

IN THE HIGH COURT OF AUSTRALIA  
SYDNEY REGISTRY

No. S262 of 2019

BETWEEN:

**JENNIFER HOCKING**  
Appellant

and

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

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**APPELLANT'S OUTLINE OF ORAL SUBMISSIONS**

**Corrs Chambers Westgarth**  
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**Part I:**

1. This outline is in a form suitable for publication on the internet.

**Part II:**

2. The Respondent has a duty pursuant to s. 40 *Archives Act 1983* (Cth) (“Act”) to make, and notify the Appellant of, a decision on her request for access if one or more of the “Palace Letters” is a “Commonwealth Record.” (AS [10] to [13]).

3. A record which is the property of the Commonwealth is a Commonwealth Record within the meaning of the Act (AS [17] to [21]; RS [8] to [12]).

4. Property means property at law (AS [22]; RS [8], [9]; ASR [18]).

10 5. Whether the Palace Letters are the “property of the Commonwealth” is determined by reference to the constitutional provisions for the relationship between the Governor-General and the Queen (AS [23] to [27]; RS [19] to [22], ASR [4] – [5]).

6. The recipient of correspondence obtains property at law in the original correspondence as received; and the sender of correspondence has property in the contemporaneously made copy of correspondence as sent (AS [22]; RS [9] to [15]).

7. The Palace Letters are the property of the Commonwealth because their respective creation and receipt by Sir John Kerr was in the performance of the office of Governor-General forming part of the functioning of the Commonwealth as a body politic. The link to our Constitutional Monarch intended by the office of Governor-General as the Monarch’s  
20 representative in Australia involves such communications. (AS [28] to [32], [42] to [50]; RS [19] to [22], [33], [34]).

8. Further or in the alternative to proposition 7, the Palace Letters are the property of the Commonwealth because the office of Governor-General is, or is in the nature of, a public office and the incidents of the relationship between the office holder and the body politic are, or are relevantly analogous to, those of a public officer and the Crown; so that all property derived from the performance of the office is, except to the extent expressly provided by the Constitution, the property of the Commonwealth. (AS [34] – [38]; RS [23] – [25]; ASR [6] – [10]).

30 9. Application of the criterion of “property of the Commonwealth” understood in light of the text and history of the Act does not support the Palace Letters being the private property of the individual holding office as Governor-General.

10. Legislative history supports the construction of the term “Commonwealth record” which gives to “property of the Commonwealth” its ordinary meaning (AS [39] to [41]; RS [38] to [42]).

11. The phrase “property of the Commonwealth” and the definition of “Commonwealth record” is not to be read down by reference to the alternative “property of a Commonwealth institution” in that definition nor by reference to “Official Establishment of the Governor-General” being the first of the institutions included within the definition of “Commonwealth institution” (RS [3], [10], [11], [12], [43]; ASR [17]).

12. The majority below erred by determining that the Commonwealth did not hold property in the Palace Letters because they were sent and received by Sir John Kerr acting “personally and not officially” when the correct question was whether their sending and receiving was in the performance of the office of Governor-General forming part of the functioning of the Commonwealth as a body politic (AS [59] – [61]; RS [15], [16], [21], [22]).

13. The majority erred at FC [95], [102] and [103] by construing the Act as excluding from “property of the Commonwealth” records of the Governor-General which are the product of the performance of that office (AS [62] to [69]; RS [3], [12], [43]).

4<sup>th</sup> February 2020

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