of a chattel; gave no consideration to the Act's detailed imposition of duties by reference to property in some circumstances and custody in others; and gave no weight to the expressed statutory objectives of identification and preservation of the nation's historical record. There is nothing in the text, structure or context of the Act or the secondary materials that supports the proposition that the Records were to be treated as the property of the person then holding the office of Governor-General. The majority reasoned to avoid the conclusion that public access to these important historical records would be determined by Australian law after 30 years in preference to the Queen's stipulation after 50 years. Perceiving, incorrectly, that the Minister's Second Reading Speech indicated that was not an outcome sought by the Bill, the majority ascribed to statutory words a meaning they cannot bear. Differing views on rules governing open access to historical records have nothing to do with the allocation of property rights as between the Commonwealth and the person holding office as Governor-General and the reasoning by assertion at FC [102] CAB 91 to the contrary was in error.

**Part VII: Orders sought**

71. Appeal allowed.

72. A writ of mandamus issue requiring the respondent, by himself or his delegate, to make and give to the appellant a decision pursuant to sec 40 of the *Archives Act 1983* (Cth) on the appellant's request for access to the Records dated 31 March 2016.

73. The respondent to pay the appellant's costs of and incidental to the proceeding at trial and in the Full Court of the Federal Court of Australia.

74. The respondent is to pay the appellant's costs in this Court.

**Part VIII: Time estimate**

75. The appellant would seek no more than 2.5 hours for the presentation of the appellant's oral argument.

Dated: 4th October 2019

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S262 of 2019

BETWEEN:

**JENNIFER HOCKING**
Appellant

and

**DIRECTOR-GENERAL OF THE NATIONAL ARCHIVES OF AUSTRALIA**
Respondent

## ANNEXURE TO THE PLAINTIFF'S SUBMISSIONS

## LIST OF CONSTITUTIONAL PROVISIONS, STATUTES AND STATUTORY INSTRUMENTS REFERRED TO IN SUBMISSIONS

**CONSTITUTIONAL PROVISIONS**

1 *Constitution*, ss 1, 2, 3, 4, 5, 32, 44, 57, 58, 59, 60, 61, 62, 63, 64, 66, 68, 128, taking into account alterations up to Act No. 55 of 1967 & current.

**LEGISLATION**

2 *Commonwealth of Australia Constitution Act 1900* (Imp) Preamble and covering clauses 2, 3, 4, 6, as enacted.

3 *Acts Interpretation Act 1901* (Cth) s 3 "Commonwealth", compilation no. 29, as in force on 5 March 2016.

4 *Archives Act 1983* (Cth) ss 2A, 3, 3C, 5, 6, 6A, 7, 18-44, 56, 57, 64, 70, compilation no. 36, as in force on 10 March 2016.

5 *Freedom of Information Act 1982* (Cth), compilation start date 13 April 2013.