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

JOINT SUBMISSIONS OF THE RESPONDENT AND ATTORNEY-GENERAL FOR THE COMMONWEALTH

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PART I FORM OF SUBMISSIONS

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

PART II ISSUE AND INTRODUCTION

2. This appeal concerns whether private and confidential letters exchanged between Sir John Kerr and the Queen (the **letters**) are "Commonwealth records" for the purposes of the *Archives Act 1983* (Cth) (the **Act**), "Commonwealth record" being relevantly defined in s 3 to mean "the property of the Commonwealth or of a Commonwealth institution".

3. Contrary to Ground 2 in the Notice of Appeal, the Full Federal Court did not find (whether at FFC [95], [102] or elsewhere) that the records in issue in this appeal were "property of the Commonwealth" but nevertheless not "Commonwealth records". No such category of records exists, and the contrary was not suggested by the Full Court.

4. In summary, the letters are not "Commonwealth records" for the following reasons. The property-based definition of "Commonwealth record" encompasses only property that is owned under the general law by "the Commonwealth" (meaning the organisations or institutions of the central government) (**Part V.A**). As such, it does not encompass the letters (or copies thereof), which at general law were owned personally by Sir John (**Part V.B**). The Appellant's argument that the Constitution, or special rules relating to the creation or receipt of property while in public office, somehow displace the result at general law and mean that the Commonwealth owns the letters should be rejected (**Part V.C**). Finally, the legislative history of the Act confirms that it does not capture correspondence between the Governor-General and the Queen (**Part V.D**).

PART III SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

5. No further notice under s 78B of the *Judiciary Act 1903* (Cth) is required.

PART IV FACTS

6. The facts are sufficiently set out in the reasons of the courts below: TJ [1]-[28], CAB 9-22; FFC [41]-[47], [49] CAB 77-79. The Respondent takes issue with certain factual assertions made by the Appellant at AS [49]-[50] and AS [51]-[58], which are addressed below in paragraphs [33]-[37].

PART V ARGUMENT

A. Archives Act

7. The following features of the Act are important. **First**, in identifying the records that the Act seeks to protect and preserve, the critical term is the "archival resources of the Commonwealth". To fall within that term, which is defined in s 3(2), records must be of "national significance or public interest" and must relate to one of the subjects identified in s 3(2)(a)-(e) (subject to the exclusions in (f)-(j)). The archival resources of the Commonwealth include both "Commonwealth records and other material", thereby acknowledging that records may be of national significance, and may warrant protection by the National Archives of Australia (**Archives**), even if they are not "Commonwealth records". It is an error to treat the historical importance of records as saying anything as to their status, or otherwise, as "Commonwealth records": cf AS [66]. As the Full Court majority observed, there is no doubt the correspondence between Sir John and the Queen forms part of the archival resources of the Commonwealth. But that is not the issue. The issue is whether the letters are "Commonwealth records": FFC [14], CAB 70.

8. **Second**, the definition of "Commonwealth record" in s 3(1) refers to a record that is "the property of the Commonwealth or of a Commonwealth institution". The definition, on its terms, utilises a property-based approach and reflects a considered legislative choice, with prior drafts of the Bill having utilised first an "administrative provenance",[1] and later a "custodial", approach.[2] The Appellant's submissions disregard Parliament's choice to adopt the property-based definition. Their focus on the connection between the records and the functions of the Governor-General might have been correct if the Act had utilised an administrative provenance definition. However, to focus on whether records were made or received in the conduct of the affairs of a public office, in circumstances where Parliament considered and rejected that approach to defining the records to which the Act applies, ignores the criterion that Parliament actually enacted: FFC [86], CAB 88.

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1 Which used the formula "all records of any kind made or received by an Australian [ie Commonwealth] Government agency in the conduct of its affairs". A primarily provenance-based definition of "Commonwealth record" is found, for example, in Part 1 to the Dictionary of the *Evidence Act 1995* (Cth).

2 See Australian Law Reform Commission, *Australia's Federal Record: A review of the Archives Act 1983* (1998) (ALRC Report No 85) (**ALRC Report**) at [8.13] (extracted at FFC [62], CAB 82), noting that successive drafts of the Bill in 1974–75 moved from a provenance definition through a custodial definition ("a record that is held in official custody on behalf of the government") to the present property definition.

9. The property-based definition permeates the legislative scheme. In particular, the Act gives the Archives significant powers in respect of "Commonwealth records".[3] Yet it contains no "historic Shipwrecks clause" or other provision for compensation for any interferences with property rights. No such provision was necessary, because the parts of the Act that would otherwise authorise interference with fundamental property rights operate only upon property that is exclusively the property of the Commonwealth or a Commonwealth institution.[4] Exclusive Commonwealth ownership of the "record"[5] is required, because otherwise the Act would purport to acquire (without compensation) the property of any person or entity that had a joint or several interest in property that was a "Commonwealth record". At AS [22], the Appellant appears to acknowledge that the letters will fall within the definition of "Commonwealth record" only if no-one other than the Commonwealth has property in them. That apparent acknowledgment is correct, but it points against the correctness of the Appellant's submissions that legal possession is determinative: AS [22]. For example, where a record is held in the custody of the Archives as bailee (eg under s 6(2) of the Act), the Commonwealth will have "legal possession" of the thing; yet the bailor will remain "owner" and retain a reversionary interest.[6]

10. **Third**, the statutory phrase "the property of the Commonwealth or a Commonwealth institution" is to be given content by the common law. This was the conclusion reached by both the trial judge (TJ [102]-[103], [136], CAB 40, 49) and the Full Court (FFC [62], [84]-[86], CAB 81-82, 87-88), and it is embraced by both parties in this appeal (AS [15(c)], [22]). For that reason, it is critical to examine the common law concerning the ownership of correspondence, to which we turn shortly.

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3 For instance, s 6(1)(h) confers express power upon the Archives to authorise the disposal or destruction of "Commonwealth records" (see also ss 24(2)(b) and 25); s 24 makes it an offence to destroy, dispose of, transfer custody or ownership of, or damage or alter a "Commonwealth record"; s 27 imposes a duty requiring Commonwealth institutions with custody of "Commonwealth records" and forming part of the "archival resources of the Commonwealth" to transfer those records into the "care of the Archives"; and s 28 confers upon the Archives a right of inspection of "Commonwealth records" in the form of "full and free access, at all reasonable times".

4 See, eg, Pt V of the Act, which relevantly concerns dealings with Commonwealth records (Division 3) and access to Commonwealth records (Division 4). See also ss 6(1)(c), (e) and (f) (dealing with copyright not "owned by the Commonwealth").

5 The term "record" is relevantly defined in the Act to refer to " a document, or an object, in any form (including any electronic form)…".

6 *Mears v London and South Western Railway Co* (1862) 11 CB NS 850; 142 ER 1029; *East West Corp v DKBS AF 1912 A/S* [2003] QB 1509 at 1528 [20], 1532–1533 [31]–[32] (Mance LJ; Laws and Brooke LJJ agreeing).

11. **Fourth**, the words "property of the Commonwealth or of a Commonwealth institution" (which appear together in paragraph (a) of the definition, notwithstanding that the definition contains multiple paragraphs) form a composite phrase. That phrase as a whole delineates the organisations, institutions and agencies of government upon which the Act operates. Recognising the uncertain meaning of the term "the Commonwealth",[7] the Act, like the Constitution itself, sought to "sweep away" potential difficulties concerning legal personality and to refer to the "organisations or institutions of government in accordance with the conceptions of ordinary life".[8] As such, the fact that the phrase "Commonwealth institution" is defined to include non-legal entities is a distraction (cf AS [20]). The point is that, taken together, the statutory reference to "the Commonwealth" and "Commonwealth institution" identifies a stable and ascertainable "conception of [the] central Government".[9] The composite phrase marks out the "property" upon which the Act operates, which the Act assumes[10] will ordinarily be in the custody of a "Commonwealth institution" (as is not surprising given the definition of that term substantially overlaps with the ordinary meaning of "the Commonwealth").

12. The manner in which the Act marks out the property to which it applies draws a distinction between the institutions themselves and the office holders who comprise or are associated with those institutions: the "official establishment" as opposed to the Governor-General (para (a) of the definition of "Commonwealth institution"); the Executive Council as opposed to individual ministers[11] (para (b)); the Houses of Parliament as opposed to individual senators and members (paras (c) and (d)); the courts referred to in sub-paragraph (f) as opposed to individual judges. The significance of that distinction for this case is developed further at [38]-[43] below. In essence, the point is that "Commonwealth institution" was defined to include "the official establishment of the Governor-General", as opposed to simply the Governor-General, in order to bring some records of the Governor-General into the Act whilst excluding correspondence between the Governor-General and the Queen (as is confirmed by the extrinsic material).

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7 Which can be understood in a variety of senses: see *R v Sharkey* (1949) 79 CLR 121, 153 (Dixon J), citing W Harrison Moore, *The Constitution of the Commonwealth of Australia* (1910, 2nd ed) 73.

8 *Deputy Commissioner of Taxation v State Bank of NSW* (1992) 174 CLR 219, 229 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ), adopting the passage from Dixon J's reasons in *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 (***Bank Nationalisation Case***) at 363.

9 See, by way of analogy, *New South Wales v Commonwealth* (2006) 229 CLR 1, 120 [194].

10 See, eg, ss 6(1)(j), 25, 27, 28.

11 Note ABFM 125-128, discussing (inter alia) "private political papers" held by the Prime Minister and Ministers, which Dr Lamb seemingly understood would be dealt with under a s 6(2) arrangement.

B. Ownership of letters at general law

13. The law distinguishes between property in or associated with letters as tangible property; copyright in their contents; and other rights relating to their contents, such as the right to restrain a breach of confidence.[12] As a chattel, the "property of the paper" of a letter is owned by the recipient.[13] The recipient retains that right even if the letter happens to return into the sender's possession.[14] If the sender of a letter keeps a copy, that copy belongs to the sender, not the recipient.[15] As to rights separately from rights with respect to the chattel, historically "the sending of the letter did not denude the writer of his property in the composition" and the law "recognized that the author of a letter might have other rights of a totally different character, which would enable him to prevent a misuse of the letter by the person to whom it was sent and whose property it became."[16] The author of a letter "had no doubt certain rights of property in these letters, [and] a determination of the statutory right of copyright does not exhaust the rights. There exist at common law in the writer certain rights apart from copyright", including "the right to restrain the receiver from publishing the letter".[17]

14. As recipient of the letters from the Queen — and as author and proprietor of his own letters before they were sent — Sir John "could not have been compelled to part with the [letters] or to allow [them] to be copied, and had anyone copied [them] without [his] consent [he] could have restrained any publication being made by means of such a copy."[18] Further, Sir John was authorised to make copies of his own letters, as he was the owner of the relevant copyright; the letters being unpublished literary works of which he was the author.[19] By contrast, the Commonwealth did not have copyright in those letters.[20]

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12 *OBG Ltd v Allan* [2008] AC 1 at 76 [274] (Lord Walker); referring to *Philip v Pennell* [1907] 2 Ch 577. Cf *Moorhouse v Angus & Robertson (No 1) Pty Ltd* [1981] 1 NSWLR 700.

13 *Pope v Curl* (1741) 2 Atk 342 at 342; 26 ER 608 at 608 (Lord Hardwicke LC); *Earl of Lytton v Devey* (1884) 54 LJ Ch 293 (Bacon VC).

14 *Oliver v Oliver* (1861) 11 CB NS 140 at 141; 142 ER 748 at 748 (Erle CJ).

15 *In re Wheatcroft* (1877) 6 Ch D 97 at 98 (Jessel MR).

16 *Macmillan & Co v Dent* [1907] 1 Ch 107 at 121 (Fletcher Moulton LJ).

17 *Macmillan & Co v Dent* [1907] 1 Ch 107 at 129 (Fletcher Moulton LJ).

18 *In re Dickens* [1935] Ch 267 at 296 (Romer LJ). See also at 307 (Maugham LJ).

19 *Copyright Act 1968* (Cth) s 32(1). A letter is a "literary work": *British Oxygen Co Ltd v Liquid Air Ltd* [1925] Ch 383 at 390–391 (Romer J). A literary work is "published" only if it is "supplied (whether by sale or otherwise) to the public": *Copyright Act 1968* (Cth) s 29(1)(a).

20 The contrary was "not suggested": FFC [84], CAB 87. The Commonwealth would have copyright in an original literary work under s 176 only if it is made "by, or under the direction or control of, the Commonwealth", which requires "the person making the work is subject to either the direction or control of the Crown as to how the work is to be made": *Copyright Agency Ltd v New South Wales* (2007) 159 FCR 213

15. The application of the principles outlined above has this result. **First**, property in the copies of Sir John's letters to the Queen was held by Sir John. It is clear that those copies were taken *for* Sir John *personally* (not for the Official Establishment or for the Commonwealth).[21] Where an agent creates a copy of the letters, the chattel so created is owned by the principal on whose behalf the copy is made.[22] Sir John's ownership of the copies of his letters to the Queen exists irrespective of who owned the blank paper on which the copies made (see FFC [84], CAB 87). This is because the process of reproduction is a form of manufacture by which new property is made: a legible copy is entirely different from a blank sheet of paper, and is not ordinarily capable of being returned to its original state as a blank sheet.[23] None of this is in dispute, as is apparent from the Appellant's acceptance that the subsequently-made copies of the letters were Sir John's personal property (AS [55]). In this sense, it can be said that the paper on which the letters were copied accedes to the writing copied upon it.[24]

16. **Second**, in respect of the Queen's letters to Sir John, they were owned by Sir John as the recipient of the correspondence, which was sent to him on a "personal and confidential basis". That conclusion follows simply from the ordinary principles that apply to the ownership of correspondence. It is also consistent with longstanding United Kingdom convention that the Queen's copy of the letters is her personal property held in the Royal Archives at Windsor Palace.[25]

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at [122]. That finding was not appealed to this Court, although an appeal was allowed on other grounds.

21 As found by the trial judge, Sir John considered that these copies were his personal property (TJ [108], [117(d)], CAB 41-43), as did the Queen (TJ [110], [117(e)], CAB 41-43), previous Governors-General (TJ [117(a), (b), (c)], CAB 41-43), and the Commonwealth (TJ [15], [113], [117(e)], CAB 16-17, 41-43). Any suggestion that, despite this shared understanding, the copies of Sir John's letters to the Queen were taken for the Commonwealth, not Sir John, flies in the face of the evidence and these findings of the trial judge: see also TJ [114], [116], CAB 42-43.

22 *Pacific Film Laboratories Pty Ltd v Commissioner of Taxation* (1970) 121 CLR 154 at 163–164 (Barwick CJ); 166–167 (Windeyer J); *Breen v Williams* (1996) 186 CLR 71 at 88 (Dawson and Toohey JJ), 101 (Gaudron and McHugh JJ) citing *Leicestershire County Council v Michael Faraday & Partners Ltd* [1941] 2 KB 205 at 216 (MacKinnon LJ).

23 Inst 2.1.25.

24 Cf Inst 2.1.33. The common law has never rigidly followed Roman law rules about accession: *Rendell v Associated Finance Pty Ltd* [1957] VR 604 at 606–7 (O'Bryan J; Lowe and Barry JJ agreeing). Within the civilian tradition, the Justinianic rules have been criticised by later writers: cf Grotius, *De Jure Belli et Pacis* (1625) Book II, Ch 8, XXI; Pufendorf, *De Jure Naturae et Gentium Libri Octo* (1672) Book 4, Ch 7 s 7. The Justinianic rule is not in terms adopted by the modern civil codes: cf *Code civil* (France) arts 565–77; *Bürgerliches Gesetzbuch* (Germany) § 947; *Zivilgesetzbuch* (Switzerland) art 727.

25 The Royal Archives are a "private archive" (ABFM 102) and the Queen's copy is is not subject to either the *Public Records Act 1958* (UK) or the *Freedom of Information Act 2000* (UK): Affidavit of Mark Fraser affirmed 3 February 2017 (RBFM 151-152 at [19], [21]-[22]); Letter from the Official Secretary to the Governor-General to the Private Secretary to the Queen dated 1 February 2017 (ABFM 99), and reply thereto

17. For the above reasons, applying the ordinary law of property, the letters and copies are owned by the Governor-General. They are not "the property of the Commonwealth or a Commonwealth institution", and therefore are not "Commonwealth records".

C. The Appellant's arguments and the office of the Governor-General

18. Notwithstanding the undisputed fact that the property-based definition of "Commonwealth record" draws on the general law, the Appellant contends that the letters are "the property of the Commonwealth" because: (i) the letters have effectively been created or received by the "Commonwealth as a body politic" (AS [15(d)(i)]); and (ii) the Governor-General is, or is relevantly analogous to, a public officer and "[a]ll 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" (AS [15(d)(ii)]; [37]). Neither argument should be accepted.

(i) The Governor-General is not relevantly "the Commonwealth" as a body politic

19. Pursuant to s 2 of the Constitution, the Governor-General is the Queen's representative – as opposed to the representative of the government of the United Kingdom[26] – in the Commonwealth. The Governor-General "stand[s] in the place of the Queen"[27] and occupies "in all essential respects the same position in relation to the administration of public affairs in the Dominions as is held by [the Queen] in Great Britain".[28] Consistently with this role as the Queen's representative, s 2 provides that the Queen may appoint and dismiss the Governor-General. Since the Imperial Conference of 1930, the power of appointment has been exercised on the advice of the Australian Prime Minister (after "informal consultation" with the Monarch), it being recognised that the "parties interested in the appointment of a Governor-General of a Dominion are His Majesty the King, whose representative he is, and the Dominion concerned".[29] That highlights the Governor-General's role as having two "interfaces": one with the Queen, and one with

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(ABFM 102).

26 In the sense of representing the Sovereign, and not the UK government: HE Renfree, *The Executive Power of the Commonwealth of Australia*, Legal Books Pty Limited (1984) (***Renfree***) 147.

27 Robert Menzies, *Afternoon Light: Some Memory of Men and Events* (Cassel, Melbourne, 1967) 256-7; 1.

28 The Balfour Declaration of 1926, p 4 (RBFM 11); *Sue v Hill* (1999) 199 CLR 462, [85].

29 Imperial Confernece 1930: Summary of Proceedings, p. 15 (RBFM 32); *Sue v Hill* (1999) 199 CLR 462, [74].

the Commonwealth. This is reflective of the framers' intention that the Governor-General be a "link" between the Queen and the new body politic[30] created by the Constitution.[31]

20. Just as the concept of "the Crown" is used in several metaphorical senses in constitutional theory,[32] the status of the Governor-General, as the Queen's representative, is also susceptible to different characterisations for different purposes. For example, in *Sue v Hill*, Gleeson CJ, Gummow and Hayne JJ observed that one of the usages of "the Crown" was to refer to "that office, the holder of which for the time being is the incarnation of the international personality of a body politic, by whom and to whom diplomatic representatives are accredited and by who and with whom treaties are concluded".[33] Their Honours pointed out that, since 1987, the Governor-General has exercised those powers. When doing so, it is no doubt correct to identify the Governor-General as an "emanation" of the Commonwealth.

21. Just as there are at least five senses in which "the Queen" or "the Crown" are used in constitutional theory,[34] the status of the Governor-General likewise does not admit of a single monolithic characterisation. What is relevant to this case is that, consistently with the recognition in *Sue v Hill* that the Constitution uses the term "the Queen" to refer to "the person occupying the hereditary office of Sovereign of the United Kingdom"[35] (who is also the Queen of Australia), the Governor-General is, by reason of s 2 of the Constitution, the representative of that person. As the Queen's personal representative, the Governor-General holds an "independent office pursuant to the *Australian Constitution*",[36] pursuant to which he or she exercises "a range of constitutional,

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30 See *New South Wales v Commonwealth* (2006) 229 CLR 1, 120 [194] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

31 Convention Debates 22 April 1897, 1177 (Deakin). See also 1 April 1891, 565 (Mr Munro) ("link binding us to [the] empire"), 576 (Cockburn) ("the only link between us and the Crown"); 10 March 1891, 186 (Dibbs) ("the last link of connection with the Crown"); 14 April 1897, 629-30 (Reid) ("The Governor-General is the only constitutional link we have between the mother-country and ourselves", '...the Governor-General is to be a visible link between the British Empire and ourselves".). The office of Governor-General was seen by the framers of the Constitution as "[t]he only way in which we can have her [the Queen] present [among us]": Australasian Federation Conference, 1 April 1891, 564-5 (Mr Munro).

32 *Sue v Hill* (1999) 199 CLR 462, [83].

33 *Sue v Hill* (1999) 199 CLR 462, [85].

34 Identified in *Sue v Hill* (1999) 199 CLR 462, [84]-[93].

35 *Sue v Hill* (1999) 199 CLR 462, [93] (emphasis added).

36 *Kline v Official Secretary of the Governor-General* (2013) 249 CLR 645, [33]. Note also *Sue v Hill* (1999) 199 CLR 462, [81], noting that the reference to the Queen in s 122 served to "distinguish the sovereign from 'the Commonwealth'". A similar distinction exists for the Queen's representative.

statutory, ceremonial and community responsibilities".[37] Amongst the multifarious responsibilities of that independent office is corresponding with the Queen. The frequency and content of such correspondence is for the Governor-General personally to determine,[38] the Queen having no power of direction over the Governor-General in that (or any other) matter, and "no part in the decisions which the Governor-General must take in accordance with the Constitution".[39] Such correspondence as does occur is "personal, not in the sense that it did not involve in some sense the performance of functions, but because the particular function that was involved for the Governor-General was aptly described as personal" (FFC [79], [97], CAB 86, 90). In that way, while the conclusion that the correspondence was "personal" is not determinative of ownership, it supports the result that the confidential correspondence was Sir John's own property.

22. As this Court recognised in *Kline*, "[i]ndependence 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."[40] The Court went on to hold that "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."[41] That conclusion was based in part on avoiding the "possibilities of giving offence to failed nominees, defamation, or political controversy".[42] Those considerations apply even more strongly to direct communications with the Queen on a personal and confidential basis. Indeed, that is part of the reason that the "unique role" of "providing personal briefings to the Queen"[43] is subject of the "longstanding convention" of confidentiality described above. It would be entirely at odds with that convention to conclude that the Commonwealth owned the letters, such that it had the legal right at any time – irrespective of the wishes of the Queen and the protection that is accorded to her copy of the same correspondence – to require the delivery of Sir John's copy of the letters to the Government of the day, so that they could

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37 *Kline v Official Secretary of the Governor-General* (2013) 249 CLR 645, [11], [38].
38 Kerr, *Matters for Judgment: An Autobiography of Sir John Kerr*, ABFM 67.
39 Renfree p 150, quoting a letter from the Queen's Private Secretary, Sir Martin Charteris, to the Speaker of the House of Representatives dated 17 November 1975. As to the date, see ABFM 67.
40 *Kline v Official Secretary of the Governor-General* (2013) 249 CLR 645, [34]. Of course, most decisions of the Governor-General are made on the advice of a Minister or the Executive Council: at [11], [38].
41 *Kline v Official Secretary of the Governor-General* (2013) 249 CLR 645, [34].
42 *Kline v Official Secretary of the Governor-General* (2013) 249 CLR 645, [39].
43 TJ [150] CAB 53; Boyce, *The Queen's Other Realms* (2008), p. 35.

be inspected within government and/or publicly released at any time of the Government's choosing. That would constitute a radical change in the understanding of the parties to the correspondence. Yet that consequence would follow from acceptance of the Appellant's argument, as is confirmed by s 56 of the Act (FFC [88], CAB 88).

(ii) The "public officer" principle posited by the Appellant is not part of Australian law

23. The Appellant submits that the letters are the "property of the Commonwealth" because they were "created or received by the Governor-General in the performance of his office": AS [45]. However, it is not the law that any property created or received by an office-holder in the performance of his or her office belongs to the polity in which the person holds office (cf AS [34]–[38]).[44] The cases upon which the Appellant relies do not establish any such proposition.

24. The line of authority in *Reading v Attorney General*[45] and *Attorney-General for Hong Kong v Reid*[46] does not support the general proposition that all property created or acquired by the holder of a public office in the performance of the functions of the office belongs to the Crown (cf AS [36]). These cases establish no more than that the Crown has an interest in property that is acquired when office holders receive property as a result of misusing their office in a way that constitutes a breach of fiduciary duty (often by taking bribes). That line of authority says nothing about the ownership of correspondence that is created or received by the holder of a public office. Nor is *R v Boston*[47] of any relevance to that issue (cf AS [36]). That case again concerned unlawful conduct by a public officer, being a conspiracy that large sums of money should be given to a member of the Legislative Assembly of New South Wales (who was party to the conspiracy) as an inducement to misuse his position. The case in fact concerned whether the offence was properly charged, rather than with the ownership of property. Further, Isaacs and Rich JJ's discussion of the duties of public officers was directed to a case

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44 Just as, in other contexts, documents produced by a person (such as an agent) in discharging a duty to another may nonetheless remain the property of the person who produced them: see *Breen v Williams* (1996) 186 CLR 71, 88-89 (Dawson and Toohey JJ), 101 (Gaudron and McHugh JJ), 126 (Gummow J).

45 [1951] AC 507 (concerning the Crown's right to thousands of pounds confiscated from an army sergeant who had abused his official position to enable drugs to be imported).

46 [1994] 1 AC 324 (concerning whether property obtained using money that was received as a bribe was held on constructive trust for the Crown).

47 (1923) 33 CLR 386.

where "intervention by a public representative be impelled by motives of personal gain".[48] That is far removed from the present context.

25. Perhaps reflecting the lack of support in Australian or United Kingdom law for the principle for which she contends, the Appellant relies on the United States' decision in *Nixon v Sampson* 389 F. Supp 107 (1975) (***Nixon v Sampson***) (AS [37], and FFC [55], CAB 80). However, that judgment does not accurately reflect even the law of the United States, much less Australia. So much is apparent from the culmination of the relevant litigation in the decision of *Nixon v United States*[49] (***Nixon v US***). The question in that case was whether the *Presidential Recordings and Materials Preservation Act* (**PRMPA**) effected a compensable taking of Mr Nixon's property in his presidential papers.[50] The Court held that the presidential papers were "exclusively the property of the President" (at 1284). It rejected any analogy with the proposition that an employer owns the papers its employees create in the course of employment, and the claim that the papers were held on trust for the American public. Far from accepting any alleged principle concerning property obtained in the performance of public office, the Court concluded that "[h]istory, custom and usage indicate unequivocally that, prior to the PRMPA, a President exercised complete dominion and control over their presidential papers" (at 1277). The Court engaged in a detailed historical analysis of the treatment of presidential papers over time, including pointing to the Court's observation in *Folsom v Marsh*[51] that President Washington had considered his papers as "his own private property" and had bequeathed them to his nephew. It traced the history up to the present time in an appendix to the judgment. The Court reasoned that, not only was the historical practice of past Presidents compelling, but that, taken together with the acquiescence of "all three branches of government" (which had "widely assumed" private ownership), it could be concluded that there was a "mutually explicit understanding and uniform custom" that "Presidents retained an exclusive property interest in their presidential papers" (at 1282).

26. The same mode of reasoning is available in Australia, where it has been recognised that, where ownership of property is not the subject of a definitive grant or is otherwise

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48 *R v Boston* (1923) 33 CLR 386, 403.

49 978 F.2d 1269 (DC Circ 1992). The history of the litigation concerning the Nixon presidential papers is canvassed in detail in this decision at 1272-1275.

50 *Nixon v US* 978 F.2d 1269 (DC Circ 1992) at 1270, fn 1.

51 9 F. Cas. 342 at 345 (C.C.D. Mass. 1841).

disputed, evidence of the conduct and belief of third parties can help to identify the true owner or the nature of the right in dispute.[52] As the majority in the Full Court put it, "[a]bsent some supervening rule ... what the only people who could have a claim to property in documents thought at the time (it would appear unanimously) does reflect not only a clear statutory premise of the Archives Act, but also who in truth was understood and agreed to have property in the documents" (FFC [103], CAB 91).

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27. History and convention concerning the ownership of private and confidential correspondence between the Governor-General and the Queen confirm that such correspondence is the property of the parties to it, this being a context where "a page of history is worth a volume of logic".[53] The uncontradicted evidence, which was accepted at trial, was that each relevant office-holder – whether at the Palace, Government House, the Lodge or the Archives – considered, and acted on the basis that, the letters belonged privately to Sir John and were not property of the Commonwealth (TJ [13]–[23], [108]-[117]). That, in turn, reflected the longstanding convention that correspondence between the Queen and her Governors-General across her 15 Realms outside the United Kingdom was private and confidential and does not form part of any official government record.[54] Historical practice supported that view. For example, the papers of Lord Stonehaven (Governor-General from 1925-30) were inherited by his son and were handed in to the care of the National Library in 1968 "subject to The Queen's wishes" and on her "instructions" that "they should remain closed until 60 years after the end of the appointment".[55] The disposition of papers "by gift or devise are clear examples of conduct inconsistent with public ownership".[56] More recently, in addition to the letters that are in issue in this appeal, the "personal and confidential" correspondence between Sir Zelman Cowen (Governor-General from 1977-1982) and the Queen was deposited with the Archives on the same terms as the deposit of Sir John's letters (again referring to

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52 *Shire of Narracan v Leviston* (1906) 3 CLR 846 at 857, 859 (Griffith CJ), 867–8 (Barton J), 872 (O'Connor J) (right of way); *J A Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 at 429 [19] (Lord Browne-Wilkinson) (adverse possession); *Administration of Territory of Papua and New Guinea v Daera Guba* (1973) 130 CLR 353 at 432–3 (Gibbs J) (sale of native title); *Nolan v Nolan* [2004] VSCA 109 [122]–[138] (Chernov and Eames JJA; Ormiston JA agreeing) (ownership of chattel).

53 *Kline v Official Secretary of the Governor-General* (2013) 249 CLR 645 at [62] (Gageler J), citing *New York Trust Co v Eisner* (1921) 256 US 345 at 349.

54 FFC [81], CAB 86; Affidavit of Mark Fraser affirmed 3 February 2017 (RBFM 167 at [25]); ABFM 97; ABFM 101-102.

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55 Letter from Sir Martin Charteris to Sir John Kerr, dated 8 October 1976 (RBFM 44). Similarly, Sir John's papers were dealt with under his will as part of his estate: TJ [116], CAB 43.

56 *Nixon v United States* 978 F.2d 1269 (DC Circ 1992) at 1279.

the Queen's "wishes" and Sir Zelman's "instructions"),[57] as was Sir Ninian Stephen's "personal and confidential correspondence with Buckingham Palace".[58] The same approach was taken by the Commonwealth, acting through Archives, with respect to the records of Lord Casey (Governor-General from 1965-1969) and Sir Paul Hasluck (Governor-General from 1969-1974).[59]

28. Furthermore, consistently with the historical practice just summarised, the Commonwealth, through the Archives, has always (that is, both before and after the Act) proceeded on the basis that correspondence between the Governor-General and the Queen is the personal property of the Governor-General. That is reflected not just in the position that the Commonwealth, through the Archives, has actually taken with respect to the letters now in issue,[60] but also in official policy documentation dealing generally with the position of Governors-General, which has consistently stated that such correspondence is not a "Commonwealth record" because it is the personal property of the Governor-General.[61] As such, the Commonwealth has not just acquiesced in such correspondence being treated by Governors-General as their private property, but it has participated in the generation of a "mutually explicit understanding" to that effect.

29. The Appellant's submissions concerning the ownership of the records of public officers, if accepted, would have implications for the ownership of the records of all holders of public office, and not just those of Governors-General (and not just concerning

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57 Instrument of deposit made for correspondence between Sir Zelman Cowan and The Queen, dated 14 June 1984 (RBFM 111 and 186 [86]).

58 Instrument of deposit made for correspondence between Sir Ninian Stephen and The Queen, dated 31 August 1990. A covering letter, in addition to the instrument of deposit, also dated 31 August 1990, made express reference to the lodgment being "in accordance with section 6(2) of the Archives Act 1983" (RBFM 11); Affidavit of David Brian Fricker affirmed 24 March 2017 (RBFM 186 at [87]).

59 TJ [117](b) and (c), CAB 43. See also undated letter from the Director-General of Archives to the Official Secretary of the Governor-General (ABFM 85).

60 Letter from Professor RG Neale (the then Director-General of Archives, part of the Department of Prime Minister and Cabinet) to Mr David Smith dated 18 November 1977 acknowledging, in effect, Sir John's personal ownership of the subject records (RBFM 49-50); Letter from the Acting Director-General of Archives to Sir John Kerr on 15 December 1983 (after the Act commenced), stating that under the Act "all private and personal material including direct and personal correspondence with the Queen, is exempt from the provisions of the legislation" (ABFM 64); File note of Director-General of Archives dated 22 June 1998 (ABFM 91); Affidavit of David Brian Fricker affirmed 24 March 2017 (RBFM 184 at [71], 194 at [13], 195 [18]). See also RBFM 168 and 169.

61 *Access Examination Manual* (Nov 2014), concerning "Other Guidance: The British Royal Family and Household" (RBFM 141); *Personal Records Service Manual* (1994) p 171, giving examples of non-Commonwealth records including "correspondence of the Governor-General ... with the Queen or her Private Secretary" (see RBFM 183 at [62] and [64], RBFM 166-167) . The current Personal Records Service Manual, which was updated in 2002, is to the same effect (RBFM 116).

correspondence with the Queen). For that reason, historical practice, custom and usage concerning the records of other public officers is also relevant. That historical practice likewise cannot be squared with the principle for which the Appellant contends. For example, private correspondence written by Members and Senators (including whilst holding offices as Ministers of State under s 64 of the Constitution) has long been recognised as comprising their personal property. That correspondence may include correspondence with the Governor-General, which (like correspondence with the Queen) is subject to a strict convention in favour of confidentiality consistent with the neutrality and independence of the Governor-General.[62] The Archives holds correspondence of that kind pursuant to a "long-standing policy of collecting personal papers, principally of former Commonwealth ministers and officials".[63] It does so because the donors elected "which institutions will have custody of their papers".[64] Indeed, even in the context of gifts received by Members and Senators (being a context in which it might be thought that the Appellant's principle would have more force), history, custom and usage is against any absolute rule that property received in the course of discharging a public office belongs to the body politic. Instead, there is a longstanding practice that Members and Senators are not required to declare official gifts that they receive where the value of the gifts is below certain monetary thresholds, such gifts being taken to be gifts to the officer holder personally, whether or not they are received in connection with the performance of official duties.[65]

30. History, custom and usage concerning the papers and correspondence of judges likewise points against the rule for which the Appellant contends. It has long been accepted that not all papers generated by a judge in the course of performing the functions of his or her office are owned by the Commonwealth. Instead, "draft judgments, correspondence, memoranda from associates" are "regarded as part of the private papers of the individual judge, to be dealt with as the judge sees fit upon retirement".[66] That understanding is

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62 Bogdanor, *The Monarchy and the Constitution* (1995), pp 66-67; Sir Paul Hasluck, lecture titled "*The Office of the Governor-General*" (1979), pp. 24-26 (RBFM at 84-86); Boyce, *The Queen's Other Realms* (2008), p. 48.

63 Senate Standing Committee on Education and the Arts, *Report on the Archives Bill 1978* (1979) [3.27].

64 Senate Standing Committee on Education and the Arts, *Report on the Archives Bill 1978* (1979) [3.28]; Affidavit of David Brian Fricker, affirmed 24 March 2017 at DBF-21 and DBF-20 (RBFM 182-183 at [56]-[62]).

65 See the House of Representatives Resolution "Registration of Members' interests" adopted 9 October 1984, as amended, the Senate Resolutions "Registration of Gifts to the Senate and Parliament" agreed to 26 August 1997, as amended, and "Registration of Senators' Interests" agreed 17 March 1994, as amended.

66 T Josev, "Judicial Biography in Australia: Current Obstacles and Opportunities" (2017) 40(2) *UNSW Law*

reflected in the Records Authority developed by this Court and the Archives to set out arrangements for keeping or destroying certain records, which states: "A Judge's own papers may be disposed of as and when their owners or controllers deem appropriate. These records may be of great interest and value because they complement the Court's records and have national importance as archival resources of the Commonwealth. Such records may be transferred to [the Archives] for continuing care and preservation."[67] The example illustrates a category of records that may be created or received by a person who holds a public office – and which might shed light on the "modern history of the nation" – without those records being " the property of the Commonwealth".

31. Of course, under the ordinary rules of property law, the Governor-General would usually hold property only in records that he or she prepared personally,[68] and which the Governor-General did not then send or give to someone else (so as to pass property in the chattel to the recipient). That will mean that the overwhelming majority of records relating to the Governor-General will be Commonwealth records. For example, whenever a document is prepared by a department or Minister for submission to the Governor-General, who then signs that document and returns it, the Governor-General would never have held property in that document. That would include records such as proclamations; regulations; records of formal advice from the Federal Executive Council (s 62); formal appointments of Ministers to Departments of State (s 64); and appointments and removals of other officers of the Executive Government. All such documents would be Commonwealth records because of the operation of the general law of property upon which the Act is predicated, without any need for a principle of the kind for which the Appellant contends. Further, even with respect to documents created by the Governor-General personally, if copies of those documents are filed with the official establishment they would become Commonwealth records as property passed to that body. It is therefore principally documents that are created or received and retained by the Governor-General personally that constitute his or her personal property.

Journal 842 at 855. See also *Baudains v Liquidators of Jersey Banking Co; Ex parte Baudains* (1888) 13 App Cas 832 at 833.

67 Records Authority 2010/00663993, dated 22 November 2010, at [9].

68 See, for example, National Archives of Australia – Access Examination Manual (November 2014) (RBFM 144). Over many years, Archives has produced successive revisions of this manual: see Affidavit of David Brian Fricker affirmed 24 March 2017 (RBFM 180 at [49]).

32. While it is not necessary for the Court to decide the point in this appeal (given the special category of documents with which it is concerned), the better view is that, in the limited circumstances identified above in which records will be the property of the Governor-General under the general law, those records are not Commonwealth records whether or not they are created or received by the Governor-General in the performance of his or her office: cf AS [45]. Just as documents of the President of the United States are the personal property of the President – irrespective of their connection with the functions of the President – documents (as chattels) may be owned personally by the Governor-General even when they are created or received in the performance of his or her office. The contrary submission wrongly assumes that public law questions of function operate to control the answer to a private law question of property.

(iii) Factual matters upon which the Appellant relies

33. In addition to the legal reasons addressed above for rejecting the Appellant's arguments, the facts also do not support some of the Appellant's factual claims. **First**, the Appellant's contention that the "Personal and Confidential" marking on the letters should, in effect, be ignored as simply a "public sector convention" imposed by Buckingham Palace on non-confidential correspondence should not be accepted (AS [49]). The document the Appellant cites does not deal with communications between the Governor-General and the Queen (and is additionally of unclear provenance). To the extent that any analogous correspondence was sent by State Governors, it was plainly intended to be personal and confidential: eg ABFM 36 "...expressing his own personal views and not those of his Ministers". As to the correspondence between Sir Paul Hasluck and Sir Martin Charteris referred to in AS [49], it concerned the impending retirement of the then Official Secretary to the Governor-General and the question of his replacement. Sir Paul was writing to Sir Martin "personally" and seeking his "own comments": ABFM 9. That is, on this occasion, Sir Martin was not a conduit for communication with the Queen. This correspondence was of an entirely difference character to the letters in issue.

34. **Second**, the submission that the letters "were not treated as Sir John's 'personal papers'" is untenable (cf AS [50]). The submission is seemingly put on the basis of two letters sent between Sir David and Sir John in 1981: ABFM 60-63. Those letters were specifically addressing "certain boxes of correspondence" that were described by Sir David as

containing "most of the letters and telegrams which were sent to you supporting or criticising your actions of 11 November 1975, and those which were sent to you during 1976 supporting or criticising you for staying in office": ABFM 62. That is, they concerned a wholly different category of correspondence to the instant letters: TJ [115], CAB 42-43. In fact, the more relevant letter is that dated 23 December 1977, where Sir David wrote that the letters were "in my strong room under absolute security until the task [of copying them for Sir John] was complete and the original file is in Archives": RBFM 53. The letters obviously had not been "passed out": cf AS [50].

35. **Third**, the Appellant now asserts that the evidence went against finding that the relevant actors perceived Sir John to hold property in "the Records, or documents of their kind", and that there was some change of practice in October 1977: AS [51]. Again, that is clearly incorrect. On appeal below, the Appellant did not seek to impugn the primary judge's findings of fact at TJ [108]-[117], CAB 41-42, the effect of which was endorsed by the majority at FFC [103], CAB 91. The contemporaneous documentation is incapable of bearing the interpretation that the Appellant now seeks to impose upon it. For example, the discussion outlined in the letter from Sir John to Sir Martin that is referred to at AS [52], rather than being limited to questions of custody, was clearly premised on Sir John's understanding of his property in the letters (to which Sir John repeatedly referred as "my papers"): RBFM 40. The response from Sir Martin to Sir John (referred to at AS [53]) made plain that it was a matter for Sir John to "agree to" the proposed archival arrangements, with Sir Martin describing the letters as "your papers": RBFM 43.

36. Contrary to what is put at AS [54], the letter from Prime Minister Fraser to Sir John dated 18 October 1977 (RBFM 46) sought to <u>persuade</u> Sir John to deposit his records with Archives, rather than to require that to occur – and referred to arrangements made by Lord Casey, Lady Casey and Sir Paul Hasluck, all of which arrangements proceeded on the basis that the records in question were owned personally by Lord Casey and Sir Paul. There is no basis for the assertion that this letter "marks the end of the practice" of Governors-General taking correspondence with them on leaving office. To the contrary, that is exactly what occurred when Sir John left office less than two months later, when Sir Zelman Cowan left office (as he deposited his papers with Archives in 1984, nearly two years after he left office) and when Sir Ninian Stephen left office (as he deposited his papers with Archives in 1990, nearly 18 months after he left office). All three Governors-

General deposited their papers with Archives under "arrangements" pursuant to s 6(2) of the Act, that being the mechanism contemplated in the Act for certain personal (i.e. non-Commonwealth) records: RBFM 58, 110, 112.

37. The letter from the Commonwealth, acting through the Director-General, to Mr Smith dated 18 November 1977 likewise indicates that it was understood that Sir John held exclusive property in the records: RBFM 48; cf AS [55]. The Commonwealth, through Archives, confirmed this in correspondence to Sir John dated 15 December 1983, stating that "all private and personal material including direct and personal correspondence with the Queen, is exempt from the provisions of the legislation": ABFM 64.

D. The legislative history of the Archives Act confirms the general law position

38. The conclusion that the Act does not apply to correspondence between the Governor-General and the Queen is "fortified by resort to statements in the relevant secondary materials"[69] concerning the development of the Act. Indeed, the first iteration of the Archives Bill in 1978 expressly excluded all documents of the Governor-General from any requirements under the proposed legislation. After that Bill was introduced, it was referred to committee for inquiry and report, with issues common to or relating to the inquiry into the Freedom of Information Bill 1978 being referred to the Standing Committee on Constitutional and Legal Affairs (the **Senate Constitutional Committee**), while the balance of the Bill was referred to the Senate Standing Committee on Education and the Arts (the **Senate Education Committee**).[70]

39. In its report, the Senate Constitutional Committee noted evidence provided by the Director-General to the effect that direct correspondence between a Governor-General and the Queen is in a special category in British law and is not made available until sixty years has elapsed since the date of creation.[71] The Senate Constitutional Committee accepted that this "may suggest the need for special treatment to be given to a few categories of records, such as...correspondence with the Monarch",[72] although it did not accept the need for the total exclusion of all documents of the Governor-General.[73] By

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69 *Kline v Official Secretary of the Governor-General* (2013) 249 CLR 645 at [48].
70 Senate Standing Committee on Education and the Arts, *Report on the Archives Bill 1978* (1979) 1.
71 Senate Committee, *Freedom of Information* (1979) [33.22].
72 Senate Committee, *Freedom of Information* (1979) [33.23].
73 Senate Committee, *Freedom of Information* (1979) [33.29].

contrast, the Senate Education Committee concluded that the exclusion of vice-regal records was "acceptable on the grounds of preserving the traditional independence of these arms of government from the executive".[74]

40. Notwithstanding the Senate Constitutional Committee's recommendations, when the Archives Bill was re-introduced in 1981, it again provided expressly for the "records" of a Governor-General to be excluded from the archival regime, unless provided for by regulation or the Governor-General entered into an arrangement with the Archives.[75] In committee, the case for protecting correspondence between the Queen and the Governor-General was again made, and it was not argued that such protection was not warranted.[76]

41. In 1983, the 1981 Bill was amended and reintroduced into Parliament. Nothing in the legislative record suggests any intention to reverse the earlier policy so as to bring correspondence between the Governor-General and the Queen into the scheme. To the contrary, in the second reading speeches to both Houses, Parliament was informed that the "provisions of the legislation will apply to the records of the official establishment of the Governor General, but not to his private or personal records".[77] Moreover, it was noted that the Bill was "chiefly designed to replace existing ad hoc decisions and conventions which have been relied upon for the last thirty years".[78]

42. Rarely does extrinsic material shed such clear light on an issue of statutory construction. Here, it shows that, over a period of years, Parliament directed its attention to the specific position of correspondence between the Governor-General and the Monarch, and decided to exclude that correspondence from the coverage of the Act. As the Second Reading Speech makes plain, the Act was evidently thought to have achieved that effect by confining the definition of "Commonwealth institution" to the "official establishment of the Governor-General".[79] That language distinguishes paragraph (a) of the definition of

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74 Senate Standing Committee on Education and the Arts, *Report on the Archives Bill 1978* (1979) [5.16].

75 See clause 18 of the Archives Bill 1981.

76 Extract of the Bill "In Committee" Debate, dated 17 February 1982, p. 316 (RBFM 108-109).

77 Second Reading Speech (Senate) to the 1983 Bill, 2 June 1983, 1184; Second Reading Speech (House of Representatives) to the 1983 Bill, 1851.

78 Second Reading Speech (Senate) to the 1983 Bill, 2 June 1983, 1183. See also the Second Reading Speech (House of Representatives) to the 1983 Bill at 1850.

79 A concept which refers to the Official Secretary to the Governor-General appointed under s 6 of the *Governor-General Act 1974* (Cth), together with the staff employed under s 13 of that Act, who together comprise the Office of the Official Secretary to the Governor-General: see TJ [139], CAB 50. These positions existed in practice prior to them being placed on a statutory footing by amendments to the

"Commonwealth institution" from all the other paragraphs, which refer to the particular institution as a whole and without qualification. As Griffiths J correctly found, this "strongly suggests that the qualification is intended not to encompass the broader institution which is reflected in the concept of 'the Governor-General'": TJ [138], CAB 50. Specifically, it was intended to exclude the personal and private records of Governors-General (the exemplar of which was correspondence with the Queen). Consistently with longstanding convention, the evident intention was that it was for each Governor-General to decide any holding and access arrangements with the Archives, that being necessary because such records were the property of the Governor-General.

43. Returning to the point made at [11] and [12] above, the Court should not construe the Act so as to deprive the phrase "the official establishment of the Governor-General" of any content. Yet that would be the result of treating all records created in the performance of the Governor-General's function as "property of the Commonwealth": cf AS [20], [21]. The specific inclusion of the "official establishment of the Governor-General" in the definition of "Commonwealth institution" imports an implicit negative. It indicates that, irrespective of the breadth of "the Commonwealth" in other contexts, in the specific context of the Act, personal and confidential correspondence between the Governor-General and the Queen is not a "Commonwealth record": FFC [94]-[96], CAB 90.

44. For all the above reasons, the appeal should be dismissed with costs.

PART VI ESTIMATED HOURS

45. It is estimated that up to 2.5 hours may be required for the presentation of the oral argument of the Respondent.

Date: 1 November 2019

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Governor-General Act 1974 (Cth) made by, respectively, the *Public Service Reform Act 1984* and the *Public Employment (Consequential and Transitional) Amendment Act 1999.*

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 RESPONDENT'S SUBMISSIONS

PART A: LIST OF CONSTITUTIONAL PROVISIONS, STATUTES AND STATUTORY INSTRUMENTS REFERRED TO IN SUBMISSIONS

1. *Archives Act 1983* (Cth) ss 3, 6, 24, 25, 27, 28, 56, 62, 64, 67, Part V, Division 3 and Division 4
2. *Archives Bill 1978* (Cth)
3. *Archives Bill 1981* (Cth) cl 18
4. *Copyright Act 1968* (Cth) ss 29(1)(a), 32(1), 176, 184(1)
5. *Constitution of Australia* ss 2, 64
6. *Evidence Act 1995* (Cth) Part 1 Dictionary (definition of Commonwealth Record)
7. *Governor-General Act 1974* (Cth) ss 6, 13
8. *Judiciary Act 1903* (Cth) s 78B
9. *Public Employment (Consequential and Transitional) Amendment Act 1999* (Cth)
10. *Public Service Reform Act 1984* (Cth)

PART B: LIST OF INTERNATIONAL STATUTES REFERRED TO IN SUBMISSIONS

11. *Bürgerliches Gesetzbuch* (Germany) § 947
12. *Code civil* (France) arts 565–77
13. *Freedom of Information Act 2000* (UK)
14. *Presidential Recordings and Materials Preservation Act 1974* (US)
15. *Public Records Act 1958* (UK)
16. *Zivilgesetzbuch* (Switzerland) art 727