Donoghue

IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

NO S262 OF 2019

JENNIFER HOCKING

Appellant

and

DIRECTOR-GENERAL OF THE NATIONAL ARCHIVES OF AUSTRALIA

Respondent

OUTLINE OF ORAL SUBMISSIONS OF THE RESPONDENT AND ATTORNEY-GENERAL FOR THE COMMONWEALTH

Filed on behalf of the Respondent and Attorney-General

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Date of this document: 4 February 2020

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PART I INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the Internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Statutory framework

2. The historical significance of the records at issue in this appeal is not relevant to whether they are "Commonwealth records": TJ[12] CAB 15.5; ABFM 69, 70.3; FFC[14] CAB 70. The "archival resources of the Commonwealth" (s 3(2)), which consist of records of matters of national significance of specified kinds, are not limited to "Commonwealth records". "Other material" may also be part of the archival resources. Where such material is deposited with the National Archives, the terms of deposit, rather than the access provisions of the *Archives Act 1983* (**Act**, in JBA T.3), govern the question of access: s 6(2). (**RS**[7])

3. The Act uses a property framework to define "Commonwealth records". That represents a deliberate choice not to adopt a functional or "administrative provenance" framework: ALRC Report (JBA T.61); TJ[102] CAB 40; FFC[86] CAB 88. The extensive powers conferred by the Act in respect of "Commonwealth records", and the absence of a "historic shipwrecks" clause, confirms that exclusive Commonwealth ownership is required to fall within the definition. (**RS**[8]-[9])

4. The phrase "Commonwealth or a Commonwealth institution" is a composite expression. It is used to refer compendiously to the organisations and institutions of central government, sweeping away issues of legal personality: *Deputy Commissioner of Taxation v State Bank of New South Wales* (1992) 174 CLR 219 at 229 (JBA T.13, 395). That composite phrase clarifies both what was intended to be included and excluded as Commonwealth property (**RS**[11], [12]). In particular, it draws an important distinction between institutions and corresponding offices or office-holders associated with them. Importantly, the definition includes only the "official establishment of the Governor-General", not "the Governor-General". (**RS**[11], [12])

Common law rules as to ownership of letters as chattels

5. The parties agree that "property" is given content by its ordinary common law meaning: **AS**[15](c), [22]; **RS**[10]. At general law: (a) the recipient of a letter owns that piece of

correspondence; and (b) if the author of a letter makes a copy before sending it, the author owns the copy. Unless it is possible to point to a constitutional or other legal basis for altering the position at general law, Sir John owned the letters: **RS**[13]-[17].

6. Sir John's ownership was a matter of common understanding. Evidence of that understanding is consistent with, and supportive of, that ownership: **RS**[27]; TJ[108]-[110] CAB 41; TJ[21] CAB 19; TJ[113] CAB 42; TJ[15] CAB 17; RBFM 135.

7. The conclusion that Sir John owned the letters is also supported by the longstanding convention that communications between the Governor-General and the Queen are confidential, and do not form part of the official records of government: (**RS**[27]); ABFM 97-98; ABFM 101-102.

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8. The drafting history and extrinsic materials likewise support the conclusion that correspondence between the Governor-General and the Queen was intended to fall outside the Act: Senate Standing Committee on Constitutional and Legal Affairs report, [33.22-23] (JBA T.62); Second Reading Speech (Senate), 1183-84 (JBA T.43).

The Appellant's "public officer" argument

9. The Appellant attributes to the "law of public office" content that it does not have: cf **AR**[6]-[9]. The "public trust" concept does not justify equating the holder of public office to a trustee. Professor Finn's work does not suggest otherwise: see Gageler, "The Equitable Duty of Loyalty in Public Office", Bonyhady (ed), *Finn's Law: An Australian Justice* (2016) at 128-130, 135; Selway JBA T.58 at 188, 227. Further, the cases upon which the Appellant relies are not relevant, as all concern property acquired as a result of dishonesty and the misuse of office (involving bribes or secret commissions): **AS**[36]; **AR**[9]); (**RS**[23]-[24]). They say nothing as to the ownership of documents produced in connection with the lawful discharge of an office.

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10. The Appellant's argument that all property acquired or generated in the course of the discharge of public office belongs to the Commonwealth cannot be reconciled with longstanding Australian practice with respect to holders of other high public office, including parliamentarians and judges: House of Representatives Resolution "Registration of Members' Interests" (JBA T.67); Records Authority between the Archives and the High Court (JBA T.70); Senate Education and Arts Committee Report JBA T.63 at [3.10], [3.27]. (**RS**[29])

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11. The law in the United States similarly does not support the Appellant's argument. To the contrary, US law clearly establishes that records produced by the President in the course of discharging his or her office belong to the President, not to the United States: *Nixon v US* 978 F.2d 1269 (1992) (JBA T.34). (**RS**[25]).

The role of the Governor-General

12. Even if the Court were to accept some form of the "public office" doctrine, it would not assist the Appellant. The Governor-General is not any ordinary "public officer". The Governor-General exercises a multiplicity of functions and powers, some of which are *sui generis*. Attention to those particular functions and powers, and to the nature of the office, points away from a conclusion that everything created in association with the performance of the role must be property of the Commonwealth. The proper discharge of aspects of that independent role requires confidentiality, such that it is free from interference or scrutiny (including from the other branches of government). See *Kline v Official Secretary of the Governor-General* (2013) 249 CLR 645 at [11], [15], [33], [34], [38]-[39] (French CJ, Crennan, Kiefel and Bell JJ) (JBA T.15) (**RS**[22]).

13. The Governor-General's role in representing the Monarch personally has the result that the incumbent has "two interfaces": one with the Queen, and the other with the Commonwealth as body politic: Constitution, s 2; Imperial Conference of 1930 (RBFM 32.7) (**RS**[19]). The discharge of this representative function is unique and its success depends upon the relationship between the Governor-General and the Monarch of the day. Communications and correspondence between them are not a matter of any direction by the Queen: Renfree, *The Executive Power of the Commonwealth* (1984) (JBA T.56, p. 1531); ABFM 67. While correspondence with the Queen relates to the functions of the Governor-General, it cannot be described as involving any exercise of power. It is personal in that sense: **RS**[21]; FFC[76]-[80], [97] CAB 90. The Governor-General's capacity to perform the role assigned by s 2 of the Constitution is also affected by the high premium that the Queen places on the confidentiality of her communications with her Governors-General, suggesting that the representative function would be impeded if confidentiality were undermined: ABFM 102; RBFM 134.15. (**RS**[19]-[22])

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