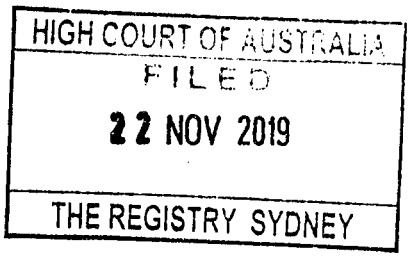
IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY No. S262 of 2019

BETWEEN:



JENNIFER HOCKING

Appellant

and

DIRECTOR-GENERAL OF THE NATIONAL ARCHIVES OF AUSTRALIA

Respondent

APPELLANT'S SUBMISSIONS IN REPLY TO THE JOINT SUBMISSIONS OF THE RESPONDENT AND THE ATTORNEY-GENERAL FOR THE COMMONWEALTH

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Part I: Certification

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

Part II: Reply

2. **Common Ground:** It is now common ground that the Records were created and received by Sir John Kerr in the performance of the functions and responsibilities of the office of Governor-General {RS [21]}.

3. **Opponents' case**: The Opponents principally support the judgment below by reasoning that was not dispositive below: that the law of the Constitution and public office do not allocate property in the Records and so property is to be allocated according to history and convention. We deal first with those matters and then attend to some of the Opponents' sundry other arguments.

4. **The Constitutional questions:** The Appellant submitted in chief, in summary, that the Records are the property of the Commonwealth because the function in the performance of which they were created and received by the Governor-General is at the centre of government of the Commonwealth {AS [28] to [32]}. The Opponents seek to avoid that outcome by their "two interface" case: the Governor-General's role has two interfaces, one with the Queen and one with the Commonwealth {RS [19]}. That case proceeds upon the impermissible assumption that the Queen is not herself part of the Commonwealth. With the Governor-General, the Queen forms part, and is at the centre, of the Commonwealth as a polity.[1]

5. At RS [21] the Opponents support, but only faintly, the dispositive reasoning below, that the Records were the personal property of Sir John Kerr because they were created and received by him performing an act personally and not officially. They do so on the basis that the representation for which s.2 of the Constitution provides is personal. In 1900 the law of the United Kingdom and the Australian colonies was that the Governors of the colonies were public officers with powers limited by their commission.[2] The powers were limited because the Governor, not representing the King, was not to be taken to be a Viceroy.[3] It is pursuant to s.2 {RS [19]} that the Governor-General "stands in the place of the Queen" in the government of the Commonwealth.[4] The representation for which s.2 provides is foundational of the functioning and independence of the Commonwealth; and to the exercise of powers directly affecting representative government, including those under ss. 57 and 64.

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[1] The Constitution, preamble and covering clause 3 together with ss.1, 2, 4, 58, 59, 60, 61, 66, 68. See also RS fn.31.
[2] *The Municipality of Cook v St Paul's College* (1866) 5 SCR (NSW) (L) 322 at 330; *Cameron v Kyte* (1835) 3 KNAPP 332, 12 ER 678 at KNAPP 343, ER 682.
[3] *Cameron v Kyte* at KNAPP 343, ER 682.
[4] See the comparative analysis of the Canadian and Australian positions in *Bonanza Creek Mining Company Limited v R* [1916] AC 566 at 585 to 587.

6. **Public Office**: Nothing in s.2 denies the position, established at federation, that Governors are public officers. The Opponents however deny the law of public office extends to the property created or received by an office holder in the performance of his or her office belonging to the polity in which the person holds office {RS [23]} and thereby recall that in 1994, Professor Finn, as he then was, commented on the curiosity of the collective amnesia of Australian lawyers concerning the common law of public office.[5]

7. By the 16th century public offices were created as property with the rights and duties of the officer defined by the instrument by which the office was created.[6] The *Earl of Devonshire's case*[7] shows that, as against the King, a public officer was entitled to property in chattels obtained in the performance of office only to the extent that that was the express effect of the instrument by which the office was created. In 1902 it was held that land purchased in the execution of a public office but vested in the individual public officer is Crown land.[8]

8. While public offices were initially associated with the right of the office holder to secure for themselves fees for the performance of office, in the 18th and 19th centuries the English remodelled public office so that officers were generally paid a fixed salary.[9] The Australian experience of public officer is of salaried officers.[10] So much is reflected in the Constitution.[11]

9. Public offices are instituted and exist "for the benefit of the State."[12] Public officers are fiduciaries bound to perform the public trust of their office for the benefit of the polity.[13] The duty of a public officer is to serve and in serving to act with a single mindedness for the welfare of the community.[14] The obligations of public officers were usually enforced in the common law Courts (in crime) and in Exchequer rather than in Chancery.[15] In that context the joint reasoning in *R v Boston*[16] is not to be dismissed by reference to the facts of the case {contra RS [24]}. In approving *R v White,*[17] in which the reasoning focussed on the offences of bribery and corruption, Isaacs and

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[5] PD Finn "The Forgotten "Trust": The People and the State" in Cope M Equity – Issues and Trends (Federation Press) 1995 (Finn Forgotten Trust).
[6] WS Holdsworth: "A history of English law" 7th edition (Methuan, 1956) (Holdsworth) Volume 1 page 247; B Selway: "Of Kings and Officers – the Judicial Development of Public Law" (2005) 33 FLR 187 (Selway) at 189, 192 and 193.
[7] (1607) 11 CO REP 89(a), 77 ER 1266.
[8] *The Hornsey Urban District Council v Hennell* [1902] 2 KB 73.
[9] Holdsworth Volume 1 page 263 and Volume 10 pages 462, 463 and 523 – 524.
[10] PD Finn: Law and Government in Colonial Australia (OUP 1987) (Finn Colonial History) pages 57 – 58 and 61 – 67; see also *Remuneration and Allowances Act 1990* ss.4, 5 and Schedules 1 and 2.
[11] Constitution ss. 3, 4, 44(iv), 48, 64, 66, 67, 81, 83, 84.
[12] J Chitty: "A treatise on the law of the prerogatives of the Crown and the relative duties and rights of the subject" (Butterworths 1820 page 83).
[13] *R v Bembridge* (1783) 3 DOUGL 327 at 332; 99 ER 679 at 681 – 682; Finn Forgotten Trust at 139 – 140, 142 – 144; P.D. Finn: "Public Officers: Some Personal Liabilities" (1977) 51 ALJ 313 at 315 and 318; Archbold's Pleadings 24th edition (1910) page 1124.
[14] *R v Boston* (1923) 33 CLR 386 at 400.
[15] Selway at 202 and 205; Finn Forgotten Trust at 143 – 144.
[16] (1923) 33 CLR 386 at 400 - 402.
[17] (1875) 13 SCR (NSW)(L) 420

Rich JJ applied a broader principle of public office, being one of trust and confidence owed to the public. That was the principle applied by the Court in *Re Day*.[18]

10. Contrary to RS [25], the utility of the reasoning on the common law of property in *Nixon v Sampson*[19] is not undermined by the conclusions reached in the separate and subsequent litigation concerning the *Presidential Recordings and Materials Preservation Act* (**PRMPA**). The Supreme Court expressly declined to decide whether President Nixon had title in the materials.[20] The reasons of the D.C. Circuit upon which the Opponents rely are to be distinguished from this case in three respects. *First,* the PRMPA applied to the whole of the Nixon Presidential Library and not only to documents created or received by the performance of a function at the centre of the functioning of the polity.[21] *Secondly*, no party contended that the Presidency was a public office or in the nature of public office.[22] *Thirdly*, in the absence of constitutional, statutory or common law rules determining the allocation of property, the Court addressed the question by reference to custom and usage –which were fact specific.[23]

11. **Custom and convention:** The contention at RS [35] that there was no challenge below to the factual findings at TJ [108] to [117] is wrong.[24] It is the inference stated in Ground 1(b) of the Notice of Appeal below for which the Appellant continues to contend.

12. The Opponents seek to prove too much from the documentary record. The British (or English) Convention upon which they rely at RS [27] has nothing to do with the protection of the office of Governor-General or the Governor-General {contra RS [22]} but was imposed by the Queen {TJ [22] CAB 20} and is concerned with maintaining an embargo period of a minimum of 50 years "to reflect the uniqueness of the length of a reign".[25] That objective could not be addressed, but was to be fundamentally compromised, by conferring on the heirs of deceased Governors-General the property right to deploy the correspondence in issue, and the inference that rational people so acted ought to have been rejected. Contrary to RS [16], while the English copy of the Records is stored in the Royal Archives they are not regarded as the *personal* property of the Queen.[26] Contrary to RS [27], none of the evidence rose as high as showing any gift or devise

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[18] See *Re Day (No 2)* (2017) 263 CLR 201 at [48]-[75] (Kiefel CJ, Bell and Edelman JJ); [96]-[113] (Gageler J); [179]-[184] (Keane J); [268]-[276] (Nettle and Gordon JJ).
[19] 389 F. Supp. 107 (1975) at 133. Professor Finn comments on the more intensive reliance in the 20th century on that common law by the US Courts in comparison with Australia at Finn Forgotten Trust pages 131, 142 and 148 – 150.
[20] *Nixon v Administrator of General Services* 433 US 425 (1977) footnote 8.
[21] At 1272.
[22] At 1276.
[23] At 1277 – 1284.
[24] The challenge was in Ground 1(b) CAB 69 and Section C of the Appellant's Outline of Submissions ASBFM pp. 73-74. It was not contended the submissions went beyond the Notice of Appeal.
[25] ABFM 101.
[26] Halsbury's Laws of England 4th ed reissue Vol 12(1) [375]; 5th ed Vol 29 pages 159 – 160 [289].

by a Governor-General of any documents of the kind in issue in this proceeding. The documents upon which reliance is placed at RS [28] show only that the Archives have consistently denied the application of the Archives Act to records of the kind in issue by applying the wrong test: whether they are the property of the official establishment.

13. The submission at RS [30] concerning the documents of Judges proceeds on the large and incorrect assumption that a Judge performs his or her office in preparing but not publishing draft judgments or corresponding with associates. The Governor-General does not perform his or her office in preparing but not sending a draft letter to the Queen. The submission indicates the Opponents' confusion between a provenance test and the property test found in the Act.

10 14. The document relied on at AS [49] was a copy of an instruction provided to Sir Henry Winneke by the British Government upon his appointment as Governor of Victoria on 18 April 1974.[27] It was powerful contemporaneous evidence of the provenance of the "private and confidential" marking as a public sector convention.

15. Contrary to RS [36], prior to Prime Minister Fraser's letter of 18 October 1977, records of a Governor-General lodged with Archives or the National Library were lodged by the retired Governor-General while after that letter all records were lodged by the Official Secretary to the Governor-General in that capacity {TJ [23] CAB 20, [77] [78] CAB 35, CAB 12 [6]}. The only inconsistency between the history and the Appellant's case was that Mr Smith purported to lodge Sir Zelman Cowan's and Sir Ninian Stephen's papers under s.6(2), the terms of which were not

20 available to Mr Smith, because he was a "Commonwealth institution" (the official establishment).[28] After the Act commenced, Sir Paul Hasluck executed an instrument of deposit by which he assented to the application of s.6(3) to records lodged by him.[29] {cf RS [27]}

16. **The Opponents' proposed operation of Act:** At RS [31] the Opponents seek, but fail, to identify a plausible operation of the Act which distinguishes between records written by the Governor-General and records written by others which are submitted to the Governor-General. Documents submitted to the Governor-General are ordinarily and necessarily written by a Minister, Secretary, or other public officer including public servants. The Opponents correctly submit that all such documents would be Commonwealth Records. That is only so because documents written by Ministers, Secretaries, Statutory and other senior officers are

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[27] ASBFM pp. 6, 8 - 9 [4(b)(c)], 26 to 41. The querying of the document's provenance in this Court at RS [33] when the record below was clear is to be deprecated.

[28] Sir Zelman and Sir Ninian could have lodged them under s. 6(2) had they not transferred custody of them to the official establishment; and the lodgement by Mr Smith under s. 6(2) was of no legal or practical consequence: it left the question arising under s. 6(3) to be determined according to law.

[29] ABFM 77.

Commonwealth Records because of the law of public office. There is no basis to distinguish between property in those documents and documents written by the Governor-General. The fallacy of the Opponents' case is underlined by the erroneous contention that the bare act of a Governor-General passing copies of documents for filing would transfer property in them.

17. **"Property of the Commonwealth or of a Commonwealth institution:"** The submissions at RS [11], [12] and [43] that the test of "property of the Commonwealth or of a Commonwealth institution" is to be applied at the level of Commonwealth institutions is to be rejected *first* because of the absence of textual or contextual support for that construction; and *secondly* because it would pose a question that conflicts with the law that executive government in its property and commercial dealings, absent statute, is indivisible; with the rights of the constituent elements of government to access or use government property determined by a mix of law, convention and guidelines governing the intra-mural dealings of the government.[30] Further, in an Act which applies to the records of the Courts, the Parliament, and the Governor-General, the Commonwealth is not to be equated with the ministerial government of the Commonwealth {contra RS [22]} and the Full Court erred at FC [88] CAB 88 in reasoning that s.56 of the Act operates and may be applied without regard to the law and conventions governing relationships between the constituent parts of government.

18. **The law of property:** The submissions at RS [9], [10], [13], [14] and [15] proceed on the basis of misunderstandings as to the law of property in a chattel. There is no derogation from the property in a chattel by another person (a) holding a possessory title or interest in the chattel;[31] (b) having copyright in a work recorded on the chattel; or (c) having a right to information in the document being kept confidential.[32] Section 57 confirms that the Act's reference to property does not extend to interests in copyright and confidentiality.

Dated: 22 November 2019

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[30] *Town Investments Ltd v Department of Environment* [1978] AC 359 at 380F – 381C and 397F – 400H; *Waterford v Commonwealth* (1987) 163 CLR 54 at 55. See also the *Public Governance, Performance and Accountability Act 2013* Chapter 2.

[31] Master Armory succeeded against the jeweller but would have failed against the true owner in *Armory v Delamirie* (1722) 1 STRA 505 KB; see also *Cook v Saroukos* (1989) 97 FLR 33 at 39 – 41; *Field v Sullivan* [1923] VLR 70 at 86; Pollock and Wright at pages 17 and 147; and Tarrant at page 99.

[32] *Breen v Williams* (1996) 186 CLR 71.